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A MINNESOTA JUDGESHIP

By Kenneth C. Sears*

In the May, 1930, number of the Illinois Law Review there appeared a discussion with reference to the appointment of federal district judges. The article considered in particular the appointment of Judge Watson for the middle district of Pennsylvania and incidentally the appointment of Judge Hopkins for the district of Kansas. In that article among the closing words were the following:

"So it appears that if President Hoover is really in earnest about making his own appointments to the federal bench and is really opposed to the old system whereby the senators make selections for his approval, the President will find that he will have at least a small body of senators who will approve his conduct. At least that is what they say. Whether, as many may suspect, a refusal to appoint the favorite of any senator and the selection of one not approved by a senator may result in the appointment never leaving the judiciary committee is still a matter of doubt. It is something of an unknown factor to contemplate that mysterious thing known as senatorial courtesy. It can only be hoped that the President at some time during his administration will make the issue."

An interesting situation has developed with reference to an appointment for a new judgeship for the district of Minnesota. The new position was created about a year ago. Senator Schall early indicated his desire that Attorney General Mitchell recommend to the President the appointment of Ernest A. Michel of Minneapolis. On June 28, 1930, Attorney General Mitchell wrote to Senator Schall that he could not approve of Mr. Michel. The matter was then held in abeyance while the primary election and the general election were held during that summer and fall. Ap-

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parently to some extent this proposed appointment was made an issue.\textsuperscript{2} Senator Schall was successful in being reelected and he again urged Mr. Michel upon the Attorney General. There was great amount of activity\textsuperscript{a} on the behalf of the proposed appointee and Senator Schall claimed that Mr. Michel had been endorsed by both Senator Shipstead and himself, by all of the representatives in the lower house of Congress, and by the entire list of state officials in Minnesota and that he was also the choice of the lawyers and of the voters generally, and, more specifically, that some 600 to 700 lawyers in Minnesota had endorsed him.

Attorney General Mitchell in his letter to Senator Schall the preceding June had stated that while Mr. Michel had many endorsements he also had more who objected to him.\textsuperscript{4} In this situa-

\textsuperscript{2} Senator Schall has stated frequently that the Michel appointment was made an issue not at his request but by the action of the friends of Attorney General Mitchell. Since the Senator was reelected he has claimed that the voters of Minnesota desired the appointment of Mr. Michel. Obviously, however, it is a fallacy to argue that the election of Senator Schall is a favorable vote for everything which the Senator was known to favor."

Cf. the following from the statement of Mr. Mitchell on January 24, 1931: "During the last summer and fall I refrained from any public comment because of the political campaign and a desire to avoid anything which might appear to affect any candidate's political fortunes or appear to make the judgeship too much a political matter."

See speech by Mr. Tom Davis, vol. 74 Congressional Record, p. 7598.

\textsuperscript{3} The Attorney General in his letter of January 28 to Senator Schall stated: "The matter of the endorsements which he (Michel) has received requires some additional comment. Everyone knows that the campaign for Michel in Minnesota has taken the form of the most active and persistent solicitation of endorsements, in which his partner, Mr. Tom Davis, has taken the lead. It is entirely certain that a very large number of those who have been persuaded to endorse Michel have yielded reluctantly to these persistent solicitations. I know that Mr. Tom Davis, who has been the leader in the fight to have his partner, Michel, elevated to the bench, was an active factor in the last political campaign and an earnest supporter of yours, and there isn't any doubt about the fact that he has insisted upon this appointment because of his political support."

\textsuperscript{4} In his letter to Senator Schall on January 28, 1931, Mr. Mitchell made the following statement: "... From the moment Mr. Michel's name was mentioned a flood of protests commenced to find its way into my office and directly to the President. In mere volume and numbers these protests exceed the endorsements. I regret that because of the unbroken rule and tradition in the Department of Justice that such personal files must be treated as confidential unless the person to whom they relate is nominated and they go to the Judiciary Committee of the Senate, I cannot still some of the claims of Michel's supporters by publishing these documents."

In his statement of January 24, 1931, Mr. Mitchell made the following observation concerning Mr. Michel's endorsements: "... I have seen a published list of lawyers and judges who are said to have endorsed him [Michel]. Some of the men on that published list have not sent such endorsements to this department. Other persons on the list have contented themselves with mentioning certain good qualities of the candidate but have fallen short of an unqualified endorsement for the federal bench. A few have privately withdrawn their endorsements claiming that their support was solicited and the endorsements given to avoid embarrassment. No
tion (for the controversy was the subject of discussion in Minnesota) it occurred to one of the members of the Board of Governors of the Minnesota State Bar Association that a vote of the members of that association would give accurate information as to the wishes of the lawyers in Minnesota. Accordingly a meeting of the Board of Governors was called on January 17, 1931. It was there determined with one dissenting vote that the members of the Minnesota State Bar Association be asked to vote upon the following proposition: "Do you favor the appointment of Ernest A. Michel to be United States District Judge for Minnesota?" Provisions were made for secrecy of the ballot and apparently no complaint has been made as to the procedure that was adopted. Letters enclosing the ballot were sent to the members on January 21, 1931. Fifty individuals, acting under the leadership of Mr. George R. Smith, favored the appointment of Mr. Michel and they prepared a letter dated January 20, 1931, which argued in favor of Mr. Michel and mailed it to many members of the association very shortly after the official letter of the association had been placed in the mails. This letter sought to have lawyers to whom it was addressed write to the President with a view of urging upon him the immediate appointment of a federal judge in Minnesota and state that, in view of the situation which had arisen, no objection by the writer now existed to the appointment of Mr. Michel. The letter, however, made no direct reference to the vote that was being taken by the Minnesota State Bar Association.

Ballots were sent to 1,561 members. The ballots returned amounted to 1,341. Of this number seventy-two were rejected as being defective. Thus 1,269 ballots were counted. Of these 293 voted in favor of Mr. Michel. 976 voted against him. At the doubt many on the list have expressed their sincere opinions. We lawyers know the difficulties confronting a lawyer when solicited for an endorsement of a man who may have a prospect of appointment and before whom he may have to practice.

"On the other hand, our file of protests against this nomination is more impressive than in any other case before the Department for years past. My refusal to recommend the Senator's candidate is not a mere matter of my personal judgment. From lawyers and judges all over the state of Minnesota have come numerous and vigorous protests against the appointment. It requires courage and strong conviction for a lawyer to protest such an appointment where there is any chance of its being made."

5. The writer is not at liberty to disclose the name of the lawyer to whom he is indebted for his kindness in disclosing the facts concerning the action of the Minnesota State Bar Association. Most of that which has been written in this connection was made public and was printed in various newspapers in the state.

6. Ballots were also sent to the various judges in the state.
request of Mr. Michel's representatives who were present at the counting, a separate count was made of the city and country votes. For this purpose Minneapolis, St. Paul, and Duluth were designated as cities. The result was that the city vote was 186 in favor of Mr. Michel and 614 against him. The country vote was 107 in favor of him and 362 against him. This vote would seem to have been a decisive rejection of Mr. Michel. His friends, however, including Senator Schall, refused to accept it as such. While as stated they made no complaint as to the procedure they argued that the form of ballot was unfair to Mr. Michel in that it placed him against all other aspirants. It was asserted in general terms that some ten to twenty other individuals in the state desired the appointment and that all of them had supporters.

It would not seem that there could be very much to this objection. One can hardly doubt that perhaps fifty or one hundred or even more of the lawyers of Minnesota would like to be appointed a federal district judge. But the issue had clearly been

7. Their arguments were presented frequently in the press of the state and in the Congressional Record.

It was frequently stated that 600 to 700 Minnesota lawyers had endorsed Mr. Michel. Notice, however, that he received only 293 votes. Thus it would appear that a large number of endorsers changed their views, refused to vote for Michel, or were not members of the Minnesota State Bar Association and thus were not entitled to vote.

In the New York Times for January 31, 1931, Senator Schall was quoted as saying that "... Mr. Michel received 293 votes of the 978 cast, or about a third of the total. The city lawyers cast 616 votes, of which 186 were for Mr. Michel, and the country lawyers 362 votes, of which 107 were for Mr. Michel."

8. Some local bar associations previous to the action of the state association had taken some votes of their members to determine preferences. The writer lacks information as to the results of these votes except that it appears that Judge Gunnar H. Nordbye received some votes in a poll taken by the Minneapolis Bar Association. Vol. 74 Congressional Record, p. 7598.

The writer since has been informed that Judge Nordbye received the highest vote cast for possible appointees from Minneapolis.

The Minneapolis Tribune on January 31, 1931, quoted Senator Schall as saying that the Attorney General "by his personal attack on Mr. Michel has made Michel the issue" and that "fairness demands that some impartial tribunal pass on Mr. Michel's fitness." This was made after the result of the bar association voting was known.

Senator Schall copied into the Congressional Record (vol. 74, p. 4224-25) the complaint of Frank Edward Day that "the two ballots by bar associations" were "deceitfully conducted" and that the last ballot was "taken so unfairly by forcing Mr. Michel to face the field." He did not specify as to
made between Senator Schall and Attorney General Mitchell of Mr. Michel's competency. Up to this time Senator Schall had suggested no other person for the position. No other person, apparently, was being definitely considered. So far as it appears even Mr. Michel's friends and supporters have not pointed out the name of any other person who was considered in any specific way as his opponent in the vote. To be certain it is entirely possible that some lawyers in casting their votes may have resorted to the philosophy indicated by the supporters of Mr. Michel. They may have thought that Mr. Michel was entirely competent and entitled to have the appointment; but for personal and selfish reasons they may have concluded to vote against him hoping in the mere possibility that some friend they had in mind would somehow be selected if Mr. Michel was not. While that is possible it does not seem sufficiently probable to make it worthy of any real consideration in determining whether the vote represents that which it purports to represent, i. e., that Mr. Michel was the choice of less than a fourth of the lawyers in Minnesota for the position of federal district judge.

Not very much has been said, as is so frequently said in other states, that the Minnesota State Bar association is not really representative of the lawyers of that state. The main reason for this is that the Minnesota State Bar Association is an affiliated association. Membership in the state association is had by being a member of a district association. There is a district association in every one of the nineteen judicial districts in the state. So while the membership of the state association is not all inclusive of the lawyers of the state, nevertheless there seems to be no serious denial that it is fairly representative.  

It was also claimed by the supporters of Mr. Michel that Attorney General Mitchell improperly influenced the vote of the Minnesota lawyers in that while the voting was in progress he

\[ \text{the deceitful conduct and his emotional letter may be explained by his statement that he was "a friend and pastor of Ernest Michel" and "a Republican of almost unreasonable devotion."} \]

9. It has been stated that the membership includes about half of the members of the bar.

Mr. Tom Davis stated to the Senate Judiciary Committee: "Less than half the lawyers in Minnesota belong to the State Bar Association, because it is a known fact that the association is dominated and controlled by attorneys who represent the privileged interests." Vol. 74, Congressional Record, p. 7598. Has any bar association ever escaped that accusation? The same has been said of the American Bar Association and Mr. Davis has been a member of that association since 1913. See Reports of Am. Bar Assn. (1929) vol. 54, p. 1037.
issued a statement to the press of the country in which he set forth the reasons why he was unable conscientiously to recommend the appointment of Ernest A. Michel to the President of the United States. But, as stated, the letter containing the ballot was mailed January 21 and it was provided that the ballot must be returned by January 29. The statement of the Attorney General was dated January 24 for release in afternoon newspapers on January 27. While it was still possible for a lawyer to vote after having read in the newspapers of January 27 or 28 of Mr. Mitchell’s views, nevertheless the records of the Minnesota State Bar Association disclose that on January 23 over 800 ballots had been returned and that on January 26, ninety-eight per cent of all the ballots received were in the secretary’s possession. Accordingly, the statement of the Attorney General could not have possibly influenced more than two per cent of the vote. It is also fair to state that the Attorney General has disclaimed that he knew that the vote was in progress and has stated that his statement was prepared in Washington, D. C., in the ordinary course of business for release on the 27th in order to give time for it to be sent by mail to newspapers over the United States.10

Thus we arrive at the objection which existed to the appointment of Mr. Michel. The attitude of the Attorney General was that Mr. Michel was a lawyer of fair ability but not a man of outstanding capacity in legal affairs. Nor was he a man, in the opinion of the Attorney General, who would have been thought of for the position except for the political considerations involved.11 It is hardly to be denied that such may be said of a good many men who in the past have been appointed to positions on the federal bench. Indeed, there seems to be no escape from the proposition that the appointments by President Hoover of Judge Hopkins and particularly of Judge Watson are subject to this same criticism. In what respect, then, did the demand by Senator Schall of the appointment of Mr. Michel differ from the demand made by Senators from Pennsylvania and Kansas? The answer is according to those who opposed him that Mr. Michel was a member of the firm of Davis, Michel, Yaeger, and McGinley of Minneapolis and that

10. Such is the information given to the writer by his informant in Minneapolis.

Cf. the charges made against the Attorney General that the vote and the publicity were a scheme to discredit Mr. Michel: Vol. 74 Congressional Record p. 7598 (speech of Mr. Tom Davis).

11. Mr. Tom Davis, partner of Mr. Michel, was once the candidate of the Farmer-Labor party for a state office and he seems to be an important individual in that organization.
that firm was one of three firms in Minneapolis which have been very prominent in the solicitation of personal injury cases. The charge is that the firm of Davis and Michel (the predecessor of the present firm) have flouted the ethics of the profession in having solicitors and by this means have built up the most or their large practice.\footnote{This firm had not confined itself to the city of Minneapolis nor the state of Minnesota. It has had runners, so it is charged, spread over a number of the middle western states and the result has been that considerable litigation which normally would have been brought in other states has been instituted in the state of Minnesota with consequent expense to the taxpayers of that state. Such is the fundamental reason for the action of the Attorney General in refusing to follow the wishes of Senator Schall.}

So far as has been observed there has been no specific denial of the truth of these charges.\footnote{Senator Schall in his various letters to the President dated February 10, 1931, Senator Schall argued: "In all my conversations and correspondence with your Attorney General, he has never once hinted of any specific act of wrongdoing upon Mr. Michel's part. The burden of his complaint has always been that Mr. Michel belonged to a firm which specialized in personal injury cases. Now, the truth is that Mr. Michel's partner is the attorney for the railroad brotherhoods, an organization which extends into many states and which, incidentally, furnished you loyal support in the campaign of 1928. One of their features is a corps for protecting injured members, visiting them, seeing that they are provided with counsel and are not taken advantage of by claim agents and other unscrupulous corporate 'right minded' representatives. Such a corps is naturally a thorn in the side of the corporation."

\footnote{In his letter to Senator Schall on January 28, 1931, Attorney General Mitchell stated two conclusions as follows: "Third, that his law firm has engaged openly and notoriously in methods of procuring and dealing with personal injury cases which have always been considered unprofessional and against the public welfare and public policy, and which in many states heretofore, and recently in Minnesota, have been put under the ban of penal statutes. "Fourth, that to appoint him would be an affront to the courts and to those members of the legal profession who have tried to maintain proper standards in this matter, and to many other right thinking people in the state of Minnesota." Most of the letter was printed in the New York Times for January 31, 1931.

In his telegram to Senator Schall, releasing the latter from further activity in his behalf, Mr. Michel stated: "While I realize, of course, the difficulties which confront every aspirant for a federal judicial office whose professional life has been largely concerned with the affairs of the average man, nevertheless I would hardly be human did I not regret and resent what I must regard as the unjust and unfair attacks made on me by those in high places through the public press. Attacks which I, as a private citizen, had to bear in silence." Vol. 74 Congressional Record p. 5487. It does not appear why he had to be silent. Senator Schall apparently was willing to have his defense printed in the Congressional Record. The speech of his partner, Tom Davis, before the Judiciary Committee is in the record.}
statements has tried to gloss over the charges by referring to them as accusations that Mr. Michel and his firm were lawyers for poor persons. He has endeavored to make an issue by stating that the Attorney General is insisting upon an appointment that will be satisfactory to the corporations, particularly the public utility and railroad corporations. He glorified himself by asserting that he is representing the great mass of the people and that Mr. Michel is the type of man who as a judge would have protected the interests of the average person as against the corporations.

To a lawyer this defense is practically an admission of the truth of the charge made by the Attorney General and it is believed

lawyers like your Attorney General, and it is for his connection with such a system that he mislabels Mr. Michel.

"The Minnesota Supreme Court has declared itself 'unable to hold that it is illegal or against public policy for an attorney to solicit a case.' (Johnson v. R. Co., 128 Minn. 365). As a matter of fact all lawyers do so in one form or another. A sign on the door or a card in the newspaper is really a solicitation of business. Some, like Mr. Mitchell, accomplish the same result, or a greater one, by joining expensive clubs and seeking otherwise the society of the rich. If nothing more can be said against a lawyer than that he is keen for business, he must be pretty clean." Vol. 74 Congressional Record, p. 4517.

In his speech before the Senate Judiciary Committee Mr. Tom Davis stated: "This is the only opportunity I can ever have, either in behalf of myself or my partner, Ernest Michel, to refute the dishonest and unjust attacks made by the Attorney General."

But he uttered no refutation any more definite than the following: "For the Attorney General to seek to charge Mr. Michel with being an ambulance chaser is a dastardly and dishonest thing. The lawyers of this country know how business is solicited, some of it openly and honestly and some of it surreptitiously and hypocritically by belonging to exclusive clubs and fawning before the representatives of privileged interests."

Then Mr. Davis referred to an article in the magazine Time entitled "Chaser Michel" and read to the committee a letter written to the editor of the magazine by Thomas B. Mouter, a Minnesota attorney. He wrote in part: "So far as I have been able to learn, Mr. Michel has never personally solicited a case in his life. While he may be responsible for the conduct of anyone in behalf of his firm, nevertheless to convey the impression that he is a mere solicitor instead of one of the outstanding lawyers of the state is highly unfair." Vol. 74 Congressional Record, p. 7599.

14. The New York Times for January 28, 1931 quoted Senator Schall as saying: "I have yet to be informed of anything in the record of Mr. Michel which would eliminate him from being classed with the most ethical of his profession. The protests on Mr. Michel are exclusively from those right-public-utility-minded men, any of whom should they (sic) be appointed, would not meet with the approval of the people of Minnesota." [Yet, when Senator Schall finally submitted to President Hoover a list of attorneys in place of the rejected Michel he included the name of a general attorney for a railway company!]

Senator Schall in a telegram to the New York Times (Friday, January 30, 1931) stated: "Ernest Michel is eminently fitted both in character and ability. It is true he has been a poor man's lawyer. The people of Minnesota want to know why this honorable title is such an insurmountable barrier in the eyes of the Attorney General." See, also, the Chicago Tribune for February 19, 1931; vol. 74, Congressional Record, p. 3524.
that the bulk of the lawyers in this country will approve the position taken by the President and his Attorney General. Solicitation of personal injury cases, more strikingly stated as “ambulance chasing,” is one of the serious evils of the profession. Yet there

15. See State ex rel v. Circuit Court (1927) 193 Wis. 132, 214 N. W. 396; Ellis v. Prowley (1917) 165 Wis. 381, 161 N. W. 384; State v. Kiefer (1929) 197 Wis. 754, 223 N. W. 795; State v. Cannon (1929) 199 Wis. 401, 226 N. W. 385.

It seems to be generally understood that in cities at least it is impossible as a rule to obtain any considerable practice in personal injury litigation unless one either personally solicits or has agents do that for him. See People v. McCullum (1930) 341 Ill. 578, 173 N. E. 827; Ingersoll et al. v. Coal Creek Coal Co. (1906) 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. (n. s.) 282.

Many lawyers will recall the investigation in New York beginning in 1928. If one wishes to read of the disgusting situation revealed in this investigation let him examine Matter of Schleider (1930) 238 N. Y. Supp. 601, 227 App. Div. 532. Schleider employed both attorneys and laymen to solicit cases for him. He did not like to use the term solicit but preferred to say that they asked for and obtained cases. Schleider was suspended for a year.


For a construction of the New York statute see Irwin v. Curie (1902) 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 830; Matter of Clark (1906) 184
seem to be lawyers who justify the business and it is not everywhere conceded that the practice should be condemned. It is not difficult to hear arguments similar to the one by Senator Schall that all lawyers solicit business; that the mere hanging of a sign or the paint-


Matter of Seligsohn (1930) 238 N. Y. Supp. 627, 227 App. Div. 547, affirmed 196 N. Y. 530, 89 N. E. 1112. reveals how solicitation of personal injury claims may begin with a doctor who treats the injured person or a policeman who becomes acquainted with the case. It also discloses the speed with which the solicitor is at the home of the injured person. Seligsohn was found guilty of soliciting personally and through his office clerk. The court stated that he had violated canon 28 of the Canons of Professional Ethics and that: “The circumstances surrounding the solicitation in the instances in the record are not merely suspicious, they are symptomatic of a practice which cannot be defended.”

Matter of Levy and Hartman (1930) 239 N. Y. Supp. 377, 228 App. Div. 249, is revealing: “The record in this case is made up of the testimony of the respondents themselves as given in the course of the investigation before Mr. Justice Wasservogel. It discloses a shameless and continued violation of the Canon of Ethics and the statutes of this state by respondents in the conduct of the negligence department of their business, which constituted seventy-five per cent of the total. At the time of the investigation they had approximately 700 actions for personal injuries pending, and 200 to 300 more in the municipal courts for injuries to property due to negligence. Admittedly, they could not have obtained that number of personal injury cases by sitting in their office and waiting for them, so they employed ‘runners,’ whose business it was to solicit the employment of the respondents by persons injured in accidents, by a printed form of retainer whereby the respondents were to receive fifty per cent of the amount recovered, of which fee the ‘runner’ was to receive thirty-three and one-third per cent...

The firm employed three ‘regular runners’ in its office during a period of six years and also did business with eight or nine ‘independent contractors,’ who are runners not attached to any regular law office and with whom they made the same arrangements for one-third participation in their fee. At times they paid salaries to one or all of the three ‘regular runners’ in their employ, but such salaries were charged against their percentages. Sometimes the ‘independent contractors’ would be hard up and would sell their interest in a case outright to the respondents. It seems that sometimes after an independent contractor had brought in a retainer to respondents, another lawyer would come in and take the case away from them. At least fifty per cent of the negligence business of respondents concededly came through ‘runners.’ The runners were paid either in cash or by checks drawn to the order of ‘cash.’ Competition among the ‘runners’ is so keen that they have to use automobiles to get around quickly enough to get results. Respondent Hartman admitted that the firm may have loaned the money ‘to their runners to buy an automobile.’ Respondent Levy testified that from his experience he had learned that ‘runners’ have a system of getting information at police headquarters; they get telephone calls from police officers; also information from hospital doctors, or any person who may come in contact with an injured person. Respondent Hartman corroborated him in this subject and admitted that various policemen had the firm’s cards in their pockets, but denied the firm paid them anything. Respondent Levy said his ‘runners’ did not get information from hospitals but they did get it from police headquarters and police officers. It was testified there was a practice of having an indemnity company settle a number of cases for a lump sum which the lawyer might apportion among the plaintiffs in those cases as he saw fit. Also public adjusters are used to effect settlements with certain
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ing of a name followed by the designation of attorney at law upon the window is a solicitation of business; that joining and participating in the privileges of a club which has in its membership bank presidents and other influential individuals is solicitation of business. A mind that would make no distinction between such things as Senator Schall has mentioned and the solicitation of personal injury suits by a system of runners, whose members frequently are not even members of the bar, is a mind warped with prejudice, or else not capable of understanding anything except the most obvious of considerations. It is difficult to believe that Senator Schall in making such an argument was doing anything more than to make the best of a bad proposition. After all it is usually impossible to make a case so clear that somebody cannot offer some words by way of excuse.

Fortunately the profession is not without expressions and adjudications of courts with reference to the matter. In *Winders v. Illinois Central Railway Co.* it was held that the trial court was correct in refusing to dismiss a case for personal injuries because of the unethical practice of the plaintiff's attorneys in soliciting the case by a lay employee, and for the attorneys' conduct in making a loan to plaintiff of $500 to finance him while the case was pending. The attitude of the court was that while it was not disposed to minimize the evil of such agreements and would refuse to enforce them, nevertheless this was not a justification for the dismissal of the cause of action for the tort at the request of the defendant. In its decision the court stated that *Emerson v. McDonald* seemed to be the only case in the country to the contrary. Judge Stone of the Minnesota Supreme Court in concurring stated what is generally recognized to be true that the practice of soliciting seems to lead in many instances to financing the claimant as a method of securing a contract with him. Then, stated Judge Stone, "That element, necessarily present, possibly explains why

indemnity companies and other corporations, and these adjusters are paid by the plaintiff's lawyer if successful, the amount not being fixed or on a percentage basis."


17. (1906) 129 Wis. 67, 107 N. W. 1037. This decision is different from the problem presented in the *Winders* case. It is stated in the following syllabus: "After action brought by the grantees in a tax deed to bar the original owners for any interest in the lands, a purchase by defendants' attorney of his clients' interest in the lands was champertous, and the court properly struck out defenses interposed by him for his own benefit, though in the name of the defendants, and held that defendants were in default."

However, Wisconsin seems to be regarded as in a class by itself on this question. See a note on the subject matter in 35 L. R. A. (N. s.) 512.
many of these imported cases are 'made' by perjury." After setting forth that the importation of cases into the state of Minnesota was a burden on the taxpayers the concurring judge further stated his views as follows:

"Nothing need be said to emphasize the vicious character and degrading tendency of the practice of organized and habitual solicitation of any kind of business by attorneys through paid employees. It is especially dangerous to the profession, when the potency of the solicitation is enhanced by the promise of whatever financial aid may be needed by the client pending the litigation. There is so much evidence of that sort of thing in this record that the trial judge was outspoken in emphatic denunciation. In his views I agree, and I think the case should be referred to the Board of Law Examiners for investigation and disciplinary action, if the facts are found to warrant it. Personally, I see so much evil already resulting from the highly organized and persistent solicitation by attorneys of personal injury business (and I am not now confining myself to that which is imported; a vast amount of local litigation is being solicited away from counsel to whom it rightly belongs), and so much more of discredit to bench and bar yet to come, if the practice is not stopped, that I take this opportunity of absolving myself, so far as I may, from responsibility for the continued refusal of the courts of this state to take effective notice of the situation. If those who indulge in the practices now questioned consider them legitimate, they should welcome an investigation, for it would give them the opportunity of demonstrating the validity of their views." 18

The Attorney General in his letter to Senator Schall dated January 28, 1931, quoted from the findings made by the trial court at Albert Lea, Minnesota, on June 26, 1923, in Moad v. Illinois Central R. R. Co. This case was one that was instituted by the firm of Davis and Michel and the quotation from the finding of the court is as follows:

"The court finds that the aforesaid solicitation of said business was and is contrary to the laws of the state of Iowa and contrary to the laws of the state of Minnesota; that the obtaining of said case by said law firm [Davis & Michel] and the commencement of said action was the direct result of the unlawful procurement and solicitation on behalf of said firm of attorneys through their said agents and solicitors, was and is,

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18. Judge Stone also called attention to a marginal comment by Mr. Justice Brandeis in writing the opinion for the Supreme Court of the United States in Davis v. Farmers' Co-operative Co. (1923) 262 U. S. 312, 43 Sup. Ct. 556, 67 L. Ed. 996: "A message, dated February 2, 1923, of the Governor of Minnesota to its Legislature, recites that a recent examination of the calendars of the district courts in sixty-seven of the eighty-seven counties of the state disclosed that in those counties there were then pending 1,028 personal injury cases in which non-resident plaintiffs seek damages aggregating nearly $26,000,000 from foreign railroad corporations which do not operate any line within Minnesota."
unprofessional and was and is champertous, contrary to the statutes of Iowa; contrary to the law and to the public policy of the state of Minnesota, and void for said reasons. To support and sanction such transactions would be a reproach to the legal profession and the courts of this state.”

Furthermore to show the extent of the activities of the firm of Davis and Michel it is only necessary to cite Chicago, B. & Q. R. Co. v. Davis et al. In that case the Supreme Court of Nebraska affirmed the action of the trial court in enjoining Tom Davis, A. E. Roe, and Ed. F. Murphy from violating sections 9737 and 9738 compiled statutes of 1922 commonly known as the Anti-ambulance Chasing Statute. Ernest A. Michel and the firm of Davis and Michel were also made defendants but they were not served with process. The statute in question made it unlawful for any person with a view of instituting a suit outside of Nebraska to solicit a claim for personal injury or death sustained within Nebraska and made it unlawful in any way to promote the prosecution of a suit brought outside of Nebraska for such damages where the right of action was in a resident of Nebraska or his legal representative and against a person, co-partnership, or corporation subject to personal service within Nebraska. In upholding the statute as against an argument that it was unconstitutional, the court stated that the statute was passed because of conditions which existed, to wit:

“It was a matter of common knowledge that a few attorneys outside of the state, through themselves and agents, were engaged in the practice of soliciting claims for settlement or suit in personal injury actions, and also in cases where the injury resulted in death, with the avowed purpose of bringing actions thereon in some foreign jurisdiction, notwithstanding the fact that both of the parties to the controversy resided in the state. A condition existed where agents of these attorneys were traveling in the state soliciting employment for non-resident attorneys, haunting the homes of the injured and bringing great discredit to the legitimate practice of the law. It was to curtail this species of ‘ambulance chasing’ which prompted the Legislature to enact the statute in question. While the statute is in general terms and applies to ‘any person’ engaged in these practices, it was chiefly aimed against the attorneys. It will be observed that there is nothing in the statute which in any wise attempts to abridge the right of a party entitled to bring an action, to bring it in any jurisdiction he may choose. So far as his rights are concerned, they are not affected.
at all by the terms of the act. The act was intended as a regulatory measure to curtail the conduct of a class of attorneys who were guilty of infractions of long-established ethical precepts of the profession. As a regulatory measure we think the Legislature was well within its power in enacting the statute in question."

It is to be noticed that in this case the defendants apparently made no claim that they were not guilty of violating the statute.

It is also significant that in Senator Schall's own state of Minnesota in 1929 the legislature passed the following statute:

"No attorney-at-law shall, through any runner, agent, or person not an attorney-at-law who is employed by him, solicit a person to employ such attorney to present a claim for damages for personal injuries or for death, or to prosecute an action to enforce such a claim, and no attorney-at-law shall directly or indirectly give or promise to any such person other than an attorney-at-law any money, fee, or commission in consideration of the employment of such attorney by a person having a claim for personal injuries or for death, or soliciting or procuring such person who has such claim to employ such attorney to present such claim or to prosecute an action for the enforcement thereof. . . .

"Any attorney-at-law who shall violate section 1 hereof [above quoted] shall be guilty of a misdemeanor and shall be punished by a fine of not less than $50, nor more than $100, or imprisonment in the county jail for not more than 90 days."

20. Laws of Minnesota (1929) ch. 289, p. 360. In the Congressional Record, vol. 74, p. 7600 the following appears from a letter by Thomas B. Mouer, a Minnesota lawyer: "In 1929 the legislature passed a law inferentially legalizing the solicitation of personal injury cases by lawyers, but barring laymen."

One may doubt whether this statement is wholly accurate. True the statute seems to punish only laymen and lawyers who hire laymen to solicit but it would hardly seem to follow that direct and personal solicitation by lawyers is thereby legalized in all respects. It would seem that direct and personal solicitation by lawyers is not controlled by the statute. Its legality would, then, remain a matter of common law.

Mr. Mouer also stated: "In Minnesota, the Supreme Court sanctioned the solicitation of law business." This statement is not precisely accurate. Mr. Mouer referred to Johnson v. Great Northern Railway Co. (1915) 128 Minn. 365, 151 N. W. 125, L. R. A. 1917 B 1140. That case arose on these assumed facts: John I. Davis and Davis & Michel (Tom Davis and Ernest A. Michel) solicited and brought a suit for Johnson. The latter settled without the consent of his attorneys after they had lent money to him pending the litigation with the understanding that the advances would be subtracted from any recovery. No proof of these facts was in the record because the attempt was made to prove the facts by questioning the lawyers involved and objections to nearly all the questions were sustained. But, as stated, the Supreme Court decided on the basis set forth. The lawyers were seeking to recover on account of an agreement the company made with Johnson as a part of the settlement that the company would reimburse Johnson for any sum he should be compelled to pay his attorneys. The Supreme Court affirmed a judgment in favor of the plaintiff. In reality, it would seem that it affirmed an allowance for the plaintiff's attorneys, on account of their statutory lien. The defendant sought to avoid the affirmation.
In view of the above showing it seems not unfair to state that it would have been very unfortunate if the Attorney General and the President of the United States had submitted to the demands of Senator Schall. The appointment of Mr. Michel, as stated by because of the conduct of the lawyers. The answer of the court was as follows: "Is conduct of this kind so against public policy that the courts will deny to attorneys guilty of it their statutory lien on the client's cause of action? We freely concede that champerty or maintenance in a case may be ground for refusing the aid of the court in compelling compensation to the guilty attorneys. But is it champerty or maintenance or against public policy for an attorney to solicit business; to pay money to a poor client for his living expenses during the litigation, or to advise him against a settlement of this case? We may have our individual opinions on these propositions as questions of good taste or legal ethics. But in the absence of some statute we are unable to hold that it is illegal or against public policy for an attorney to solicit a case. See concurring opinion of Justice Canty in Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything, may in a sense tend to foment litigation by preventing a settlement from necessity, but we are aware of no authority holding that it is against public policy, or of any sound reason why it should be so considered."

It is to be noticed that the court did not sanction the solicitation of law suits by attorneys in the sense that it approved of the conduct as ethical. The case does not necessarily hold that the attorneys in question would have been discharged if a disciplinary proceeding had been instituted against them.

However, there is no disposition on the part of the writer to approve of Johnson v. Great Northern Railway Co., supra. The standard there set forth is weak and low. Solicitation of legal business and particularly of certain types such as personal injury litigation by members of the bar is bad policy and unnecessary except as between lawyers in an overcrowded bar who are competing for it. This is no less true even though solicitation by laymen is probably worse.

Before the statute was passed in 1929, solicitation by laymen and by lawyers who acted through laymen had been definitely condemned in Minnesota: Huber v. Johnson (1897) 68 Minn. 74, 70 N. W. 806 (decision mainly rested on provision that person could not settle his case except on payment of fixed sum); Gammons v. Johnson (1899) 76 Minn. 76, 78 N. W. 1035 (worked up a scheme of litigation); Gammons v. Gulbranson (1899) 78 Minn. 21, 80 N. W. 779; Holland v. Sheehan et al. (1909) 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. s.) 510. See People v. McCallum (1930) 341 Ill. 578, 173 N. E. 827, where the four majority judges condemned solicitation by an attorney through others, presumably laymen. The minority wished to disbar.

The Tennessee Supreme Court, in a very exhaustive opinion setting forth the contrary opinion of the court of chancery appeals and the argument of the attorneys involved, has held that it would not allow fees to attorneys where a special partner, a lawyer, solicited the cases by approaching strangers, victims of a mine disaster, and secured written contracts with them and where the cases were settled by the defendant without the consent of the attorneys. A Tennessee statute authorized disbarment of a lawyer who had been guilty of "such misdemeanor or acts of immorality or impropriety as are inconsistent with the character or incompatible with the faithful discharge of the duties of his profession." The Court stated that the acts of the attorneys were "inconsistent with the character of the profession and incompatible with the faithful discharge of its duties." Ingersoll v. Coal
the Attorney General, would have been an affront to the legal profession. It is submitted that nothing could more clearly demonstrate the viciousness of the practice which Senator Schall insists upon, i.e., that appointments to the federal district bench are matters of patronage with reference to which the President infringes upon the customary prerogative of the Senators from any particular state whenever he refuses to appoint the person selected by two particular Senators. However, the writer believes that it is not undesirable that Senator Schall should have been so constituted as to have insisted upon such a striking exhibition of the so-called senatorial prerogative. The bar of this country greatly needs to have a settlement of the issue between the right of the President to appoint and the power of Senators from any particular state, with the aid and assistance of their fellow Senators, to compel the President to submit to their selections. Perhaps this particular case is an extreme example of what may be expected if it is ever definitely conceded that the Senators have any such power. Nevertheless, if the power becomes openly and firmly established the bar may expect a deterioration of the federal bench in spots until it will become no more worthy than that of the bench of various large cities such as Chicago and New York.21

Finally, the President definitely informed Senator Schall that he would not appoint Mr. Michel. At the same time he suggested to Senator Schall that he submit to him a list of eight or ten men whom he considered to be qualified for the position and the President also added with some apparent irony that out of such a list he hoped that he would be able to find "someone with fitness for

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21. According to an article in the New York Times for February 23, 1931, William S. Vare is insisting upon a political appointment for the eastern district of Pennsylvania. Apparently, no decision was reached during the last session of Congress.
that position." The Senator from Minnesota for a time refused to accede to this request, and it appeared that there might be a deadlock. Later, the President again requested the Senator to submit his recommendations. On the same day, Senator Schall abandoned his position of Michel or nobody, and he sent to the President a list of individuals who would be satisfactory to him. The next day he received a telegram, dated February 19th, from Mr. Michel releasing him from his obligations.

What may have been the political intrigue behind these movements the writer does not know. At this point, however, the President made a move that seems to have been of doubtful wisdom. On February 19, 1931, the day following the date on which Senator Schall submitted his list, the President wrote to the former stating that the time for the end of the short session of Congress was close at hand and that the names submitted by Senator Schall were of individuals with reference to whom the Department of Justice was lacking information. Furthermore, stated the President, it was advisable to appoint an individual who had had judicial experience and he asked Senator Schall to express his views "on the men whose names I submitted to you yesterday." On the same day the President

22. Letter from President Hoover to Senator Schall, dated February 3, 1931. The next letter from President Hoover to Senator Schall was dated February 10, 1931, and it contained this sentence: "I would be glad if you could accept the suggestion in my letter of February 3d that you give me a list of the names of men who may be investigated as to fitness for this appointment." No answer was received before President Hoover again wrote on February 18th. At that time the President submitted to Senator Schall the names of eight judges, one on the Minnesota Supreme Court, as men "who seem to have substantial support from citizens of Minnesota."

The Minneapolis Tribune on February 8, 1931, quoted Senator Schall as saying that he had "no intention of submitting other names, in fact could not do so without surrender in the view of other senators." A similar statement appeared in Labor for February 10, 1931.

23. The letter from Senator Schall to the President was dated February 18th. It is copied in the Congressional Record, vol. 74, p. 5487.

24. Senator Schall had it printed in the Congressional Record, vol. 74, p. 5487: "... I cannot ask you to do more and with gratitude for what you have done, I hereby release you from further activity in my behalf..."

25. On the same day, February 19th, Senator Schall wrote to the President that many federal judges had had no previous judicial experience, including seven members of the present United States Supreme Court and also as follows: "I would extremely regret, Mr. President, if you should feel it necessary to disregard the names of the men I have submitted to you, which was done at your request, for it is an undoubted fact that if your Department of Justice desires to do so they can advise you by Saturday morning, the 21st, as to the fitness and qualifications of any one of the names suggested.

"With reference to the names submitted in your letter to me, I desire to say that I have not the same facilities of investigating and passing upon these names, which were undoubtedly suggested by the Department of
nominated Judge Gunnar H. Nordbye and sent his name to the Senate. Without regard to the merits of the man selected by the President this gave an opportunity to Senator Schall to claim that the Attorney General was offering a personal affront to him and immediately the support of other Senators was asked in order to block the confirmation. Without pretending to know that there was nothing which justified such an apparently brusque disregard of the invited suggestions made by Senator Schall it would seem that it would have been more politic to have investigated the list of men submitted by him. The time was not so short that it forbade investigation and the possible selection of one of those suggested before the ending of Congress on March 4.

The appointment by the President of Judge Gunnar Nordbye was referred to the Committee on the Judiciary and hearings were had upon the appointment. The statements and testimony before the committee have not been printed in full and therefore are not available. However, Senator Schall printed a part of it, presum-

Justice, as is possessed by the Attorney General's office, but it seems to me that it should not be necessary, because you have asked me to submit these names and I have done so in good faith, with the assurances, as stated in your letter, that you would hope that among them would be found at least one man qualified for this office.

"There is more than one man qualified for this office in the list of names I submitted to you, Mr. President, and some of them are men with judicial experience.

"I certainly hope that the appointment of a federal judge will not be delayed by the taking of any arbitrary position in this matter, for I want to cooperate with you, and I feel certain that if you give this matter serious and fair consideration that you can find from among the list of names submitted to you a man fully qualified for the position and who will pass the qualifications of the Department of Justice and meet the requirements outlined in your favor of the 19th." Vol. 74 Congressional Record, p. 5617.

The Minneapolis Journal for February 20, 1931, printed an editorial which asserted that the Senator's list was a Pandora's box conceived in bad faith and cleverly arranged to embarrass the President.

27. In his statement of January 24, 1931, Attorney General Mitchell declared: "Under the Constitution, power to nominate, that is, the duty of selection, rests with the President, and the function of the Senate is to approve or disapprove such nominations. The traditional practice has been for the President in advance of nominations to receive suggestions from his party's Senators from the state involved, and wherever the Senators submit names of men who are well-qualified and about whom there is no room for serious difference of opinion, their suggestions are generally accepted. But it has likewise been the practice, if the initial suggestions are unsatisfactory to the Executive, for the Senators to present other names. The time has arrived for that to be done in this case."

The New York Times for February 21, 1931, states that before sending Judge Nordbye's name to the Senate President Hoover wrote to Senator Schall that "all of the candidates on Senator Schall's own list were above the age limit." Accepting the statement of Mr. Mitchell that sixty is the age limit the quoted statement does not appear to be literally true according to the meager information in Martindale's Legal Directory.
ably that favorable to his own cause, in the Congressional Record and from this excerpt and from articles in Minnesota papers copied into the Record it appears that something of a case was made against the confirmation of Judge Nordbye's appointment. Whether the objection offered—his conduct with reference to a certain grand jury investigation—proved to be of any merit after Judge Nordbye's defense was introduced the writer is in no position to state.  

However, the situation offered an opportunity for Mr. Tom Davis of the firm of Davis and Michel to appear and make an argument before the committee of the Senate. In this argument Mr. Davis frequently flattered the Senate and urged the Senate not to confirm the appointment because that would mean that it was giving up its rights and privileges and thus it would be a blow to the prestige of the Senate. He also claimed that the appointment of Nordbye was a political move to discredit Senator Schall and he invoked the notion of senatorial courtesy, by which it appears that an appointment even of a judge who may be personally objectionable to a Senator is not to be permitted in these United States.

So it was that the short session of Congress came to an end without the nomination of Judge Nordbye being reported from the Committee on the Judiciary.

On the 30th day of March, 1931, shortly after President Hoover returned from a trip to Porto Rico, a recess appointment was given to Judge Nordbye. The latter immediately announced

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28. Objection was offered, also, to Judge Nordbye's judicial temperament. See *U. S. Daily* for March 2, 1931, p. 3.

There may be a doubt as to the impartiality of the chief witness against Judge Nordbye. His name is Truman Pierson and he seems to have exercised his influence in favor of Mr. Michel. See Congressional Record, vol. 74, p. 3954.

Senator Schall claimed that Judge Nordbye had "belittled, slurrd, and slandered" him and "has continuously spoken disparagingly of my character." Vol. 74 Congressional Record, p. 6903. He presented to the committee four telegrams from four individuals to sustain these assertions: id. p. 7596. The telegrams were declared to be false by Judge Nordbye. *Minneapolis Journal* for March 3, 1931.

Such information as is available concerning the charge that Judge Nordbye improperly attempted to influence a grand jury will be found in the same volume of the Congressional Record, pp. 7596-97; 7602-7603.

But the charge has been refuted by Governor Olson (an endorser of Michel) who was prosecutor at the time in question and by the foreman and acting foreman of the grand jury under consideration. *Minneapolis Tribune* for February 28, 1931; *Minneapolis Journal* for February 28, 1931.


30. In announcing the appointment of Judge Nordbye President Hoover stated: "There seems to be no way, in the public interest, to avoid the recess appointment of a United States district judge in Minnesota. The calendar of that court is badly congested, and the sitting judges are overworked.

"Since the adjournment of Congress the Attorney General has applied to the senior circuit judge of the Eighth Circuit to assign to Minnesota a judge
that he would accept the appointment. He resigned from the state
district court and started upon his duties as federal judge on
April 20. The legality of the appointment was immediately chal-
 lenged by Senator Schall. He even asserted that Judge Nordbye as a
federal judge would be lacking in power to make binding decisions.81

from some other district in the circuit, but Judge Stone has reported that
no other judge is available. An effort has also been made to procure the
assignment of a judge from another circuit, but it has been found difficult
to arrange. The only solution seems to be to make a recess appointment.”

31. On March 30, 1931, Attorney General Mitchell issued the following
statement: “No opinion has been asked of or given by the Attorney General
respecting the right of the President to make a recess appointment of the
United States district judge of the Minnesota district, as it is not an open
question.

The power of the President to make a recess appointment as in the
Minnesota case has heretofore been repeatedly considered as affirmed by
opinions of former Attorney General (sic). It has been expressly held in
the past that there is no distinction between a case where a vacancy results
from resignation or death and the case where the vacancy results from
passage of a statute creating an additional position.

“Whereas in the Minnesota case the vacancy occurred while the Senate
was in session, the appointee’s right to compensation for his services depends
on ultimate confirmation of his appointment. The validity of his judicial
acts while holding a recess appointment is unquestioned.” U. S. Daily for
March 31, 1931; New York Times for March 31, 1931.

The position of Senator Schall is stated in U. S. Daily for April 1, 1931,
page 2.

In the same paper for March 3d appeared a statement purporting to be
from the Senate Judiciary Committee: “It was further explained that the
nomination being for an additional judgeship, it will not be possible for a
recess appointment to be made before Congress reconvenes in December.
Recess appointments are allowed, it was said, only in cases of vacancies
occurring in an existing judicial position.”

The controversy between the Attorney General and Senator Schall de-
pends upon clause 3 of section 2 of Article 2 of the Constitution of the
United States as follows: “The President shall have power to
fill
up all
vacancies that may happen during the recess of the Senate, by granting
commissions which shall expire at the end of their next session.”

With reference to this clause two questions of present importance arise:
first, is the clause to be interpreted that the vacancy must first come into
existence while the Senate is in recess or is it to be interpreted that the
President has power to fill up a vacancy that may exist while the Senate is
in recess; second, with respect to such a vacancy is there any difference
between an office which has been newly created and has never been filled and
an office which has been filled but is now vacant by reason of resignation,
death, etc.

On the first point it seems that, with one exception which dealt specifical-
ly with a newly created office, for more than 100 years the uniform inter-
pretation of the various Attorney Generals, some of whom have been
exceedingly able lawyers, has been that the clause should be interpreted to
mean that the President has the power to make a temporary appointment
whenever a vacancy shall happen to exist during the recess of the Senate.
This view may be stated in this way, that whenever a vacancy occurs it
happens from day to day until the vacancy no longer exists. Under this
view it has been the custom for the Presidents of the United States to fill
up vacancies which first occurred while the Senate was in session as well as
vacancies which first occurred during the recess of the Senate. See 18 Op.
Att. Gen. 29; 12 id. 32. This point of view was adopted by Woods, C. J., in
Attorney General Mitchell took the opposite position. He asserted that the President has the power to appoint temporarily a person to an office that has never been occupied and one that was created while the Senate was in session. He seems to be even more certain that the judicial acts of Judge Nordbye until the latter is refused confirmation, if that should happen, will be valid. It seems to be agreed

In re Farrow (1880) 3 Fed. 112. The opposite view was presented very elaborately by Judge Cadwalader in 1868 in Case of the District Attorney, American Law Reg. 7 N. S., 16 O. S. 786, 7 Fed. Cases 731, Fed. Case. No. 3924. The view of Judge Cadwalader was approved and complimented by Judge Caldwell in Schenk v. Peay et al. (1869) 21 Fed. Cases 672, Fed. Cas. No. 12,451. In re Yancey (1886) 28 Fed. 445 also discusses this problem. Woods then was on the Supreme Court of the United States and he desired in a telegram to adhere to his views in In re Farrow, supra. Jackson, C. J., agreed with Cadwalader's opinion. Hammond, D. J., expressed no definite opinion but perhaps was more favorable to Cadwalader's view. All of the expression on this question in the Yancey case should be regarded as dicta.

Either view is arguable and what may be decided by any future court probably will depend upon how much weight that court will attribute to the practically uniform practice of the executive department of the federal government. In favor of this practice it would seem fairly clear that on the whole the interpretation given by the Attorney General's and Judge Woods is the more useful one. The business of the federal government is so extensive that the other interpretation probably would handicap rather considerably the execution of federal affairs including the federal judicial functions.

Furthermore in 1863 Congress enacted the following: "No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate." Sec. 56, ch. I U. S. Code, Title 5.

There is force in the argument which follows this section: "This legislation in assuming to act upon the salary of officers appointed during the recess of the Senate, when the vacancies actually existed while the Senate was in session, must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution. In postponing the payment of the salary of the appointee until the Senate has given its assent to the appointment, it concedes the right of the President to appoint, although it undoubtedly embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous. (1880) 16 Op. Atty. Gen. 522. See, also, (1883) 17 Op. Atty. Gen. 521."

The interpretation favorable to the power of the Senate is set forth on page 385 of the 1923 annotated Constitution of the United States prepared by George Gordon Payne. There it is stated: "The President cannot make a temporary appointment during a recess, if the Senate was in session when or since the vacancy occurred."

The second problem, i.e., whether any difference with reference to recess appointments exists between a newly created office and an office which has once been filled, so far as is known, is a question upon which there has been only one judicial decision. In the annotated Constitution above referred to, on page 389 it is stated, referring to clause 3 of section 2 of Article 2: "This clause confers upon the President the power to make temporary appointments, or what are called 'recess appointments'. Such appointments cannot be made unless a vacancy actually exists. An office newly created which has not been filled is not a vacancy within this pro-
that Judge Nordbye will receive no salary for his services until he is confirmed; and that he will be entitled to no salary if he fails of confirmation. Such is the hobbled manner in which appointments to the federal bench must be made. The chief factor in this undesirable situation is the apparent assertion upon the part of Senators of the power to control the President in the exercise of his discretion. This amounts, it seems fair to say, to nothing more

The statement of the annotator is justified, however, by the decision of Judge Caldwell in Schenck v. Peay et al. (1869) 21 Fed Cases 672, Fed. Cas. No. 12,451. Its essence on the question here involved is: "The office to which Snow was appointed in the recess of the Senate, having been created and not filled at the session of Congress at which it was created, nor at the next subsequent session of that body, his appointment was without authority of law and void."

Attorney General Mason wrote a similar opinion informing the President that he lacked authority to appoint to newly created offices where they were created while the Senate was in session: 4 Op. Att. Gen. 361. However, his opinion in the same volume p. 523 has been regarded as a retraction of his former opinion. In the second instance, however, a newly created office was not involved. A vacancy first occurred during a recess. There was an appointment to fill the vacancy. After the Senate was next in session a nomination was made. It was rejected. Another nomination was made and the Senate adjourned without acting on it. One problem was, when did the temporary appointment end? It was suggested that the appointment and the Senate may have ended at the same instant. If so, did the new vacancy happen during the recess? In any event, Mr. Mason advised the President that he was entitled once again to fill the vacancy. See 12 Op. Att. Gen. 32, 455.

There have been opinions by several Attorney Generals that the President has the power to fill up with a recess appointment a newly created office: 12 Op. Att. Gen. 455; 18 id. 28; 19 id. 261, 263; 26 id. 234.

The writer has not been able to discover in clause 3 any language which would justify a difference between a newly created office and an office which theretofore had been filled before the recess appointment thereto was attempted, except that possibly that the word "happen" in the Constitution should be construed to mean some casualty such as death. From that rather legalistic argument it would seem to follow that a mere failure to appoint for the first time to any office created while the Senate was in session is not casualty and therefore a vacancy did not happen.

However, Webster's collegiate dictionary states: "Happen has nearly lost the implication of chance, signifying merely to take place, occur." It might be interesting to investigate the meaning of "happen" in 1787 and what, if any, legal effect might result therefrom. What should be said of a vacancy caused by resignation, discharge, or an acceptance of another office? See the opinion of Judge Caldwell, supra, pages 674-675. Cf. 19 Op. Att. Gen. 261, 263.


32. Senator Schall, according to the Chicago Tribune for January 28, 1931, stated "that unless Michel was nominated and sent to the Senate the judicial post would remain vacant."

In his letter of February 3, 1931, President Hoover wrote to Senator
than political racketeering. It is not believed that any competent and unbiased lawyer would seriously argue that the federal Constitution contemplates otherwise than that the President is to make his own selection with power on the part of the Senate as a body to refuse confirmation for any reason good, bad, or indifferent which appeals to it. It becomes a most undesirable situation when Senators assert their power to impose their choices upon the President and to invoke a combination among themselves in order to make their power potent. Against such a system the American

Schall: "... I am aware also of the implications which have been made of reprisals against the administration if I fail to agree to this [Michel] appointment." This letter appeared in the New York Times for February 7, 1931.

On February 10, 1931, Senator Schall wrote to President Hoover that he did not understand the sentence quoted immediately above. He added: "You have never had any such implication from me." In the same letter, however, the Senator advised Mr. Hoover that he "could not in good confidence" submit names of other lawyers. Vol. 74 Congressional Record, p. 4518.

33. "... Mr. Schall's theory, one only too often put in practice, is, in effect, that the President shall consent to a nomination made on the advice of a Senator or the Senators from the state in which the office is established. It is unfortunate that in Pennsylvania and in Kansas federal judges were appointed by Mr. Hoover against his will, against the findings of his Attorney General. Those two instances of senatorial nomination are justly, if maliciously, cited by Mr. Schall; but if Mr. Hoover was wrong then, he has all the more reason to be right now.

"The federal bench has suffered enough from the selection of judges for predominant political reasons. The megalomania of the Senate needs to be reduced, not humored. Mr. Schall's course amounts to saying to the President: 'You must appoint my man and no other man.' The President could but resist so insolent a derogation of his constitutional authority." Editorial, the New York Times, February 9, 1931. See also, editorial by John H. Wigmore in (1931) 25 Illinois Law Review 929.

A previous editorial from the same paper that pleased Senator Schall so much that he had it copied in the Congressional Record, vol. 74, p. 7603, was perhaps ironical in part.

Senator Schall before the Senate Judiciary Committee: "To ask me to indorse Mr. Nordbye is to ask me to betray the people of Minnesota who elected me and to place in the saddle my enemies. I have, therefore, no other course left to me in self-preservation than to declare that Mr. Nordbye is personally objectionable to me. The burden is on me today, Mr. Chairman. It will be no doubt upon you and our colleagues to-morrow. The Constitution declares that 'the President shall nominate and with the advice and consent of the Senate appoint' (sic). I hope that the advice and consent of the Senate will be against this confirmation. . . .

"I personally object to his confirmation, which would be obnoxious to me and place in the saddle in my state the belittlers and slanderers and defamers of my character. . . .

"I ask that the time-honored custom of the Senate be enforced and that your committee and the full judiciary committee reject his confirmation." Vol. 74 Congressional Record, p. 7596.

Senator Schall's legal argument is that the President is wrong in assuming that the function of the Senate is to be confined to passing on nominations after they are made; that the Constitution means that the advice of the Senate is to be given before the nomination is made: id. p. 7602.
bar should make a protest and should carry on its protest as long as the system remains as powerful as it appears to be today. Unfortunately in this particular instance it seems that the situation could have been handled so as to have made a more decisive issue. After notifying Senator Schall to submit the names it would seem as if in fairness a better reason should have been given for the rejection of the names submitted by him. 34

34. The conflict has been rendered still more complicated by the institution of a contest of the election of Senator Schall. Vol. 74 Congressional Record, pp. 6898, 6951, 7395: "This contest originates right here in Washington and is an attempted intimidation to cause me to abandon this judicial fight. . . ." Senator Schall before the Senate Judiciary Committee.