OFFICERS: Present incumbent of the office of Grain Warehouse Commissioner is entitled to remain in office until April 15, 1943.

October 28, 1941

11-18

FILE 24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

We are in receipt of your request for an opinion, under date of October 25th, 1941, which reads as follows:

"On May 16, 1939, a Warehouse Commissioner was appointed for a term ending April 15, 1943, and until his successor is appointed and qualified. On October 10, 1941, House Bill No. 191 became law. (Laws of Missouri for 1941, page 373). Section 4 of said law, page 375, provides that it shall be the duty of the Governor to appoint a suitable person, to be confirmed by the Senate, who shall be known as the Grain Warehouse Commissioner for the State of Missouri, whose term of service as such shall continue for four years from the date of his appointment unless removed for cause.

"I respectfully request an opinion from your office on the following question: Should the Governor now appoint a Commissioner under the provisions of Section 4, page 375, of the Laws of Missouri for 1941, or does the Commissioner appointed, as above stated on May 16, 1939, continue in office under such ap-

pointment until April 15, 1943 and until his successor is appointed and qualified?"

The two main and principal sections which are in issue in this opinion are Section 14622, R. S. Mo. 1939, and Section 4, Laws of 1941, page 373.

Section 14622, R. S. Mo. 1939, reads as follows:

"The governor shall, by and with the advice and consent of the senate, appoint the warehouse commissioner for a term of six years, such term to begin on the date of the taking effect of this article. Upon the expiration of said term, and thereafter, a commissioner shall be appointed for four years from the time of his appointment and qualification and shall serve until his successor is appointed and qualifies. Any vacancy occurring by removal, resignation or death, shall be filled by the governor for the unexpired term."

Section 4, Laws of Missouri 1941, page 373, reads as follows:

"It shall be the duty of the Governor to appoint a suitable person, to be confirmed by the Senate, who shall be known as the Grain Warehouse Commissioner for the State of Missouri, hereinafter referred to as 'the Commissioner', whose term of service as such shall continue for four years from the date of his appointment unless removed for cause. Said Commissioner shall not, directly or indirectly, be interested in buying or selling

> grain either on his own account or for others, nor shall he be directly or indirectly interested in handling or storing grain as a public warehouseman or on private account during his term of office. Any vacancy occurring by removal, resignation or death shall by and with the consent of the Senate be filled by the Governor for the unexpired term."

It will be noticed in comparing the above two sections that they are similar in every respect as to the mode of appointment and tenure of office. Section 4, supra, slightly modifies the name of the Commissioner as set out in Section 14622, supra, the difference being that in Section 14622, the Commissioner is designated as the Warehouse Commissioner and in Section 4, supra, the Commissioner is designated the Grain Warehouse Commissioner.

Section 4 is one of the fifty-nine sections contained in the 1941 Act, which act, according to the title, repealed Article 1 of Chapter 109, Revised Statutes of Missouri 1939, we find that most of the sections from 14621 to 14685 inclusive, have been retained and only slightly modified in a few sections under the Act of 1941. It has been held that in this State where a statute has been repealed and re-enacted in the same session without a radical change in the contents it is considered the same as a continuation of the former law. In the case of State v. Ward, 40 S. W. (2d) 1074, para. 10-11, 328 Mo. 658, the court, in holding that a repeal and re-enactment of a section in the same session is but a continuation of the previous section, said:

> "III. The point that the repeal by the Fifty-fifth General Assembly in 1929 of section 5596, R. S. 1919, and the enactment in lieu thereof of a new section to be known as section 5596 (Laws 1929 p. 217 (now Rev. St. 1929, Sec. 8246)), terminated the two year closed season voted by Harrison county in 1928, is without merit.

> "In Brown v. Marshall, 241 Mo. 707, 145 S. W. 810, loc. cit. 815, this court ruled: 'A subsequent act of the Legislature repealing and re-enacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. State ex rel. v. Mason, 153 Mo. 23, loc. cit. 58-59, 54 S. W. 524; State ex rel. v. County Court, 53 Mo. 128, loc. cit. 129-130; Smith v. People, 47 N. Y. 330.'"

Also in the case of State v. Bradford, 285 S. W. 496, l. c. 500, para. 8, 314 Mo. l. c. 697, the Supreme Court of this State, even where a modification of a section repealed and re-enacted was held to be a continuing law of the former section, and said:

> "While the act of 1921, page 206, purports to repeal section 3973 of Revised Statutes 1919, yet, as the same law was re-enacted with a modification, it is simply an amendment of the law of 1919, and is a continuation of the latter as amended. Brown v. Marshall, 241 Mo. loc. cit. 728, 145 S. W. 810, and cases cited; State ex rel. v. Jost, 269 Mo. loc. cit. 258, 191 S. W. 38, and cases cited."

Also in the case of Brown v. Marshall, 241 Mo. 707, l. c. 727, 728, the court said:

> "Not only was said order of July 28th fixing said terms valid when made, but it remained so during the entire period covering the administration of Lewis V. Bogy's estate. This is true because the Act of 1877 only purported

> to repeal (quoting), 'all acts and parts of acts inconsistent with this act.' (See section 20 of that act.)
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> "Clearly there was nothing inconsistent between section 9 of the Act of 1855, and section 7 of the Act of 1877, both of which have been previously quoted. Each in express terms and almost in the same language authorize the various probate courts of the State, by order, to change the stated terms thereof, to such times as the judges thereof may deem best and most convenient for the transaction of the business therein.
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> "But independent of that, there is another sound rule of statutory construction which governs this case, and that is, a subsequent act of the Legislature repealing and reenacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. (State ex rel. v. Mason, 153 Mo. 23, l. c. 58-59; State ex rel. v. County Court, 53 Mo. 128, l. c. 129-130; Smith v. People, 47 N. Y. 330."

And, on page 739 the court in that case stated:

> "'The legal effect of the separation of the city and county was a division of the old county of St. Louis into two counties, the one, namely, the city of St. Louis, having within its borders the seat of government; while it may not have continued to be the

> identical entity as the old county, and while the form of its government thereafter was different from what it was before, it was at least the continuation of and successor to, for legal purposes, the old county, and its government the successor, in so far as the same functions were provided to be performed, of the old government; the courts, except the county court, which was expressly abolished, remained the same and retained the same habitation and jurisdiction."

This case was followed in the case of State ex rel. v. Jost, 269 Mo. 248. In the case of State ex rel. v. Mason, 153 Mo. 23, the Supreme Court held that where one act specifically stated repealed a previous act and, at the same session the same act in the same form was readopted, it was an amendment and not a repeal of the previous act. The court in that case, at page 58, said:

> "That the Act of 1899 continued the then system and was merely an amendment of that law is obvious notwithstanding the use of the formal words repealing the Act of 1860 and 1861 and amendments and re-adopting the same in the form of a new law.
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> "The new law must be construed as a continuing act as to all the provisions which were carried forward from the old to the new."

Also in the case of State ex rel. v. The County Court of Vernon County, 53 Mo. 128, l. c. 131, the court said:

> "The act of 1873 is really nothing more than a revision of the act of 1872. Some of the provisions in the two acts are identical, and they all

relate to the same subject matter. The purpose of the later enactment was to remedy defects that were supposed to exist in the former. The subsequent law was not designed to interrupt the continuity of the first act, so as to avoid or annul proceedings commenced under it.

"By the first section of article 17, in the act of 1873, (Sess. Acts, 1873, p. 120,) it is provided, that the County Court in each county having adopted the township organization, at their first meeting after the adoption of the act shall proceed to district their respective counties, as directed in article fifteen, for the purpose of electing County Court judges, and shall appoint a day for the purpose of electing the same. Then after making various provisions, not necessary to be here noticed, the 6th section declares, that an act entitled, 'an act to provide for the organization of counties into municipal townships, and to further provide for the local government thereof,' approved March 18, 1872, is hereby repealed.

"This last section does, in terms, repeal the former law, but the effect is not to be ascribed to it of completely annulling all proceedings commenced when the former law was in force. The first section, which explains and prescribes the mode of executing the act, says, the County Court in each county having adopted the township organization of this State, at their first meeting after the passage of this act shall proceed, etc. As a law existed providing for township organization before, and the provision for putting it in force is essentially the same in both acts, the latter law must be construed

> as a mere continuation of the former, and one vote of the people is sufficient. But after the passage of the act of 1873 all subsequent proceedings must conform to it."

46 Corpus Juris, Section 30, page 934, in stating the rule, said:

> "And since every public office is the creation of some law it continues only so long as the law to which it owes its existence remains in force."

Under the facts in the present case Section 4 did not annul or repeal the method and the tenure of office of the Commissioner. 46 Corpus Juris at page 935, also in stating the rule, said:

> "While a civil service law does not preclude the legislature from abolishing in good faith an office whose incumbent is under the protection of such a law, such a law cannot be avoided by abolishing the office and creating a new one with duties substantially the same, to which new officers are appointed."

In the State of Texas the Court of Civil Appeals in the case of Bennett v. City of Long View, 268 S. W. l. c. 788, said:

> "Every public office is the creation of some law, and continues only so long as the law to which it owes its existence remains in force."

22 R. C. L. page 581, Sec. 296, states the rule as follows:

"* * * Yet the better opinion is that while the legislature may abolish an office and thereby abrogate the rights and duties of the officer it cannot leave the office standing and abolish the officer. Not only is a statute which legislates an officer out of office in the middle of his term, and devolves his duties and emoluments on another, unconstitutional, but the legislature cannot take from a constitutional officer the substance of the office itself, and transfer it to another, who is to be appointed in a different manner and to hold the office by a different tenure from that which is provided for by the constitution. The powers, authority and jurisdiction of an office are inseparable from it. Hence while the legislature may diminish the aggregate amount of duties of a judge, by the division of his district, or otherwise, it must leave the authority and jurisdiction pertaining to the office intact. And where a state constitution provides for the election of sheriffs, fixes the term of office, etc., but does not define what powers, rights and duties shall attach or belong to the office, the legislature has no power to take from a sheriff a part of the duties and functions usually appertaining to the office, and transfer it to an officer appointed in a different manner and holding the office by a different tenure. A transfer within the meaning of a constitutional provision prohibiting it during the term of an incumbent, and not an abolition of the office of prison superintendent, is effected by a statute incorporating a prison, abolishing the office of superintendent, and placing the management under directors, where the prison and the duties of management are essentially the same after as before the passage of the statute. * *"

Under the facts in the present request it cannot be held that the legislature abolished the incumbent of the office of Commissioner. In the case of Malone v. Williams, 118 Tenn. 390, 103 S. W. 798, 121 A.S.R. 1002, the court, at page 476, said:

> "'In the case at bar, however, it will be noticed that, within a few days of the passage of the ordinance which appellants claim abolished the office, another one was passed providing for the same office, that both ordinances were published on the same day, and that on the day previous to the publication, another person was appointed to fill the office. This shows that before the ordinance which is claimed to have abolished the office could become operative, the same office was again created. . . . . It is too clear for argument that the real purpose and design was, not to abolish the office, but to get rid of one incumbent to make room for another. The method pursued to effect the removal is not such as commends itself to a court of justice. An officer whose tenure is during good behavior, or who can only be removed for cause, cannot thus be legislated out of office. People v. McAllister, 10 Utah, 357, 37 Pac., 578; Pratt v. Board, 15 Utah, 1, 49 Pac., 747; Heath v. Salt Lake City, 16 Utah, 374, 52 Pac., 602; Pratt v. Swann, 16 Utah, 483, 52 Pac., 1092.'
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> "The same rule is laid down in Kentucky. In Adams v. Roberts it is said:
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> "'Though the legislature is given the power to abolish the office of commonwealth's attorney in this State, until it does so it cannot abolish the tenure of any rightful incumbent of the office.

> He might be impeached, but not legislated out of office. Cooley's Const. Lim. (6th Ed.), 482; Black, Const. Prohib., p. 119, sec. 99.' 83 S. W., 1035, 1037, 119 Ky., 364.
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> "To the same effect is State v. Wiltz, 11 La. Ann., 439, wherein the court said:
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> "'It is inadmissible to say that a person holding an existing office under a fixed tenure can be removed, or that his regular term of office can be abridged, by an ordinary act of the legislature other than an act abolishing the office.'
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> "The same rule obtains in this State.
> * * * *"

The court further, at page 479, said:

> "The court held that the foregoing act simply changed the name of the office, leaving its duties intact, and devolved those duties upon a person other than the incumbent at the time, and did not in fact abolish the office, but was an abortive attempt to legislate the incumbent out of office. It was held that this could not be done."

In construing the intention of the legislature one must investigate into the history and purpose of the act. Section 34, Article IV, of the Constitution, reads as follows:

> "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but

> the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

Under the above section it would have been necessary in the drafting of the new act under the laws of 1941 to amend Article 1 of the old act in Chapter 109 of the Revised Statutes of Missouri, 1939, by stating specifically the designated words stricken out or the designated words inserted and the words to be inserted in lieu of the words stricken out. The act contained in Article 1, Chapter 109 of the Revised Statutes of Missouri, 1939, affected by the act of 1941 consists of sixty-four sections and in order to amend the act of Article 1, Chapter 109 Revised Statutes of Missouri 1939, the person who drafted the act of 1941 repealed and re-enacted all of the sections except a slight few. The purpose of the repealing and re-enacting, which, according to the above authorities was an amendment and a continuation of the old law, was to consolidate several of the sections within one section and to delete certain obsolete sections contained in the act of 1939. This repeal and re-enactment could be considered as a non-legislative revision of Article 1, Chapter 109, Revised Statutes of Missouri 1939. That the purpose of the act should be considered in a construing of the act was held in the case of Artophone Corporation v. Coale, 133 S. W. (2d) 343, para. 2-4, where the court said:

> "'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S. W. 2d 920, 925 (7-10)."

The above case was followed by Betz v. Columbia Telephone Co., 24 S. W. (2d) 224.

In the case of the appointment of a Clerk of the County Court under a law in force in 1919, which was repealed and re-enacted by the Laws of 1921 in the State of Nebraska, the Supreme Court in that case, which was Ford v. Boyd County, 197 N. W. 953, l. c. 954, said in paragraph 3 as follows:

> "Defendant contends that plaintiff's appointment was valid only until the taking effect of section 2395, Comp. St. 1922,and that thereafter she was not authorized to act as clerk of the county court, because she was not reappointed and there was no approval of the appointment nor salary fixed by the county board after the new act took effect. We think this position is untenable. The law in force in 1919 authorized the appointment of an assistant to act as clerk of the county court, and further provided that such appointment should be approved and salary fixed by the county board. While the law of 1919 was repealed, yet these provisions, in effect, were carried forward and re-enacted into the law of 1921. The provisions of section 2395, relative to the appointment of a clerk of the county court and the fixing of salary, was but a continuation of the law previously in force. Under the circumstances, no new appointment was necessary. Gage County v. Wright, 86 Neb. 347, 125 N. W. 626, 36 Cyc. 1223."

In a Kentucky case, which was State Insurance Board of Kentucky v. Greene, 213 S. W. 218, the re-enactment of the section repealed read as follows:

> "That section 762d, of Carroll's Edition of the Statutes of 1915, relating to the creation of state insurance

> board, the creation of secretary of said board and the appointment of an attorney therefor, be and the same is hereby repealed and the office of the present incumbents are hereby terminated."

And the court in its opinion, in paragraphs 3, 4, 5, said:

> "The manifest intention of the Legislature was to abolish the state insurance board, and the offices of secretary and attorney therefor. This has effectively been accomplished, and, obeying that canon of construction above stated, it is our duty to sustain the act in question. Though the court might be of the opinion that a statute is unjust, unwise, or oppressive, it is powerless to intervene and declare it invalid, if the law be within constitutional limits.
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> "Authorities from other jurisdictions are cited in support of the proposition that the Legislature cannot, by changing the name of the office, abolish the officer, and continue the same office in existence, without abolishing the act creating the office. Repeals by implication are not favored, and while the act in question does not expressly repeal the statute creating the state insurance board, and the secretary and attorney therefor, we think the language of the act sufficient to abolish said offices. An office is abolished by implication, where a statute transfers all its functions to another office. People v. Henshaw, 76 Cal. 436, 18 Pac. 413."

Under the above case it held that the State Insurance Board was abolished and it was the intention of the Legislature to

so abolish by reason of the enactment of Section 762d, supra. Under the facts in the present case, if it had been the intention of the legislature to abolish the office of warehouse commissioner, as set out in Section 14622, supra, it could, in the re-enactment and setting out of the re-appointment of the grain warehouse commissioner, have so said that the office of the present incumbent of the warehouse commissioner is abolished.

In the case of Collins v. Twellman, 126 S. W. (2d) 231, the Supreme Court of this State, in paragraph 3, said:

> "Appellant, however, insists that section 13757 was repealed by the legislature of 1917 and re-enacted with some new provisions, see Laws 1917, page 492; that this law was approved April 12, 1917, page 492; that this law was approved April 12, 1917, and became effective ninety days after the adjournment of the assembly. Appellant then points out that the act of 1909, now article 7 of chapter 93, was repealed by the same legislature and re-enacted adding new provisions, see Laws 1917, pages 300 to 307; that this act carried an emergency clause and became effective when approved on April 10, 1917. So appellant argues that section 13757 must control over the other sections because it is the last expression of the legislature on this subject matter. We are of the opinion that appellant's position cannot be sustained. The repealing and re-enacting of the acts, by the legislature of 1917, was evidently for the sole purpose of amending those acts. It will be noted that the provisions now under consideration were left substantially as they were before 1917. It would have been an easy matter for the legislature to have dropped sections 13096 and 13097 from the article, or to

> have harmonized them with section 13757, when the laws were rewritten in 1917, but they did not do so."

Under the opinion in this case, which is a Missouri case, it would cover the same statement of facts as set out in the present request, showing that the purpose of the repealing and re-enacting of the acts were for the sole purpose of amending those acts and not the enactment of a new article.

In the case of Great Northern Ry. Co. v. United States, 155 Fed. Rep. 945, l. c. 948, the Circuit Court of Appeals of the 8th Circuit, interpreted the facts such as set out in the present request as follows:

> "Generally speaking, where a statute is amended 'so as to read as follows,' or is re-enacted with changes, or is in terms repealed and simultaneously re-enacted with changes, the amendatory or re-enacting act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation. In Sutherland on Statutory Construction (2d Ed.) Sec. 237, it is said of an amendment 'so as to read as follows':
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> "'The amendment operates to repeal all of the section amended not embraced in

the amended form. The portions of the amended section which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule.'

"And in the succeeding section it is said of a simultaneous repeal and re-enactment:

"'Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force, It operates without interruption where the re-enactment takes effect at the same time. The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, nor pending proceedings or criminal charges affected by such repeal and re-enactment of the law on which they respectively depend.'

"The subject has been considered several times by the Supreme Court, and always with the same result. Steamship v. Joliffe, 2 Wall. 450, 458, 17 L. Ed. 805, involved the right of a port pilot to collect half pilotage fees for services proffered and declined, and during the pendency of the action the statute giving the right was in terms repealed and at the same time substantially re-enacted; the

new act allowing half pilotage fees in the same circumstances as the original. The court held that the new act did not impair the right to fees which had arisen under the original, saying:

"'The new act took effect simultaneously with the repeal of the first act. Its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them.'

"Murdock v. Memphis, 20 Wall. 590, 617, 22 L. Ed. 429, to which we will refer again, related to a revisory and substituted act, which, it was said, was a new law in so far as it differed from the original, and in so far as it embraced portions of the original was a preservation of them. Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 11, 17 Sup. Ct. 7, 9, 41 L. Ed. 327, related to an act which expressly repealed and at the same time substantially re-enacted a prior one, and of this it was said:

"'Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in

the new act. This is the same principle that is recognized and asserted in Steamship Co. v. Joliffe.'

"Holden v. Minnesota, 137 U. S. 483, 490, 494, 11 Sup. Ct. 143, 146, 147, 34 L. Ed. 734, was a criminal case involving the infliction of the death penalty. After the commission of the offense and before the indictment of the offender a statute was adopted which substantially re-enacted or repeated the provisions of the previous law relating to the mode of inflicting that penalty and to the issuing of the governor's warrant therefor. It also contained new provisions imposing solitary confinement after the issuance of the warrant and regulating the details of the execution, and in terms repealed all acts and parts of acts inconsistent with it. Responding to the contention that the previous law was thereby repealed, and that the new act could not be applied to prior offenses, the court, in addition to holding that the new provision for solitary confinement, although not in terms so written, was applicable only to future offenses, held that the previous law was not repealed, and in that connection said:

"'These provisions were not repealed by the act of April 24, 1889 (Gen. Laws Minn. 1889, p. 66, c. 20). In respect to the first and second sections of that act, it is clear that they contain nothing of substance that was not in sections 11 and 12 of chapter 118 of the General Statutes of 1878. And it is equally clear that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter re-enacts or repeats those provisions. As the act of 1889 repealed only such previous acts and parts of acts as were inconsistent

> with its provisions, it is inaccurate to say that that statute contained no saving clause whatever. By necessary implication, previous statutes that were consistent with its provisions were unaffected.'
>
> "And again:
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> "'The provisions of the previous law, as to the nature of the sentence, the particular mode of inflicting death, and the issuing by the Governor of the warrant of execution before the convict was hung, were, therefore, not repealed, although some of them were re-enacted or repeated in the statute of 1889, and other provisions relating merely to the time and mode of executing the warrant, but not affecting the substantial rights of the convict, were added.'
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> "The rule announced in these cases was again recognized by the Supreme Court in Campbell v. California, 200 U. S. 87, 92, 26 Sup. Ct. 182, 50 L. Ed. 382, and was recently applied by us in Lamb v. Powder River Live Stock Co., 65 C. C. A. 570, 132 Fed. 434, 67 L. R. A. 558. It has also been quite generally recognized and applied in the state courts."

It also immediately following the last citation set out approximately sixty leading cases where the above rule has been followed.

It is not within the power of the legislature to remove appointed officers by such subterfuge and thereby abrogate the powers of the appointing officer. In the case of State ex rel. Birdsey v. Baldwin, 45 Conn. 134, l. c. 144, the court, in construing this rule of law, stated:

> "We have then this condition of things--an act of the legislature repeals by its terms a certain section of the General

> Statutes and abolishes a board of officers appointed under it, and the same act creates precisely the same board and clothes them with the same powers and duties enumerated in the section repealed. Can this be done? We think not. The act in question contains the elements of its own destruction. It attempts to kill and make alive at the same instant, an impossibility. There must be some appreciable space of time between the repealing act and the re-enactment of the same act. In this case not a second intervened, and there was never a moment when the relators were out of office, or when the office of county commissioners for New Haven County was abolished."

In all of the above cases they are to the effect that the repeal of the statutes by the re-enactment of other statutes which are substantially to the same effect should be considered as an amendment and not as the enactment of a new law.

Another matter which has been brought to our attention, although not requested in the original request, is: "In case of any vacancy by removal, resignation or death, shall it be filled by the governor for the unexpired term or for a term of four years?"

Section 14622, R. S. Mo. 1939, reads as follows:

> "The governor shall, by and with the advice and consent of the senate, appoint the warehouse commissioner for a term of six years, such term to begin on the date of the taking effect of this article. Upon the ex-

> piration of said term, and thereafter, a commissioner shall be appointed for four years from the time of his appointment and qualification and shall serve until his successor is appointed and qualifies. Any vacancy occurring by removal, resignation or death, shall be filled by the governor for the unexpired term."

It is very noticeable under this section that it carries the old obsolete partial section which reads as follows:

> "The governor shall, by and with the advice and consent of the Senate, appoint the warehouse commissioner for a term of six years, such term to begin on the date of the taking effect of this article."

This part of the section was placed in what is now Section 14622 at the time that the grain inspection article was passed and the other part of the section provides that the term shall be for four years so that the term would expire each four years thereafter and not six years as provided in the original appointment by the governor with the advice and consent of the Senate. This section first appeared as Section 5994, R. S. Mo. 1919 by reason of the enactment of the law and appearing in the Session Laws of 1913, page 356. The section as set out in the Revised Statutes of Missouri for 1939 and the section as set out in the Session Laws of 1913, page 356 are identical. It is a matter of arithmetic to determine the term of office of the original appointee as warehouse commissioner, as the original section in the Laws of Missouri 1913, page 356, and the present Section 14622, R. S. Mo. 1939, specifically stated that the appointment for the term should begin on the taking effect of this article. By reason of an emergency clause to the whole act of 1913 the act came into effect on April 15, 1913. For your information we are

hereunder setting out the names, date of appointment and date of expiration of the appointment of each warehouse commissioner from the date that the article came into effect, April 15, 1913, to date.

James T. Bradshaw, appointed April 15, 1913, for a term expiring April 15, 1919.

This appointment was for a term of six years. His next appointment, which was for a term of four years as provided in the original act and as provided in Section 14622, R. S. Mo. 1939, was made April 22, 1919, as of April 15, 1919.

Under the laws of this State where the Legislature does not state the exact date of appointment of an appointee the Governor sets the exact date of the beginning of the term and thereby sets the exact date of the expiration of the term. In this appointment of James T. Bradshaw on April 15, 1919, the Governor has set the term to begin on April 15, 1919 and to expire four years thereafter or until his successor is appointed and qualifies. In other words, it is the duty of the Governor on April 15th every four years from April 15th, 1919, to make an appointment. This rule of law is stated, and has not been repealed, in the case of The State ex rel. Withers v. Stonestreet, 99 Mo. 361, l. c. 373, 374 and 375, where the court said:

> "This reasoning leads to this result: That the date of the appointment, first made by the governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. This conclusion is well sustained by authority. Attorney General ex rel. v. Love, 39 N. J. L. 476, is decisive of this point. And the general rule is elsewhere recognized that when no time

is mentioned in the law, from which the term shall commence, it must begin to run from the date of election. State ex rel. v. Constable, 7 Ohio, 7; Marshall v. Harwood, 5 Md. 423; Hughes v. Buckingham, 5 S. & M. 632.

"These last, though election cases, furnish a strong analogous support to the view already expressed, showing as they do, the urgent necessity felt of having some determinate period at which and from which official terms shall begin. The law favors uniformity, but uniformity cannot be obtained except by the establishment of an inflexible rule. And the course in the office of the executive in regard to appointment of the first appointee, the language of his commission, and the language of all subsequent commissions, except that of relator, fixing the beginning of such official term at June 18, biennially, as the period from which to reckon the duration of such term, affords a contemporaneous, as well as a continuous, exposition of the meaning of the law, and of the intention of its makers, that is not without value in the present investigation. Such contemporaneous and continuous construction, in the absence of anything of a countervailing character, should be sufficient per se to settle the controversy on the point in hand adversely to the relator.

"Under statutory provisions substantially identical with those under discussion, it has been held that the true rule was to construe the word 'term' as designating consecutive periods of six years, following

each other in regular order, the one commencing where the other ends, and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. People ex rel. v. McClare, 99 N. Y. 83, 93. The statute there was like section 5838, providing that the appointee should hold for a certain number of years and until his successor should be appointed and qualified, and also like section 5832, providing that in case of vacancy, an appointment should occur for the residue of the term.

"The ruling just mentioned is in entire conformity to the authorities and views heretofore cited and expressed as to the date of the commencement and the uniform duration of the successive terms of office of the different and successive appointees under the law now being discussed. And, upon the very face of section 5838 aforesaid, there appears a legislative command that the terms of office of each appointee is to last two years 'from the date of his appointment;' but the legislature was cognizant that appointments might fail to be made at the proper time; that deaths, resignations, failure to accept, qualify, etc., might occur, and so made provision in section 5838, that an appointee should hold office not only for his official term of two years, but until his successor should be duly appointed and qualified. And section 5852 exhibits the same marks of legislative solicitude that uniformity should prevail as to the duration of the official

> term of the inspector; for that section makes special provision, in case of vacancy, that the governor, upon being informed thereof, 'shall appoint and commission his successor for the remainder of the term of office as therein provided.' What term of office? Evidently the term of two years mentioned in section 5938, beginning at the date of the original appointee's appointment."

James T. Bradshaw was originally appointed on April 15, 1913, for a term of six years and then was re-appointed on April 15, 1919 for the term of four years, which would have expired April 15, 1923.

Section 4, of the grain and warehouse act in the Laws of Missouri 1941, page 373, when amended and re-enacted has deleted the first part of Section 14622 of the Revised Statutes of Missouri 1939, which refers to the original appointment for a term of six years.

We are hereafter referring to further appointments made on the office of warehouse commissioner as shown by the records in the office of the Secretary of State:

	Appointment	Expiration
T. J. Hedrick	June 13, 1931	April 15, 1923
W. O. Atkeson	June 25, 1923	April 15, 1927
Charles P. Anderson	Jan. 9, 1925	April 15, 1927
Roy H. Monier	Feb. 3, 1925	April 15, 1927
" " "	April 15, 1927	April 15, 1931
Ralph Brissenden	April 11, 1929	April 15, 1931
" "	April 15, 1931	April 15, 1935
J. B. Hopper	June 22, 1933	April 15, 1935
" " "	April 15, 1935	April 15, 1939
James T. Bradshaw	June 29, 1937	April 15, 1939
C. E. Yancey	Dec. 31, 1937	April 15, 1939
James Buffington	May 16, 1939	April 15, 1943

In reading the above appointments it will be noticed that James Buffington, the present incumbent, was appointed on May 16, 1939, for a term expiring April 15, 1943. The question then is: "In case of a vacancy at the present time, should the appointment be made for the unexpired term or for a term of four years?" The statutes on this question are unambiguous. The original act, Laws of 1913, page 356, Section 14622, R. S. Mo. 1939 and Section 4 of the grain and warehouse act, Laws of Missouri, 1941, page 373, specifically provide: "Any vacancy occurring by removal, resignation or death, shall, by and with the consent of the Senate be filled by the governor for the unexpired term."

CONCLUSION.

In view of the above authorities it is the opinion of this department that the Governor of the State of Missouri at this time should not appoint a Commissioner under the provisions of Section 4, page 375 of the Laws of Missouri for 1941, and it is further the opinion of this department that the Commissioner duly appointed under Section 14622, R. S. Mo. 1939, and who was appointed on May 16th, 1939, shall continue in office under such appointment until April 15th, 1943.

It is further the opinion of this department that if any vacancy occurs by removal, resignation or death it shall be filled for the unexpired term with the consent of the Senate by the Governor.

Respectfully submitted,

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WJB:CP