2630.

APPROVAL BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO, $25,000.00.

COLUMBUS, OHIO, May 8, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2631.

APPROVAL—NOTES OF LEWIS RURAL SCHOOL DISTRICT, BROWN COUNTY, OHIO, $1,862.00.

COLUMBUS, OHIO, May 8, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2632.

SENATE—IN ABSENCE OF CONSTITUTIONAL PROVISION, STATUTE OR RULE TO CONTRARY FAVORABLE ACTION OF MAJORITY OF QUORUM SUFFICIENT TO CONFIRM APPOINTMENT—DIRECTOR DEPARTMENT OF LIQUOR CONTROL CONFIRMED.

SYLLABUS:

1. *The action of the Senate in advising and consenting to the appointment of an officer may be taken by a majority of a quorum in the absence of any constitutional provision, statute, or rule requiring some other vote thereon.*

2. *After a majority of a quorum has voted favorably upon the question of advising and consenting to the appointment of such officer and the chair declares that the Senate has advised and consented to the appointment, a subsequent vote on a ruling of the chair, which followed such declaration, to the effect that a majority of a quorum is sufficient, is of no legal effect.*

COLUMBUS, OHIO, May 9, 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 Colonel John A. Hughes as Director of the Department of Liquor Control?

I shall appreciate your giving this matter your earliest possible consideration."

The action of the Ohio Senate to which you refer was taken pursuant to the provisions of section 2 of the "Liquor Control Act" that the Director of the Department of Liquor Control "shall be appointed by the Governor with the advice and consent of the Senate."

The journal of the Senate discloses that the following action was taken upon this matter:

"Mr. Yoder submitted the following report:

The standing committee on Rules, to which was referred the appointment by the governor of John A. Hughes of Cuyahoga county to be director of liquor control for the term ending at the pleasure of the governor, having had the same under consideration, reports it back to the Senate.

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

Mr. Lloyd arose to a point of personal privilege:

Mr. Lloyd explained his position on the confirmation of Mr. Hughes as director of the department of liquor control, saying that he would not vote for or against Mr. Hughes until the Senate investigating committee, investigating the department, has completed its work and made a report, reserving his opinion until the investigation is completed.

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 4, as follows:

Those who voted in the affirmative were Senators

Annat,	Espy.	Herner,	Roberts, J. Eugene
Bower,	Harrison	LeFever,	Ruff,
Donovan,	Haynes,	Mosier,	Waldvogel—13.
Emmons,			

Messrs. Gunsett, Lewis, Pfeiffer and Sheppard voted in the negative—4.

The chair declared that the Senate had advised and consented to the appointment.

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."

There were 32 members elected to the Senate of the 90th General Assembly. Article II, Section 6 of the Constitution provides that "A majority of all the members elected to each House shall be a quorum to do business"; hence, it is obvious that a quorum was present when the foregoing action was taken. It becomes necessary first to consider the legal effect of the vote of more than a majority of the quorum in favor of the confirmation of the Director of the Department of Liquor Control, followed by the announcement of the President of the Senate set forth in the journal, supra. The legal effect of the subsequent action taken will then be considered.

Neither the Constitution nor the General Code contains any provision with respect to the vote required on the matter of consenting to or confirming the appointment here under consideration. There are provisions controlling the vote required for the adoption or passage of other measures, which provisions are contained in the Constitution and in the General Code.

Particularly pertinent is the provision contained in Article II, Section 9, of the Constitution that "No law shall be passed in either House, without the concurrence of a majority of all the members elected thereto." This requirement as to the necessity for a majority vote of the members elected in the passage of a law is not controlling for the reason that it is self-evident that the confirmation of an appointment by one house of the legislature does not constitute the passage of a law.

It being expressly provided in Article II, Section 6, supra, that a quorum of each House, consisting of a majority of all the members elected thereto, is sufficient to do business, it appears to be well established that the majority of such quorum is all that is required in the absence of any provision of law to the contrary. Under the common law, the act of the majority of a legal quorum constitutes and is the act of the entire body since it is not required that a quorum shall act but only that a majority present shall act. *State, ex rel vs. Green,* 37 O. S. 227; *United States* vs. *Ballin,* 144 U. S. 1, 36 L. Ed. 321.

In the early case of *The State* vs. *McBride,* 4 Mo. 303, the court had occasion to consider the constitutional provision of Missouri that two-thirds of each house of the General Assembly may propose a constitutional amendment. It appeared that two-thirds of a quorum in the Senate voted in favor of an amendment but that the affirmative vote was less than two-thirds of the number elected to that body. The second branch of the syllabus is as follows:

"An amendment which is ratified by two-thirds of a quorum—that is two-thirds of a majority of all elected, is ratified by two-thirds of that *house,* within the meaning of the constitution."

At page 308, the court said:

"The first objection of the defendant's counsel is, that this amendment did not pass the senate by a majority of two-thirds of that house. The senate then consisted of twenty-four members, and it appears that seven voted against, and fifteen for it. The question to be solved is, what is the meaning of the word *house,* as used in the constitution; does it mean all the members elected, or does it mean any number sufficient to constitute a quorum?

In the 17th section of the third article of the constitution, the word house is mentioned as consisting of all the members elected. 'A majority of each house shall constitute a quorum to do business.' The word house, is frequently used in the same article as 'each house shall appoint its own officers' &c.

'Neither house shall, without the consent of the other, adjourn for more than two days at any one time' &c. To cite further instances, would be useless. The word house, as used in the constitution, may then, either be the whole number elected to that house or a majority of its members. The most common meaning of the word then, being a number of members sufficient to constitute a quorum to do business, it is our opinion that fifteen members of the senate having voted for this amendment, and seven only against it, two being absent, it was passed by the required number of votes."

This case is cited in Hughes American Parliamentary Guide, page 917.

The case of *Atkins* vs. *Philips* (Fla.), 10 L. R. A. 158, 160, supports this same principle. To the same effect is *Commonwealth vs. Allen,* 128 Mass. 308. This rule is well stated in the foot-notes of 6 L. R. A. at page 309 in the following language:

"It is an established general rule that a majority constitutes a quorum of a body consisting of a definite number of persons, and that the act of a majority of a quorum is the act of the body, unless otherwise determined by its constitution. Ex parte Willcocks, 7 Cow. 402; *Damon* vs. *Granby,* 2 Pick. 353; *Kingsbury* vs. *Centre School Dist.* in Quincy, 12 Met. 99; *Price* vs. *Grand Rapids & I. R. Co.* 13 Ind. 58; *State* vs. *Jersey City,* 27 N. J. L. 493; *State* vs. *Farr,* 47 N. J. L. 208; *State* vs. *Deliesseline,* 1 McCord, L. (S. C.) 52; *Com.* vs. *Read,* 2 Ashm. 261; *State* vs. *Green,* 37 Ohio St. 227; *State* vs. *Huggins,* Harper, L. (S. C.) 139; *Rex* vs. *Miller,* 6 T. R. 268; *Rex* vs. *Bellringer,* 4 T. R. 810; *Rex* vs. *Headley,* 7 Barn. & C. 496; *Blacket* vs. *Blizard,* 9 Barn. & C. 851; 5 Dane, Abr. 150; Kyd Corp. 111; Ang. & A. Corp. §205, Kent, Com. 293; Cushing, Legis. Assem. §247."

In support of the text to this same effect in 46 C. J. 1378, 1380, additional authorities are cited.

Before concluding upon a consideration of the sufficiency of the vote upon this matter of confirmation, had there been no subsequent action taken by the Senate, further comment should be made upon the effect of Article II, Section 9, supra. In construing a constitution, the courts apply the same rules of statutory construction as are applied in construing a statute. *Miami County* vs. *Dayton,* 92 O. S. 215, 223. This provision of the Constitution that in passing

a law the concurrence of a majority of all members elected to each House shall be necessary, is a limitation placed upon each House in derogation of the common law and by its language applies solely when a vote is taken upon the passage of a law. The well established maxim which has been repeatedly upheld by the Supreme Court that the expression of the one thing is the exclusion of the other, is here clearly applicable. As stated in 2 Lewis' Sutherland Statutory Construction, 2nd Ed. 921, "Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general." It must follow that the constitutional restriction placed upon each House of the General Assembly with respect to the required vote for the passage of a law is limited and applicable solely thereto. Since "A majority of all the members elected to each House shall be a quorum to do business," it follows that a majority of a quorum was sufficient to act upon this measure.

It being apparent that the vote here under consideration was sufficient to constitute a confirmation of the appointment, it becomes necessary to consider the legal effect of the subsequent act taken after the chair had declared that the Senate had advised and consented to the appointment. Reference must be had to the Senate journal, quoted supra. The courts of this state have long considered the journals of each House of the General Assembly as the best evidence of their proceedings. *State, ex rel.* vs. *Moffit,* 5 Ohio 359; *State, ex rel* vs. *Price,* 8 O. C. C. 25; *State, ex rel.* vs. *Smith,* 44 O. S. 348, 362.

The journal discloses that after inquiry was made as to the vote necessary to confirm, the chair ruled that the confirmation required only a majority of those voting, a quorum being present. It appears that an appeal was taken from this ruling, which ruling upon vote the Senate overruled. It further appears that the Senate had no rule on the question of the vote required under such circumstances, and an examination of the rules of the Senate fails to disclose any rule thereon. There might be a question as to the authority to adopt a rule attempting to prescribe the number of votes required under such circumstances, but it is sufficient to say that no rule had been adopted when the vote on the question of this confirmation was taken, and no opinion is expressed thereon.

The legal question was raised as to how many votes were required, and a vote was taken upon this legal question. The majority opinion of the Senators on the question of what the law is, obviously is of no legal effect, since a single house of the legislature may not by resolution determine the legal effect of their own acts. It is pertinent to note that the vote in overruling the chair was not a vote upon the question of the confirmation of the Director of hte Department of Liquor Conrol, nor was it a reconsideration of the vote theretofore taken upon this matter. The second vote was apparently a vote upon the legal effect of the first vote which, as hereinabove indicated, was sufficient.

Consideration must be given to the final declaration of the chair that the Senate by its action in overruling the decision of the chair upon the question of the vote required had therefore declared that the appointment had not been confirmed. In *Chariton vs. Holliday,* 60 Iowa 391, it was held that a declaration by a presiding officer that a resolution is lost will not be sufficient to defeat it if the vote was sufficient to carry it. Conversely, it was held in *State* vs. *Fagan,* 42 Conn. 32, that a declaration that a man was elected is of no avail where the vote was in fact against him. Particularly pertinent is the language in 43 C. J. 510, wherein it is stated:

"The majority rules, and when that has been ascertained in a lawful method the result cannot be defeated by the arbitrary ruling of the presiding officer; or by the mistaken holding of the council that no valid action had been taken by it, or by their vote to defer action, as what they actually did, not what they thought, controls. After a valid election by ballot no resolution declaring the party elected is necessary, nor after announcement of the result of the vote can the lawful result be defeated by a resolution declaring a different result."

Numerous cases are cited in support of the foregoing text. These principles have been adhered to in this state. The case of *State* vs. *Miller,* 62 O. S. 436, held as set forth in the syllabus:

"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."

In view of the foregoing, the conclusion seems apparent that the subsequent vote of the Senate upon the question of how many votes were necessary and the announcement of the chair pursuant thereto had no legal effect upon the action theretofore taken.

Summarizing, it is my opinion that:

1. The action of the Senate in advising and consenting to the appointment of an officer may be taken by a majority of a quorum in the absence of any constitutional provision, statute, or rule requiring some other vote thereon.

2. After a majority of a quorum has voted favorably upon the question of advising and consenting to the appointment of such officer and the chair declares that the Senate has advised and consented to the appointment, a subsequent vote on a ruling of the chair, which followed such declaration, to the effect that a majority of a quorum is sufficient, is of no legal effect.

It is my opinion, in specific answer to your question that the Senate has advised and consented to the appointent of Col. John A. Hughes as Director of the Department of Liquor Control.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2633.

COUNTY RECORDER—RECORD OF MORTGAGES—EASEMENT FOR LIMITED TIME ON PROPERTY OWNERS AGREEMENT LIMITING USE AND OCCUPANCY RECORDED THEREIN.

SYLLABUS:

1. *Easements for a limited period of time, such as twenty-five years, should be recorded in the record of mortgages.*