is evidenced by my approval endorsed upon the resolution which is attached to your finding and made a part of the proceedings relating to this matter.

I am herewith enclosing the files which have been submitted to me.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2740.

LIQUOR CONTROL BOARD — APPOINTMENT — CONFIRMATION BY SENATE—ADOPTION OF RULES BY SENATE—QUORUM OF SENATE—FAILURE TO CONFIRM NOT REJECTION OF APPOINTMENT WHEN.

SYLLABUS:

1. *The action of the* 90th *General Assembly on May* 3, 1934, *in voting against a ruling of the chair, which ruling was that a majority of a quorum was sufficient to confirm such appointment, did not constitute the adoption of a rule upon this question.*

2. *A majority of all the members elected to the Senate is a quorum to do business, and when the Senate journal discloses less than that number voting upon a question, other than a question to adjourn, without showing that there were any senators present who did not respond to the call of their names, or who were excused from voting, then any presumption of a continuance of a theretofore existing quorum is overcome and such vote is not a vote of the Senate.*

3. *When an appointment is made by the Governor which is subject to the advice and consent of the Senate, the failure of the Senate to confirm such appointment while in special session before adjourning for several months does not constitute a rejection of such appointment and the appointee should continue in office unconfirmed until the Senate either acts on his appointment at such special session or until such special session is terminated.*

COLUMBUS, OHIO, May 25, 1934.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of recent date is as follows:

> "Will you please render to me your formal opinion upon the question of whether or not the action taken by the Ohio Senate the evening of May 3rd, 1934, does or does not constitute the confirmation of my appointment of George O'Brien and Lockwood Thompson, as members of the Liquor Control Board?
>
> I shall appreciate your giving this matter your earliest possible consideration."

Section 2 of the "Liquor Control Act" provides that "The members of the board * * shall be appointed by the Governor with the advice and consent of the Senate."

As pointed out in Opinion No. 2632 rendered to you May 9, 1934, it is the law of this state that the journal of the Senate is the best evidence of the proceedings of that body. It accordingly becomes necessary at the outset to refer to the Senate journal of May 3, 1934, to determine the action taken. Immediately following the action taken with respect to the confirmation of the Director of the Department of Liquor Control, the Senate journal discloses the following:

"Mr. Sheppard arose to a point of parliamentary inquiry, and asked what vote was necessary to confirm appointments of the governor.

The chair ruled that confirmation required only a majority of those voting, a quorum being present.

Mr. Sheppard appealed from the decision of the chair, on the point that in order to advise and consent to an appointment of the governor, a constitutional majority of the members elected to the Senate was necessary.

Mr. Marshall arose to support the appeal from the decision of the chair, stating that inasmuch as there was no rule on the question of what majority was necessary to confirm appointments, the Senate by its action on the appeal should indicate the status of the confirmation.

The question being, 'Shall the decision of the chair be sustained?'

The decision of the chair was not sustained.

The chair declared that the Senate by its action overruling the decision of the chair had, therefore, declared that the appointment of Mr. Hughes had not been confirmed.

Mr. Yoder submitted the following report:

The standing committee on Rules, to which was referred the appointment by the governor of George J. O'Brien, of Stark county, to be a member of the Ohio board of liquor control for the term ending first Monday in February, 1935, having had the same under consideration, reports it back to the Senate.

W. H. HERNER, JOHN P. BOWER,
L. L. MARSHALL, D. J. GUNSETT.
EARL R. LEWIS,

The question being, 'Shall the Senate advise and consent to the appointment by the governor?'

The yeas and nays were taken, and resulted—yeas 13, nays none, as follows:

Those who voted in the affirmative were: Senators

Annat,	Harrison,	Mosier,
Donovan,	Haynes,	Smolka,
Emmons,	Herner,	Waldvogel—13.
Espy,	Marshall,	
Ford,	Matthews,	

So the Senate did not advise and consent to said appointment.

Mr. Yoder submitted the following report:

The standing committee on Rules, to which was referred the appointment by the governor of Lockwood Thompson, of Cuyahoga County, to be a member of the Ohio board of liquor control for the term ending first

Monday in February, 1935, having had the same under consideration, reports it back to the Senate.

W. H. HERNER, JOHN P. BOWER,
EARL R. LEWIS, D. J. GUNSETT.

The question being, 'Shall the Senate advise and consent to the appointment by the governor?'

The yeas and nays were taken, and resulted—yeas 14, nays none, as follows:

Those who voted in the affirmative were: Senators

Annat,	Haynes,	Roberts,
Donovan,	Herner,	Sheppard,
Espy,	Marshall,	Smolka,
Gunsett,	Matthews,	J. Eugene
Harrison,	Mosier,	Waldvogel—14.

So the Senate did not advise and consent to said appointment."

Immediately following the foregoing action, the journal discloses that without any question being raised as to the absence of a quorum, the Senate voted upon the question of confirmation of the other two board members who had been appointed by the Governor, with a vote of twenty-one and twenty-two Senators respectively.

It is first necessary to consider whether or not the vote upon a ruling of the chair as to the vote necessary to confirm constituted the adoption of a rule. Before determining this question, however, consideration must be given to the nature of the act of the Senate in advising and consenting to an appointment by the Governor. If this is a legislative act, then the vote necessary may not be prescribed by rule,—this for the reason that "The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives." Article II, Section 1, Constitution of Ohio. In *State* vs. *Guilbert,* 75 O. S. 1, the first branch of the syllabus is as follows:

> "1. The whole legislative power of this state having been conferred by the Constitution upon the General Assembly as a unit and not upon the Senate or House of Representatives acting separately, a single branch of the General Assembly so acting has no power of independent legislation, except as expressly granted in the Constitution or as necessarily implied in the express grants."

The authorities on the question of whether or not this act of confirmation of an appointment is legislative are not in harmony. A number of the states have held such an act to be legislative, while a number of other states have held otherwise.

Among the cases holding the act of a Senate in advising and consenting to an appointment by the Governor to be a legislative act is the case of *Dust* vs. *Oakman* (Mich.), 86 N. W. 151, the fourth branch of the headnotes reading as follows:

> "Where a state senate consented to an appointment to office made by the governor, it had power at the same session, before any action on the vote was taken, to reconsider its vote, and refuse to concur in the appoint-

ment, since in concurring in such appointment it exercised a legislative function revocable under ordinary parliamentary rules governing legislative bodies, and not a quasi executive duty, incapable of revocation when once exercised."

The Supreme Court of Mississippi in 1925 in the case of *Witherspoon* vs. *State,* 103 So. 134, followed the Oakman case, supra, holding that the Senate could govern its action by rule in acting upon the confirmation of an appointment made by the Governor, citing the federal practice and decisions of the Supreme Courts of Illinois, Massachusetts and New Jersey. One of the judges, however, in his dissenting opinion contended that the great weight of authority of the country treated the power of consenting to the appointment of officers as the exercise of an executive rather than a legislative function, citing *State* vs. *Barbour,* 53 Conn. 76, 22 A. 686; *Draper* vs. *State, ex rel. Patillo,* 175 Ala. 547, 57 So. 772, and the case note in Ann. Cas. 1914D at page 304 discussing this conflict of authority.

Among the cases holding that the act of confirmation is not a legislative act may be cited *State* vs. *Wadhams* (Minn), 67 N. W. 64; *State* vs. *Williams* (Mo.), 121 S. W. 64; and *State* vs. *Dowling* (La.), 120 So. 593. In the Williams case, supra, decided by the Supreme Court of Missouri in 1909, the court said:

"It is insisted by respondent that the first appointment of the relator, Mr. Sikes, was not confirmed by the Senate. This insistence is doubtless predicated upon the theory that the Senate had no authority to confirm at a special session. We are unwilling to give our assent to this insistence. The confirmations by the Senate of appointments made by the Governor are not legislative acts, and in our opinion can be made as well at a special session as a regular session. Such acts by the Governor concerning appointments are merely administrative, and can be confirmed by the Senate whenever that body is in session, and it is immaterial for what purpose the legislative body may have been called in session. In other words, whenever the body is lawfully convened for legislative purposes, it has the right to act for administrative purposes, even without mention of such purpose in the call for a special session. We deem it unnecessary to further discuss this contention, for in our opinion the call by the Governor of the special session was broad enough to cover all emergencies, and fully authorized the Senate to confirm the merely administrative acts by the Governor."

In *State* vs. *Dowling, supra,* the thirteenth paragraph of the headnotes reads as follows:

"Confirmation by Senate of appointment to office made by Governor during recess is an administrative and not a legislative act, and it is not necessary that such purpose should be included in the call for the special session issued by Governor to authorize such confirmation at special session, under Const. 1921, art. 5, § 12."

Apparently the question of whether or not the act of confirmation is legislative is not controlled by a consideration of whether or not authority to provide

by law for confirmation by the Senate is contained in the state Constitution, Article VII, Section 2 of the Constitution of Ohio provides as follows:

> "The directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct; and the trustees of the benevolent, and other state institutions, now elected by the general assembly, and of such other state institutions, as may be hereafter created, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by yeas and nays, and entered upon the journals of the senate."

Of course, the foregoing section did not place the legislature under any duty to provide that the members of the Board of Liquor Control should be appointed with the advice and consent of the Senate, since this provision only relates to trustees of state institutions. However, the mere fact that the Constitution contains a recognition of senatorial power to confirm an appointment of the Governor does not constitute the exercise of that power a legislative function. The Constitution of Texas (Art. 4, sec. 12) provides that:

> "All vacancies in state or district offices, except members of the legislature, shall be filled unless otherwise provided by law, by appointment of the governor, which appointment, if made during its session, shall be with the advice and consent of two-thirds of the senate present."

The Court of Civil Appeals of Texas in the most recent case which has come to my attention on the point here under consideration held in *Denison* vs. *State*, 61 S. W. (2d) 1017, as set forth in the fifteenth branch of the headnotes:

> "Senate's confirmation or rejection of nomination by Governor for appointment to office is not legislative act (Const. art. 4, § 12)."

There would be greater difficulty, in view of the foregoing conflicting authorities as to the nature of the act of confirmation by the Senate, in determining the law on this point in Ohio were it not for the fact that most of the decisions holding such act to be legislative, base their conclusions upon and refer to cases dealing with the election of officers by municipal councils or other subordinate bodies. For instance, in the case of *Dust* vs. *Oakman, supra,* holding that the act of the Senate in consenting to appointment by the Governor constituted a legislative function, the Supreme Court of Michigan speaking through the Chief Justice based its decision chiefly on a Massachusetts and a New Jersey case. The language of the court is as follows:

> "In *Wood* vs. *Cutter,* 138 Mass. 149, the school committee of a town had authority to elect a superintendent. The committee voted to elect relator. At the same meeting a motion to reconsider was made, and carried, and the respondent was elected. The language of Holmes, J., is pertinent to this case: 'It begs the question to say that the board, having once definitely voted in pursuance of the instructions of the town meeting, therefore was functus officio, and could not reconsider its vote. The vote

was not definitive if it contained the usual implied condition that it was not reconsidered in accordance with ordinary parliamentary practice, and it must have been taken to have been passed subject to the usual incidents of votes unless some ground is shown for treating it as an exception to the common rule.' The ruling in the case cited was reaffirmed in the case of *Reed* vs. *School Committee,* 176 Mass. 473, 57 N. E. 961. The case of *State* vs. *Foster,* 7 N. J. Law, 101, is a leading case on the question. The power to appoint a clerk for the county of Gloucester was vested in a joint meeting of the legislative council and general assembly. At such a session a vote was taken, and a majority voted for relator, but the presiding officer failed to declare the election under the mistaken view that a majority of all members-elect was required, and that a majority of a quorum was not enough to elect. The joint meeting then proceeded to elect respondent. The court determined the case distinctly upon the ground 'that all deliberative assemblies during their session have a right to do and undo, to consider and reconsider, as often as they think proper, and it is the result only which is done.' It was further said, 'So long as the joint meeting was in session, they had a right to reconsider any question which had been before them, or any vote which they had made.' This case was approved in *Whitney* vs. *Van Buskirk,* 40 N. J. Law, 467, and by the supreme court of Massachusetts in *Baker* vs. *Cushman,* 127 Mass. 105."

These decisions of the states of Massachusetts and New Jersey, upon which the Michigan case was predicated, are directly contrary to the law of Ohio. The syllabus of the case of *State* vs. *Miller,* 62 O. S. 436, reads:

"1. Where all of the members of a city council, in a city of the second class, vote to elect a city clerk, and one of the candidates voted for receives a plurality of the votes cast, such candidate is duly elected, and a formal declaration of the result is not necessary to fix his right to the office; and thereafter it is not within the power of any member of the council to change the result by changing his vote.

2. When a choice has been made on such vote, it is not essential that the mayor as the presiding officer of the council shall declare the result. In such case the mayor has no duty whatever to perform as to the election. He can take part only in case of a tie vote."

It is my judgment in view of the foregoing that the act of the Senate in advising and consenting to the appointment of members of the Board of Liquor Control is not legislative in its nature, and accordingly the Senate might be said to have the power to prescribe by rule the vote necessary in giving its advice and consent on such a question.

Considering then the question of whether or not the Senate did, in fact, adopt a rule by its vote in appealing from the ruling of the chair upon the question of the number of votes required for confirmation, it must be observed that the journal discloses nothing whatsoever being said about the adoption of any rule. It appears that the question of whether or not a rule should be adopted on this subject was not submitted or ever considered by the Senators. As stated in my Opinion No. 2632, the "vote was apparently a vote upon the legal effect of the

first vote" which was cast for the confirmation of the Director of the Department of Liquor Control.

Rule 113 of the Senate provides as follows:

> "These rules shall not be altered except after two days notice of the intention of alteration; and no rule shall be altered, except by a two-thirds vote of the senators present.
>
> Any of these rules may be suspended by a two-thirds vote of the members present excepting rules which specifically require otherwise."

It is obvious that if the adoption of a new rule amounts to the alteration of the existing rules, then whatever construction might be placed upon the vote on the matter of the number of votes required for confirmation, such act could not constitute the adoption of a rule as the journal does not disclose the two days' notice as required by Rule 113, supra. The cases are legion interpreting the word "alter" as used in connection with deeds, notes, corporation charters, wills, etc. Many of these are collated in Vol. I, Words and Phrases, 1st, 2nd and 3rd Series. It is sufficient to say that the courts have consistently held that any material change increasing the scope of a written instrument is an alteration thereof.

It accordingly follows that prior to acting upon the matter of the confirmation of Messrs. O'Brien and Thompson, the Senate had adopted no rule as to the vote required for such confirmation.

In voting for the two appointees here under consideration by an affirmative vote of thirteen and fourteen votes respectively, more than a majority of a quorum of seventeen voted for confirmation. As stated in Cooley's Constitutional Limitations, 8th ed., Vol. 1, page 291, when some other rule is not established by law "a simple majority of a quorum is sufficient". See also Opinion No. 2632 and cases cited therein. It is not necessary that a quorum vote on a measure so long as a quorum is present. In Hughes' American Parliamentary Guide, 1931-32 edition, the adopted parliamentary authority of the Ohio General Assembly, it is said at page 370:

> "Sec. 882. The fact that a quorum is present and is not dependent on the number who participate in the proceedings or vote. The Supreme Court of the United States, as shown in the preceding paragraph has decided what is meant by a present quorum in this language: 'In all cases if the number necessary to make a quorum is present it makes no difference how many or how few actually participate in the decision. Those who sit silent are regarded as consenting to the result.' A House competent to do business is a present quorum and not a voting quorum."

See also *State, ex rel.* vs. *Greene,* 37 O. S. 227, and *United States* vs. *Ballin,* 144 U. S. 1, 36 L. ed. 324.

The question of the presence of a quorum must, however, be decided. According to the Senate journal no question of the absence of a quorum was raised between the time a quorum voted upon the confirmation of the Director of the Department of Liquor Control immediately preceding the vote upon these two board members, and the time a quorum voted upon the confirmation of the remaining two members. Although a quorum is presumed to continue after having been established, this presumption may be refuted. At page 368 of Hughes' American Parliamentary Guide, it is stated:

"Sec. 876. It should be remembered in ordinary parliamentary practice when the body is convened with a quorum present it is presumed that a quorum continues to be present *until* a question of no quorum is raised or *a lack of a quorum is disclosed by a vote or division.*" (Italics the writer's.)

The case of *State, ex rel. Stanford* vs. *Ellington,* 117 N. C. 158, 30 L. R. A. 532, is directly in point. The first three branches of the headnotes are as follows:

"1. A quorum shown to have been present will be presumed to continue present at proceedings taken the same day, until the contrary is shown.

2. The fact that less than a quorum of a legislative body are reported by the tellers as voting when the roll is called overcomes any presumption that a quorum present earlier in the day still continues present.

3. It seems that the presiding officer of a legislative body is powerless to count those who are present and do not vote, for the purpose of making a quorum, in the absence of any rule of the House or other express authority to do so."

In the opinion, after mentioning the presumption of the continuance of a quorum, the court said:

"But when the roll was called, the name of each member voting recorded, and the tellers appointed report the number voting for plaintiff and the number voting against him,—a modern division,—we have the facts, and they must prevail over the presumption which existed in favor of a quorum before that time. Cooley, Const. Lim. p. 168; *United States* vs. *Ballin, supra.* It may be there was a quorum present when this vote was taken. But if there was it does not appear to us, and we have no means of finding out whether there was or not, and no authority to do so if we had the means. And if they were present, whether they could have been compelled to vote is not before us, as there was no such proposition made, so far as we know. But it seems to be conceded that the speaker of the house of representatives of the United States could not compel a member to vote. Nor had he any right to count members present and not voting, to make a quorum, until the House adopted a rule to that effect. He then counted nonvoting members present to make up a quorum, and the Supreme Court of the United States sustained his action. *United States* vs. *Ballin,* 144 U. S. 1, 36 L. ed. 321. So may the legislature of North Carolina adopt a similar rule, as there is nothing in the Constitution to prevent its doing so. But it has not adopted such a rule, and under the authority of *United States* vs. *Ballin, supra,* we suppose the presiding officers were powerless, if a quorum was actually present, either to make them vote or to count them to make up a quorum. * * * * The legislature of North Carolina consists of 170 members, — 50 in the Senate and 120 in the House. Therefore it takes the presence of 26 senators to constitute a quorum in the Senate, and 61 members of the House. In this election 26 senators voted, which was a majority of that body, and a quorum. But in the House there were but 48 members who voted. This we see

was less than a quorum. For this reason plaintiff has failed to establish his right to the office."

To the same effect is *Webb* vs. *Carter* (Supreme Court of Tennessee), 165 S. W. 426, 129 Tenn. 182.

In the case of *State, ex rel. Herron* vs. *Smith,* 44 O. S. 348, the Supreme Court of Ohio recognized the principle that when the journal discloses less than a quorum voting, the act is insufficient. In the opinion at page 366, the court cited a Virginia case in the following language:

"In *Wise* vs. *Bigger,* 79 Va. 279, it was claimed that an act apportioning the congressional representation in that state, having been vetoed by the governor, had not repassed the senate by the requisite affirmative vote; that there were at least twenty-nine members present when the question was put, 'shall the bill pass notwithstanding the objections of the governor', and that nineteen voted aye, and nine nay—the constitution requiring that it should be affirmed by two-thirds of the members present; but the court held that the journal did not show that there were more than twenty-eight present, and that it imported absolute verity."

There are two rules of the Senate which are pertinent. Rule 56 is as follows:

"When fewer than a quorum vote on any question the President shall forthwith order the roll of senators to be called again."

The foregoing rule was obviously not observed in the instant case. There appears no rule to the effect that the President may count non-voting members and obviously no attempt or effort so to do was made.

Senate Rule 54 reads:

"Every senator present when the question is put shall vote unless the Senate by a majority vote shall excuse him. A request to be excused from voting must be made before the Senate divides or before the call of the roll begins."

It must be presumed that the Senate complies with its own rules. Hence, the fact that the journal discloses no senators present having been excused from voting would indicate that when these two votes were taken there was less than a quorum present. Furthermore, the fact that when less than a quorum voted the president did not order the roll of senators to be again called would indicate that there was nothing to be gained by so doing. I presume that if there were non-voting senators present when these votes were taken, who had not been excused, the president would have ordered the roll to be called again as he is required to do by Rule 56.

As stated in the Ellington case, supra: "It may be there was a quorum present when this vote was taken. But if there was it does not appear to us, and we have no means of finding out whether there was or not, and no authority to do so if we had the means."

In view of the foregoing, although in each instance the number voting voted unanimously for confirmation, the journal discloses that a quorum was not present and since less than a majority of all the members elected to the Senate is not

sufficient to do business under Article II, Section 6, of the Constitution, the Senate has not legally acted upon the question of advising and consenting to the appointment of George O'Brien and Lockwood Thompson as members of the Liquor Control Board.

While you do not specifically inquire as to the effect of the failure to date of the Senate to confirm, it might be observed that the Senate has not rejected these appointments. It has been held that an appointee of the Governor holds office until the Senate passes adversely upon the appointment. The fifth branch of the headnotes of *State* vs. *Williams, supra,* reads as follows:

> "A statute creating an office to be filled by appointment made by the Governor, with the advice and consent of the Senate, which provides for the first appointment at a time when the Senate is not in session, contemplates that, on the expiration of the term of an incumbent, the Governor may make an appointment, and that the Senate will act thereon when the General Assembly meets in session, and the appointee holds the office until the senate passes adversely on the appointment."

Section 12, General Code, is pertinent to a consideration of the present status of these appointees. This section provides:

> "When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

The foregoing section was considered in *State, ex rel.* vs. *Johnson,* 8 C. C. (N. S.) 535. In this case, decided during the September term, 1906, the Governor had made an appointment June 1, 1905 to the office of supervisor of public printing which was subject to confirmation by the Senate. The facts as set forth in the opinion were that this appointment was not confirmed at the next session of the Senate which adjourned April 2, 1906. After quoting Section 12, supra, the court said:

> "The last clause of the foregoing section applies exactly to the circumstances of this case. The Senate did '*not* so advise and consent' to the second appointment; therefore, Slater's legal incumbency immediately ceased.
>
> It became the duty of the then governor at once to make a new appointment. Until that was done Slater was a *de facto,* but not a *de jure* official."

The journal of the Senate discloses that the adjournment of April 2, 1906, was an adjournment for a year and nine months. The legislature then adjourned

to meet at ten A. M. on the first Monday in January, 1908, that legislature having held over until January, 1909. For all practical intents and purposes, therefore, the adjournment of April 2 was the same as a *sine die* adjournment, the legislature having adjourned until the beginning of the next biennium. Under authority of this case, therefore, it would appear that if the Senate finally adjourns without having affirmatively advised and consented to the appointment by the Governor, the effect of such failure to confirm is the same as though the Senate had rejected the appointment and it would then become the duty of the Governor to make new appointments.

In the case here under consideration, however, the Senate has not finally adjourned since the second special session is not terminated. It has been adjourned under authority of Section 9, Article III of the Constitution until next November 19. Under these circumstances, *State, ex rel.* vs. *Johnson, supra,* is clearly not controlling. I know of no authority to the effect that an appointment by the Governor to fill a newly established office, which appointment is subject to the advice and consent of the Senate, and which appointment has not been rejected by the Senate in special session, shall be said to be rejected before the expiration of such special session, thereby placing upon the Governor the duty of making a new appointment. Therefore, it is my opinion that until the Senate rejects your appointment of these two officials, or until the present session is terminated, you have no authority to make any further appointments to the offices here under consideration.

Summarizing, it is my opinion that:

1. The action of the 90th General Assembly on May 3, 1934, in voting against a ruling of the chair, which ruling was that a majority of a quorum was sufficient to confirm such appointment, did not constitute the adoption of a rule upon the question.

2. A majority of all the members elected to the Senate is a quorum to do business, and when the Senate journal discloses less than that number voting upon a question, other than a question to adjourn, without showing that there were any senators present who did not respond to the call of their names, or who were excused from voting, then any presumption of a continuance of a theretofore existing quorum is overcome and such vote is not a vote of the Senate.

3. When an appointment is made by the Governor which is subject to the advice and consent of the Senate, the failure of the Senate to confirm such appointment while in special session before adjourning for several months does not constitute a rejection of such appointment and the appointee should continue in office unconfirmed until the Senate either acts on his appointment at such special session or until such special session is terminated.

Respectfully,
JOHN W. BRICKER,
Attorney General.