ELECTIONS: Fred C. Bollow not the legal nominee of the Democratic party to the office of Circuit Judge
JUDICIAL COMMITTEE: of the Second Judicial Circuit because there was no quorum of the judicial committee present
QUORUM: at the meeting at which he was nominated on July 29, 1954.

September 15, 1954

Honorable Walter H. Toberman
Secretary of State
State of Missouri
Jefferson City, Missouri

Dear Mr. Toberman:

This is in response to your request for opinion dated July 30, 1954, which reads as follows:

> "This office has received a 'Certificate of Nomination' from two members of the second judicial district committee attesting to the nomination of Fred C. Bollow to be the district nominee for the remainder of the unexpired term of the late Judge Harry J. Libby, who died on July 14, 1954.
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> "We are also in receipt of a 'Notice of Meeting' directed to Mrs. Preston Walker, Vice Chairman and Acting Chairman of the Macon County Democratic Committee. She is also the third member of the existing judicial committee. Also attached are two 'Waiver of Notice' forms signed by Mr. Bollow and Alice McCarty, Vice-Chairman of the Shelby County Democratic Committee. Both of the latter are Members, of course, of the second judicial district committee.
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> "On the reverse side of the enclosed 'Notice of Meeting' is a written statement signed by a deputy sheriff of Macon County.
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> "These various documents stated Mrs. Preston was notified of a meeting held July 29, 1954, in Macon, but she did not appear. They also state that at this meeting Members McCarty and Bollow declared Mr. Bollow nominated by virtue of receiving the only two votes cast.

It is also set forth in the attached 'Certificate of Nomination' that a vacancy has existed on this judicial committee for 'some months' because Romet Bradshaw, Chairman of the Macon County Democratic Committee resigned and no successor had been elected and qualified to fill this position.

"This office respectfully requests an opinion on the following questions:

1. Is Mr. Bollow legally made the nominee by virtue of only two votes being cast for him?

2. If he was nominated properly, is this true because he received a majority of the votes cast by those present; or, was he nominated because he received two votes out of a possible three because the vacancy had reduced the committee, legally, from a four member body to a three member group at the time of the meeting?

3. If Mr. Bollow was not legally nominated at this meeting what procedure should the committee have followed on this matter?

4. If Mr. Bollow was not legally nominated and it is necessary to call another meeting of the second district judicial committee after the election of new county committee officers on August 17th, should the new nomination be made by the old county committee officers or the new chairmen and vice-chairmen?"

We know from the provisions of Section 478.080, RSMo 1949, that the Second Judicial Circuit is composed of the counties of Macon and Shelby, and from Section 120.800, RSMo 1949, that the judicial committee is composed of the chairman and vice-chairman of each county committee in the district; therefore, the judicial committee of the Second Judicial Circuit is composed of four members.

Upon the death of Judge Harry J. Libby, it became the duty of the judicial committee of each party to nominate a candidate for the ensuing general election under the provisions of Section 120.550(3), MoRS, Cum. Supp., 1953. That section reads:

> "The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:
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> * * * * *
>
> "(3) When a vacancy in office which is to be filled for the unexpired term at the following general election, shall occur after the last day in which a person may file as a candidate for nomination."

From the documents presented with your request, it appears that the Chairman of the Macon County Democratic Committee had resigned some months prior to July 29, 1954, and that this vacancy on the committee had not been filled on that date. On July 29, 1954, the Chairman and Vice-Chairman of the Shelby County Committee met for the purpose of nominating a candidate for circuit judge. Although the Vice-Chairman of the Macon County Committee was notified of this meeting, she did not appear, which raises the first question as to whether there was a quorum present at this meeting so as to make the action taken thereat effective.

The term "quorum" is defined as the number of members of a deliberative or judicial body whose presence is necessary for transaction of business. 23 Am. and Eng. Ency. of Law, Second Edition, page 589; State ex rel. Kiel v. Riechmann, 239 Mo. 81, 106, 142 S.W. 304; Bouvier's Law Dict., Rawles' Third Edition, Volume 3, page 2790; Black's Law Dict., Fourth Edition, page 1421. For the origin of the term "quorum," see Blackstone's Commentaries I.351.

Often the number necessary to constitute a quorum of a deliberative body will be expressly stated by the creative power or the authority to designate what shall constitute a quorum delegated to such body, but it is significant to note that the statutes providing for the judicial committees do not specify what shall constitute a quorum, nor is the authority to define a quorum delegated to such committee. Under such circumstances as stated in State ex rel. Robert Otto, Attorney General, v. Kansas City et al., 310 Mo. 542, 586:

> " * * * We must look then to the common law as to what in such case would constitute a quorum, and the rule here clearly applicable is thus stated in 29 Cyc. 1688:

> "'Where a quorum is not fixed by the constitution or statute creating a deliberative body, consisting of a definite number, the general rule is that a quorum is a majority of all the members of the body.'"

The statement of the common-law rule, above quoted, does not fully solve our problem in this case, however. We must further determine what is meant by "a majority of all the members of the body" because the potential and contemplated membership of the Judicial Committee of the Second Circuit is four, whereas, by virtue of the vacancy thereon, there were, in fact, only three members remaining and existing. If the phraseology above quoted refers to the potential membership, a majority thereof, and hence a quorum, would be three, but if it refers to the existing membership, making a deduction for vacancies in arriving at the number constituting "all the members of the body," a majority thereof, and hence a quorum, would be two.

Although we find no Missouri case based upon the common law involving this precise factual situation, we know from the Missouri cases on the subject of quorums generally that we must turn to the common law in order to find the answer to the question here presented. State ex rel. Otto v. Kansas City, supra; State ex rel. Kiel v. Riechmann, supra. Although the term "common law" has various meanings, generally, when we use the term in this connection we mean the unwritten law as defined by Blackstone, that portion of the law of England which is based, not on legislative enactment, but on immemorial usage and the general consent of the people. 15 C.J.S., Common Law, Section 1(c), page 612.

As will be hereinafter noted, we find conflicting statements from various text writers as to what the English law is, and was, on this precise subject. They are all in agreement that a majority of the body constitutes a quorum, but differ as to the method of reckoning the membership of the body.

For example, in McQuillin, Vol. 4, Municipal Corporations, Third Edition, Section 13.28, page 478, it is stated:

> "At common law, in corporations consisting of an indefinite number, a major part of those who are existing at the time, when legally convened, are competent to act for the corporation. This rule is applicable to New England towns. But when the body is definite there must be a major part of the whole number of members composing it, and not merely a

> major part of its existing members. When such body is legally assembled, a majority thereof may do valid acts for the corporation. This rule of the common law has often been declared by statute." (Emphasis ours.)

In Cushing, Law and Practice of Legislative Assemblies, Section 247, page 94, the rule is stated thus:

> "In all councils and other collective bodies of the same kind, it is necessary, therefore, that a certain specified number, called a quorum, of the members, should meet and be present, in order to the transaction of business. This number may be precisely fixed in the first instance, or some proportional part established, leaving the particular number to be afterwards ascertained, with reference to each assembly, and this may be done either by usage, or by positive regulation; and, if not so determined, it is supposed, that a majority of the members composing the body constitute a quorum. * * *"

Section 261, page 100:

> "When the number, of which an assembly may consist, at any given time, is fixed by constitution, and an aliquot proportion of such assembly is required in order to constitute a quorum, the number of which such assembly may consist and not the number of which it does in fact consist, at the time in question, is the number of the assembly, and the number necessary to constitute a quorum is to be reckoned accordingly. Thus, in the senate of the United States, to which by the constitution each State in the Union may elect two members, and which may consequently consist of two members from each State, the quorum is a majority of that number, whether the States have all exercised their constitutional right or not. So, in the second branch of congress, in which, by the constitution, the whole number of representatives of which the house may consist is fixed by the last apportionment, increased by the number of members to which newly admitted States may be entitled, the quorum is

> a majority of the whole number, including the number to which such new States may be entitled, whether they have elected members or not, and making no deductions on account of vacant districts." (Emphasis ours.)

It is interesting to note, however, that this latter rule was departed from during the War Between the States when several of the states seceded from the Union and did not send members to Congress. The Supreme Court of Florida, in Opinions of the Justices, 12 Fla. 653, recognized this but declared it an error excusable only because of the exigency of the situation.

In the Florida opinion, above cited, the senate had convened and adopted a resolution impeaching the governor. The Florida Constitution provided for twenty-four senatorial districts and that each district should be entitled to one senator. Twelve senators were present. It was held that the least number which could constitute a quorum was thirteen, a majority of the whole number, and that vacancies from death, resignation or failure to elect could not be deducted in ascertaining a quorum. In the course of the opinion it was said, l.c. 679:

> "'According to the authorities afforded by the English books relating to municipal corporations, there must be present at a corporate assembly, besides the President, a majority of each integral part, if composed of a definite number, and not merely a majority of the surviving or existing members of each class. Indeed, if there be not a surviving majority of the constitutional members, no corporate assembly, say those authorities, can be formed, and the functions of every meeting in which that class ought to participate are suspended.' 4 T. R. 823; 6 do., 278; 4 East., 26; do., 307; Cowen's notes to ex parte Willcocks, 7 Cow., 410; 7 S. and R., 517; 9 Foster, 213; Angell and Amee on Corp., secs. 501, 506."

See also 46 C. J., Parliamentary Law, Section 8, page 1378:

> "It is a well established parliamentary rule that a quorum of the body must be present in order to validate its action or to transact any business. In order to constitute a quorum it is not necessary that the entire

> membership of the assembly be present. In reckoning a quorum the general rule is that, in the absence of a contrary provision affecting the rule, the total number of all the membership of the body be taken as the basis; and ordinarily a majority of the authorized membership of a body, consisting of a definite number of members, constitutes a quorum for the purpose of transacting business; * * *"
> (Emphasis ours.)

Contrary to the above authorities, we find this statement in 62 C.J.S., Municipal Corporations, Section 399(c), page 758:

> "Although there is some authority to the contrary, particularly where a charter or statute defines a quorum as a majority of the whole number of councilmen, as a general rule, if there is a vacancy in the council or governing body, a majority of the remaining members will suffice for a quorum, especially where a statute or charter defines a quorum as a majority of the council, or similar phrase, as distinguished from a majority of the entire board 'elected,' or similar terms. Thus, in reckoning a quorum, the rule ordinarily is not to count as members those who are not at the date of the meeting legal members of the body; and, hence, those are omitted from the count of members who, by reason of resignation, recall, or removal from their respective wards, are out of office; and also those whose terms of office have expired."

The cases cited as authority for the above proposition are: Nesbitt v. Bolz, 91 P. 2d 879, 13 Cal. 2d 677; Ross v. Miller, 178 A. 771, 115 N.J. Law 61; State v. Orr, 56 N.E. 14, 61 Ohio St. 384; and People v. Wright, 71 P. 365, 30 Colo. 439. All of these cases involve the problem of filling a vacancy existing on the body itself, and only one, Ross v. Miller, supra, purports to be based upon the common law. All the rest involve the construction of a statutory or constitutional provision and represent an effort by the courts to arrive at the intent of the Legislature or the framers of the Constitution. Without going into the merits of the argument to be made for the rule contained in the above cases respecting the filling of a vacancy on a body itself, we should like to point out that this office has ruled contrary to

the cases above cited in an opinion issued to Honorable Chas. A. Lee under date of September 27, 1934, copy enclosed. See also State ex rel. Thurlo v. Harper (Mo.), 80 S.W. (2d) 849, 852.

Ross v. Miller, supra, does, however, make the flat statement that the common law was that in case of a vacancy a quorum consisted of a majority of the remaining members. At 178 A., l.c. 772, the court said:

> "At common law, a majority of all the members of a municipal governing body constituted a quorum; and in the event of a vacancy a quorum consisted of a majority of the remaining members. Hutchinson v. Belmar, 61 N.J. Law, 443, 39 A. 643, affirmed 62 N.J. Law, 450, 45 A. 1092; Tappan v. Long Branch, etc., Commission, 59 N.J. Law, 371, 35 A. 1070; Mueller v. Egg Harbor City, 55 N.J. Law, 245, 26 A. 89; Cadmus v. Farr, 47 N.J. Law, 208. And it was likewise the rule at common law that a majority of a quorum was empowered to fill a vacancy, or take any other action within its proper sphere. Housman v. Earle, 98 N.J. Law, 379, 120 A. 738; Cadmus v. Farr, supra; 19 R.C.L. 890; 43 C.J. 506, 507."

The oldest New Jersey case cited in Ross v. Miller, supra, is Cadmus v. Farr, 42 N.J. Law 208, 19 R.C.L. 890. That case merely declared the common law in general and cited, among other cases, that of The King v. Bellringer, 4 T.R. 810, decided in the thirty-second year of the reign of George III. Therefore, in order to check the accuracy of the statement of the common law contained in Ross v. Miller, supra, it behooves us to analyze the case of The King v. Bellringer, supra.

In that case the charter of the city of Bodmin required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect all the officers and ministers of the borough. The common council was a definite body consisting of thirty-six members, but on the date in question there were only eighteen of the common council living and surviving. On this date a majority of those remaining elected the defendant as one of the capital burgesses by which he claimed title. The action was one of quo warranto in which the defendant was ousted.

Lord Kenyon, Ch. J., delivered the unanimous opinion of the court, wherein, at 4 T.R., l.c. 823, he said inter alia:

" * * * But the cases which were cited in the argument of this case are all one way, that there must be a major part of the whole number, constituted by the charter, in order to make the elections, and to do the several other acts under it. In R. v. Varlo (b), Lord Mansfield observed upon the distinction, which is extremely well founded, between corporations consisting of a definite and an indefinite number; that in the latter a major part of those who are existing at the time is competent to do the act; but that where the body is definite (as it is in this case) there must be a major part of the whole number. His Lordship's words are, 'Upon the words of the charter alone, I myself have no doubt about the construction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made. It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter-days, and the major part who are present do the act. But where there is a select body, it is a different thing, for there it is a special appointment. All the reasoning therefore is different.' It appears to me therefore that it was his opinion, and that of the Court, that where there is a definite body, there must exist at the time when the act is done a major part of that definite body; it is not necessary indeed that they should all concur in the election, or other act done; but they must be present; and the election at such meeting is in point of law an election by the whole. In the case of R. v. Monday (a), Lord Mansfield asked this question, 'Is there any case where the charter has directed the election to be by the majority of the body, in which it has been held that a less number than a majority of the whole corporate body can elect? For instance, suppose the corporate body consisted of twelve, and two were dead; is there any instance where the charter has said that the election shall be by a majority of the body, in which it has been held that six, which are a majority of the remaining ten, were sufficient to elect?' This

> question was immediately answered by Aston, J. who said, that 'In R. v. Reese and R. v. Newsham, it was clearly understood that if the major part of the corporation had been dead, it would have been in fact dissolved, or at least those who survived could not have assembled for the purpose of an election.' * * *"

It is clear from a reading of The King v. Bellringer, supra, and the cases cited therein, that when the body is definite as it is in this case there must be a major part of the whole body and not merely a major part of the remaining members in order to constitute a quorum at common law. Therefore, the statement of the common-law rule as contained in Ross v. Miller, supra, on which the text of C.J.S. is based, is erroneous.

The King v. Bellringer, supra, was cited in Blacket v. Blizard, 9 B & C 851, which in turn was cited in State ex rel. Otto v. Kansas City, supra, and recognized as a part of the common law of England. Although this precise factual situation was not present in the last-mentioned case, we can only assume that the Supreme Court of Missouri, in recognizing the line of cases represented by Blacket v. Blizard, supra, as declaratory of the common law, would also render the same recognition to The King v. Bellringer, supra, as declaratory of the common law under the facts as here presented.

Since action by a deliberative body at a meeting of which no quorum was present is void, and since we must use the common-law rule in arriving at the number necessary to constitute a quorum, which rule requires a majority of the whole body and not merely a majority of the remaining members in case of a vacancy, we can only conclude that the action of the Democratic Judicial Committee of the Second Judicial Circuit taken at the meeting thereof on July 29, 1954, at which Fred C. Bollow was nominated for the office of Circuit Judge for the Second Judicial Circuit, was void because of the lack of a quorum.

Therefore, the answer to your first question is that Mr. Bollow is not legally the nominee of the Democratic party for the office of Circuit Judge for the Second Judicial Circuit.

Having answered this first question in the negative, this being the only question properly presented to you at this time, we respectfully refrain from answering the remaining questions in your request.

Honorable Walter H. Toberman

CONCLUSION

It is the opinion of this office that the meeting of the Democratic Judicial Committee of the Second Judicial Circuit on July 29, 1954, was not a valid meeting for the lack of a quorum and that as a consequence Fred C. Bollow is not at this time the legally nominated candidate of the Democratic party for the office of Circuit Judge of the Second Judicial Circuit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.