der of the governor's term or only a portion of that remainder.

It seems to me the holding of the court in the Chadwick case, that the office of governor devolved upon the secretary of state for the full term of the outgoing governor, carrying with it all the attributes of that office in the hands of him who had resigned, including the duration of the term, was necessary to that decision, and indeed was the very foundation upon which the decision was based.

That being true, it follows that we must so hold in this case unless we are ready to overrule the Chadwick decision and disturb again what was once settled thereby, because our own individual judgments—or the individual judgment of the majority of us—differs from the judgment of the preceding tribunal. This I am not willing to do.

How can anything in relation to these great constitutional matters, be settled, if one court does not follow the precedent of another? How can we expect other courts in the future to follow our decisions if we ourselves refuse to follow the decisions of those who have gone before. If we overthrow the decision in the Chadwick case because some of us now believe that the constitution should have been differently construed, there is nothing settled—nothing determined.

The next court coming after us will find two decisions of this court in direct conflict. One a unanimous decision by a full court, holding directly that the secretary of state holds for the entire term of the governor and our decision by a divided court to the contrary. Which decision would the succeeding court be bound to follow, or would it be bound to follow either? The whole question will be thrown into chaos and no one, under such conditions, would know who would be really governor.

Since the Chadwick case was decided I think it has been universally accepted as settling the question.

As is shown in the opinion of Mr. Justice Johns, the different codifiers of our laws—all of them learned lawyers—since that time, have embodied in every codification a note to this section of the constitution, announcing that the secretary under such conditions holds over during the entire term. No lawyer could open his code to the constitution without having it staring him in the face. It has stood thus for 35 years. The decision of the Chadwick case is a part of the early history of the state. Since that decision, young men have grown old. Children have been born and married and died. An entire generation, has passed away.

Since then seventeen legislatures have held their biennial sessions. They have not even submitted an amendment changing the constitution as thus construed. For many years now the people have had the opportunity to change their own constitution by the initiative. No change in this regard has been made or even offered.

May we not assume fairly, that the people and the legislature, have been satisfied with the constitution as it was considered in the Chadwick case?

It is true that our system of filling our offices is generally by election rather than by appointment. But when the secretary of state takes the office of governor he takes it in some sense by election. The people, when they elect a secretary of state, know that in case of the death or resignation of the governor, he will become the incumbent of that office. Since the decision in the Chadwick case, we must suppose that the people knew and accepted the fact that he would become governor for the entire remainder of the governor's term. When they elect a secretary of state they may fairly be presumed to have elected him for that purpose and with these things in view; and we may assume that he is their choice to fill that position in case of the death or resignation of the governor.

Of course if there is no vacancy—if the office of governor is already filled, by an incumbent who has the right to hold the office for the entire term for which Governor Withycombe was elected—then there is no governor now to be elected, and the petition of the relator must be denied.

I cannot see any escape from this result.

By Justice Harris

Harris, J. (Dissenting.) The relator contends that the legal voters of Oregon have the right to elect a governor at the regular biennial election to be held in November 1920; while it is argued, in behalf of the defendant, that Ben W. Olcott who is now occupying the office of governor is entitled to continue to perform the duties of governor until January 1923. The question for decision has received the careful consideration of all the members of the court, but with the result, however, that all do not reach the same conclusion. A majority of the court are of the opinion that the legal voters of the state cannot choose a governor until the biennial election occurring in 1922 and that Ben W. Olcott can occupy the office of governor until January 1923, notwithstanding the fact that his term as secretary of state will expire on the first Monday in January 1921 and in spite of the fact that a regular biennial election will be held throughout the state in November 1920. I dissent from the conclusion reached by a majority of my associates; for I am of the opinion that under the constitution of this state the people have a right to elect a governor at the next election. Although I expressed my views upon the subject at some length in Olcott v. Hoff, 181 Pac. 466; yet I think that the arguments advanced in the instant proceeding warrant a re-statement of some of the facts narrated in Olcott v. Hoff and justify an amplification of some phases of the subject there considered.

It is argued that the question to be decided in this case was determined in the case of Chadwick v. Earhart, 11 Or. 389, and that consequently the doctrine of stare decisis is applicable. The case of Chadwick v. Earhart occupies an important place in this controversy. Mr. Justice Bennett expressly bases his conclusion upon Chadwick v. Earhart and says that, were it not for the Chadwick case, he would come to a different conclusion. An analysis of the opinion written by Mr. Justice Johns will show that the case of Chadwick v. Earhart is taken as the sole foundation and then upon it as such foundation is laid the whole argument for the conclusion finally reached. This is equivalent to saying that because, and only because, of what was decided in Chadwick v. Earhart it is now here decided that Ben W. Olcott is entitled to serve as governor until the expiration of the term for which James Withycombe was elected. If this is a correct statement then it is accurate also to say that a majority of the court would not hold that a governor could be elected in November, 1920, were it not for the decision rendered in the Chadwick case.

If the case of Chadwick v. Earhart had never been brought and if the questions necessarily decided in that case were now for the first time presented it would, for reasons which to me appear to be not only persuasive but also convincing, construe Article V, section 8 of the constitution differently in some respects from the interpretation expressed in Chadwick v. Earhart; but since Chadwick v. Earhart was prosecuted to a final decision in this court I think that under the rule of stare decisis this court ought to be bound by that decision to whatever extent, but no further than, it was necessary for the court to go in order to dispose of the controversy there presented.

We can all agree that the doctrine of stare decisis is a firmly established rule and that it is peculiarly applicable to controversies involving the construction of any given section of the state constitution. But we cannot all agree that the doctrine of stare decisis applies here. That we may see if possible, whether this doctrine is properly applicable to the case in hand let us ask: What is this rule of stare decisis? When can we say that the doctrine is applicable? And is this case which is now presented to us for decision properly governed by the rule? As the writer views the facts, the situation presented in Chadwick v. Earhart is essentially different from the situation presented here. As the writer reads the records, it was not necessary for the court to decide in Chadwick v. Earhart and the court did not decide that the secretary of state could hold the office of governor under the provisions of Article V, section 8 of the constitution through two regular biennial state elections. In the opinion of the writer an analysis of the facts in Chadwick v. Earhart, when made and compared with the facts presented here, will show plainly that the two situations are essentially different and that the doctrine of stare decisis has no application whatever to the present controversy.

Expressed in plain English the doctrine of stare decisis means: To stand by precedents, and not to disturb settled points; a point once decided ought to stand as settled and should not be disturbed. In other words, stated in general terms, but subject to the limitations yet to be noticed, whatever points were necessary to be decided in Chadwick v. Earhart in order to reach the final conclusion there expressed should be considered as settled and ought not to be disturbed.

The rule of stare decisis is not a loose generality; but it is circumscribed and confined within well established limits. In Hough v. Porter 51 Or., 318, 410, 95 Pac. 732, 98 Pac. 1083, this court said:

> "It is well settled that no case can be deemed a precedent binding upon the court unless the point in question was there presented or considered."

The following terse statement appears in Johnson v. Bailey, 17 Colo. 59, 28 Pac. 81:

> "It is not every remark in a judicial opinion that amounts to a judicial decision."

See also: People ex rel. v. State Board of Tax Commissioners 174 N. Y. 417, 67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. 884, 895; McAdams v. Bailey 169 Ind. 518, 82 N. E. 1057, 124 Am. St. Rep. 240; 13 L. R. A. (N. S.) 1003, 1009. In Cohens v. Virginia 6 Wheat. 264, 399, Chief Justice Marshall used the following language which has been repeatedly quoted with approval by text writers and jurists:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In Larzelere v. Starkweather 38 Mich. 96, 101, the court used the following apropos language:

> "In the preparation of an opinion the facts of the case are in mind. It is prepared with reference to such facts, and when considered in connection therewith, will generally be found satisfactory. When, however, an attempt is made to pick out particular parts or sentences, and apply them indiscriminately in other cases, nothing but confusion and disaster will be likely to follow. In other words, the opinion and decision of a court must be read and examined as a whole in the light of the facts upon which it was based. They are the foundation of the entire structure which cannot with safety be used without reference to them."

This principle was invoked by Mr. Justice Bennett when dissenting from the majority opinion in the recent case of Wilcox v. Warren Construction Company; for we quote from his dissenting opinion as follows:

> "However, as the question of preference between the widow and the orphan children was not before the court in that case (referring to a prior adjudication) and there is much ground for distinction between the priority of the mother and father on the one hand and those of the widow and children upon the other, **we must according to recognized principles, assume that the court only intended to pass upon the question that was really presented in the case for decision, and that its language is limited to that question.**"

In the historic case of Ogden v. Sanders 12 Wheat. 212, 332, it was contended that the opinion rendered in the prior case of Sturges v. Crowninshield 4, Wheat. 122 was controlling; but this contention was answered by Chief Justice Marshall who in the course of his justly celebrated opinion wrote as follows:

> "But that decision (Sturges v. Crowninshield) is not supposed to be a precedent for Ogden v. Saunders, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in Sturges v. Crowninshield, that the positive authority of a decision is co-existence only with the facts on which it is made."

Remembering that "it is not every remark in a judicial opinion that amounts to a judicial decision," that "general expressions in every opinion are to be taken in connection with the case in which those expressions are used," that the opinion in a "former case must be construed with reference to the particular facts in that case," that "we must, according to recognized principles assume that the court only intended to pass upon the question that was really presented in the case for decison, and that its language is limited to that question," and that "the positive authority of a decision is co-extensive only with the facts on which it is made," and with these fundamental rules constantly in mind, let us now narrate the material facts presented in Chadwick vs. Earhart and then let us state the facts presented in the instant controversy and after so doing, let us then compare the two situations and ascertain if we can whether the doctrine of stare decisis can be invoked by the defendant.

L. F. Grover was elected governor at the June 1874 election for the full term of four years; and at the same time Stephen F. Chadwick was elected secretary of state for a like term. The constitution has always provided that the returns of every election for governor shall be sealed up and directed to the speaker of the house of representatives who shall open and publish them in the presence of both houses of the legislative assembly; and in 1878, as now, the law also provided that the term of office of the governor ceases when his successor, having been declared elected by the legislative assembly as provided in the constitution, shall be inaugurated by taking the oath of office. Prior to 1908, the law provided that the term of office of secretary of state, state treasurer and state printer "shall cease on the first day of the regular session of the legislative assembly next following the general election on which the terms of their successors shall begin." Deady's Code p. 711; section 3441 L.O.L. Prior to 1885, the biennial sessions of the legislative assembly began on the second Monday in September in the even numbered years, but commencing with 1885 the sessions have begun on the second Monday in January in the odd numbered years. The legislative assembly of 1876 elected L. F. Grover United States senator; and on February 1, 1877, Grover resigned as governor so that he could assume the duties of United States senator. W. W. Thayer was elected governor at the June 1878 election, and at the same time R. P. Earhart was elected secretary of state. The legislative session which was held in 1878 convened on the 9th day of September. The speaker of the house of representatives having published the returns of the election for governor in the presence of both houses of the legislative assembly, W. W. Thayer took the oath of office on September 11, 1878. Thus it is seen that the term for which Grover was elected governor began in September 1874 and ended on September 11, 1878; and it is likewise seen that the term for which Chadwick was elected secretary of state began in September 1874 and ended on September 9, 1878, and Earhart's term as secretary of state began simultaneously with the ending of Chadwick's term as secretary of state. Chadwick performed the duties of secretary of state during his entire term as such officer and in addition to performing the duties of that office he also discharged the duties of governor from February 1, 1877, the date of Grover's resignation, until September 11, 1878, the date of Thayer's inauguration as governor. Chadwick demanded of Earhart as secretary of state a warrant for $2,420.75 covering the salary of governor for the period commencing February 1, 1877 and ending September 11, 1878. Upon the refusal of Earhart to issue the warrant, Chadwick began a proceeding for the purpose of compelling Earhart to issue a warrant for the full amount demanded. The parties submitted the case to the court upon an agreed statement of facts; and, among other things, the parties agreed as follows:

> "Mr. Earhart objects to the salary being paid from the 9th day of September, 1878, to the 11th day of September, 1878—two days—on the ground that Mr. Chadwick was not secretary of state after Mr. Earhart was sworn in on the 9th day of September 1878, though Mr. Chadwick acted as governor or until and including the 11th day of September, 1878."

We also find in the agreed statement of facts the following:

> "That on the first of February, 1877, the said Stephen F. Chadwick being the secretary of state as aforesaid duly qualified as governor of the State of Oregon and thereafter discharged the duties of said office of governor of the State of Oregon during the remainder of the unexpired term of the said L. F. Grover * * *."

The language already quoted makes it plain that Earhart conceded that Chadwick was entitled to the salary of governor from February 1, 1877, to and including September 9, 1878, but that he denied and was only contesting the right of Chadwick to draw the governor's pay for September 10th and 11th, two days, on the ground that the right of Chadwick to perform the duties of governor ended with the end of his term as secretary of state. If, however, we assume for the purposes of the discussion that the pay for those two days was not the only point in controversy, yet all will no doubt admit that it was the main point presented for decision, for we find the parties saying in their agreed statement of facts that "Mr. Earhart objects to the salary being paid from the 9th day of September, 1878, to the 11th day of September, 1878—two days—on the ground that Mr. Chadwick was not secretary of state after" September 9th.

The instant case presents an entirely different state of facts. Ben W. Olcott was re-elected secretary of state at the 1916 election and his term of four years as such officer will expire on the first Monday in January, 1921. James Withycombe was re-elected governor at the November, 1918, election, and if he had lived to complete his term of four years his incumbency would not end until 1923. But James Withycombe died on March 3, 1919, and since that time Ben W. Olcott has been discharging the duties of governor.

Having stated the essential facts involved in the two cases let us now compare them and ascertain whether the doctrine of stare decisis has any application. In the Chadwick case there was an unexpired term and it was referred to by the parties in their agreed statement of facts as the "remainder" of Grover's term; and naturally the court, when passing upon the case used the language of the parties and referred to the only unexpired term then being considered as the "remainder" of the term. In the instant case there is also an unexpired term and therefore a "remainder," but the "remainder" in one case is essentially different from the "remainder" in the other case. Grover served through the first election occurring after his inauguration, but Withycombe did not. The "remainder" in the Chadwick case covered a period embracing only one election, the "remainder" in the instant case covers a period embracing two elections. During the "remainder" mentioned in the Chadwick case an election occurred and at that election a governor was elected. In the Chadwick case the question as to whether a governor could be elected was not and could not have been decided, because a governor was in truth elected. In the instant case no governor has yet been elected and the very question in dispute and the only question to be decided is whether a governor can be elected. The question as to whether or not Chadwick could have held through two elections and until 1878 if Grover had resigned on February 1, 1876, instead of February 1, 1877, was not involved in the Chadwick case; the court neither decided nor attempted to decide, that question; and indeed, any attempt to decide that question would have been the purest obiter dictum. Since then the question of whether or not the people could elect a governor "was not before the court in the Chadwick case, is it not manifest that the doctrine of stare decisis has no application whatever to the instant case, where the only question for decision is whether the people can elect a governor? And since the "remainder" spoken of in the Chadwick case is so widely, so materially and so inherently different from the instant case and since in the Chadwick case the question which the court was called upon to decide was so utterly different from the question now presented for decision, is it not clear that "we must," again borrowing language used in Wilcox vs. Warren Construction Co., "according to recognized principles, assume that the court only intended to pass upon the question that was really presented in the case for decision, and that its language is limited to that question?"

If the legal voters are permitted to elect a governor at the November, 1920, election, the person so elected could not take the oath of office until the speaker of the house first publishes the returns of the election in the presence of the two houses of the legislative assembly. A secretary of state will be elected in November, 1920, to succeed Ben W. Olcott as secretary of state, and the person so elected will assume the duties of the office on the first Monday in January, 1921; but by virtue of the ruling in the Chadwick case Ben W. Olcott would continue to occupy the office of governor not only until the first Monday in January, 1921, but also until the legislative assembly convenes in 1921 and the speaker of the house publishes the election returns and the elected governor takes the oath of office. The Chadwick case is authority for holding that Ben W. Olcott is entitled to the salary of governor so long as he discharges the duties of governor. The Chadwick case is authority for holding that Ben W. Olcott is entitled to occupy the office of governor until some person is elected and qualifies for the office. But the Chadwick case does not decide when a governor can be elected. In the Chadwick case a governor had in truth been elected. The election of a governor was an accomplished fact. There was no occasion to decide or to attempt to decide whether a governor could be elected. The most that can be said for the Chadwick case is that it decided that Chadwick was entitled to occupy the office of governor until Thayer, who had been elected, was sworn in and assumed the duties of the office.

The single question here for decision is whether the legal voters have a right to elect a governor at the next election. If the holding in the Chadwick case does not, when measured by the rules governing the doctrine of stare decisis, decide that question, then we must look to the constitution itself for an answer; and if the language of that instrument does not solve the problem, then the question must be determined by general legal principles governing vacancies in elective offices.

Article V section 8 of the constitution reads as follows:

> "In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor, until the disability be removed, or a governor be elected."

Article XV section 1 provides that:

> "All officers, except members of the legislative assembly, shall hold their office until their successors are elected and qualified."

Under the terms of these sections of the constitution Ben W. Olcott can hold the office of governor until a governor is elected and has qualified; but these sections do not tell us when that governor, who is to be elected, can be elected; nor does any other section of the constitution contain language which alone and in express terms tells us that the governor, who is to be elected, shall be elected in 1920 or in 1922.

It is contended however in behalf of defendant that Article V, section 8, takes the office of governor out of the general rule which regulates other offices, and that the office of governor is an exception to the general rule. The argument is that there never had been a vacancy in the office of governor. This argument proceeds on the theory that when the people elected Ben W. Olcott as secretary of state they also at the same time elected him governor and that therefore when James Withycombe died and Ben W. Olcott assumed the office of governor he became an elected rather than an appointed governor; and that Olcott's accession to the governorship was contemporaneous with Withycombe's decession, so that there was not in fact any vacancy in the office of governor. This argument that Ben W. Olcott is an elected governor is answered by other sections of the constitution. Article V, Section 1, of the constitution provides that the governor shall hold his office for the term of four years and that "no person shall be eligible to such office more than eight years in any period of 12 years"; but it is also provided in Article II, Section 12, that "in all cases in which it is provided than an office shall not be filled by the same person more than a certain number of years continuously, an appointment pro tempore shall not be reckoned a part of that time." The mere reading of these provisions of the contsitution makes it plain that Ben W. Olcott is now serving under an appointment within the meaning of Article II, section 12, and that the time so served is not to be counted as a part of the eight years period mentioned in Article V, Section 1. The constitution appoints the secretary of state as the person to fill the office of governor in the event the latter office becomes vacant by death or otherwise, while vacancies in other offices are filled by appointments made by the governor himself. The appointment of the secretary of state as the person to fill the office of governor is automatic and is made by force of the terms of the constitution, but it is none the less an appointment.

It is further argued that there has been no vacancy in the office of governor. Matthew P. Deady, who was president of the convention that prepared the very constitution which we are now considering evidently construed Article V, Section 8, to refer to a vacancy in the office of governor for in the code compiled by Deady and Lane in 1874 they gave to Article V, Section 8, a marginal heading as follows: "In case of vacancy or disability"; and it may be noted that this same marginal heading appears in every code that has been issued since that time. A vacancy in the office of governor is filled by an appointment and so too is a vacancy in the office of secretary of state filled by an appointment. In the one case the appointment is by the constitution; in the other case it is by the governor. In the one case the person who is to be appointed is described by the constitution; in the other case the person is not described and the governor is permitted to name whomsoever he chooses. In the one case the appointment is made instantly; in the other case some delay is unavoidably necessary and yet in both instances the appointment is mandatory for even where the governor fills a vacancy by appointment he "shall," not "may" fill the vacancy by appointment. But in the final analysis there has been an appointment in both cases; and in both cases the appointment is made to fill a vacancy, for without a vacancy there would be no appointment. To very fact of an appointment pre-supposes a vacancy. The circumstance that the appointment was instantaneous does not alter the situation. Frank W. Benson was elected secretary of state in 1910, but he died on April 14, 1911. Ben W. Olcott was appointed secretary of state on April 17, 1911, so that there was an actual vacancy from April 14 until April 17. And in passing we may add that Ben W. Olcott did not take the oath of office as governor until March 7, 1919, although James Withycombe died on March 3, 1919. In 1912 Ben W. Olcott was elected secretary of state. At the very moment when the election was being held in 1912 the office of secretary of state was occupied and filled by Ben W. Olcott; and yet it is accurate to say that Ben W. Olcott, when elected in 1912, was elected to fill a vacancy caused by the death of Frank W. Benson. And so, too, if a governor is elected in 1920 he will be elected to fill a vacancy caused by the death of James Withycombe in exactly the same sense as in the case where Ben W. Olcott was elected to fill a vacancy in the office of secretary of state.

As the writer reads and construes the constitution the right of the voters to elect a governor is the same and no different from the right of the voters to elect a secretary of state in the event a vacancy occurs in the latter office by death, resignation or otherwise. If, in this respect, the office of governor is subject to the same rule as the office of secretary of state, then regardless of whatever the rule may be in the other jurisdictions we are controlled by precedents in this state holding that a vacancy in an elective office, in the absence of an organic or statutory law to the contrary, causes the office to revert to the people, the source from whence it came, again to be filled by them. This branch of the case need not be elaborated further, for it is fully discussed in the precedents relied upon in State ex rel. v. Kellaher 90 Or. 538, 177 Pac. 944.

The principle that the death, resignation or removal of an elected officer leaves a vacancy and that such vacancy, in the absence of express legislation to the contrary, shall be filled by the legal voters at the very next regular election, if there be sufficient time, has been recognized and and invariably followed and applied during an unbroken period of 49 years, beginning with State ex rel. v. Johns, 3 Or. 533, decided in 1870, and ending with the recent case of State ex rel. v. Kellaher 90 Or. 528, 177 Pac. 944. In State ex rel. v. Johns a county judge was elected in June, 1866 for a term of four years. He qualified in July 1866 but died in September of that year. The governor appointed a person to fill the office, but at the June 1868 election, not the June 1870 election, a successor was elected. In Baker v. Payne 22 Or. 335, 29 Pac. 787, the legislative assembly of 1891 created the office of attorney general and provided that an attorney general "shall be elected" at the general election held in June 1894 for the term of four years and "until his successor is elected and qualified." A separate section of the act provided that in case of a vacancy in the office the governor "shall" appoint a suitable person who "shall" hold the office until the next general election when his successor shall be elected and shall qualify. The act also made it the duty of the governor to appoint some person as attorney general as soon as the act became effective; and accordingly on May 21, 1891, the governor appointed an attorney general. The question involved was whether the appointed attorney general held until the election of 1894 or whether an attorney general could be elected in 1892 to serve until 1894 at which latter time an attorney general was to be elected for a term of four years; and yet, notwithstanding the fact that there was ample reason for holding that the legislature intended that the appointed attorney general should hold the office until 1894, the principle of the right at the very next election to fill a vacancy in an elective office by an election was decreed to be so thoroughly established that it was held that an attorney general could be elected in 1892.

The principle was strictly followed when the death of Frank W. Benson caused a vacancy in the office of secretary of state. Frank W. Benson was elected secretary of state at the 1910 election for a term of four years; and he died in April, 1911. Had he lived and served through his full term he would have occupied the office through two elections, one in 1912 and another in 1914. After the death of Benson the governor appointed Ben W. Olcott on April 17, 1911. The appointee did not serve as appointee merely through the next ensuing election and until the second election, but upon the contrary at the very first election after the death of Benson the people voted for a secretary of state and selected Mr. Olcott and then in 1916 he was reelected to the office. Thus it is seen that the invariable practice, sanctioned and enforced by this court and followed by the voters, has been to fill a vacancy at the first election.

The provision in the federal constitution relating to the president and vice president do not furnish any analogy to the provisions of our state constitution relating to the governor and secretary of state. The federal constitution provides that the president and vice president shall be elected "together" for "the term of four years" and consequently upon the death of the president the vice president occupies the office of president until the end of four years and a president cannot be elected before that time as the president, when elected, must be elected "together" with a vice president. A governor was not elected in 1912 when Ben W. Olcott was elected secretary of state; nor was a governor elected in 1916 when Ben W. Olcott was reelected secretary of state. If the governor and the secretary of state must be elected "together" then the people had no right to elect a secretary of state in 1912 nor in 1916 with the result that Ben W. Olcott has been holding the office of secretary of state merely as an appointee since April 1911 and has now been an elected official. Under the terms of the federal constitution a president cannot be elected at all unless he is elected "together" with a vice president. No such language appears in our state constitution.

The reasons for my dissent given in Olcott v. Hoff and assigned herein may be summarized thus: If Chadwick v. Earhart had never been decided and if Article V, section 8 of the constitution had never been previously considered by the court I would take the view that Ben W. Olcott could discharge the duties of the office of governor only until the end of his term as secretary of state, which will occur on the first Monday in January, 1921, and that whoever is selected secretary of state in November 1920 would on the first Monday in January, 1921, assume the duties of governor and discharge them during the few days which would intervene between the first Monday in January and the day when the speaker of the house publishes the election returns for the office of governor but since it was decided in Chadwick v. Earhart that Chadwick could hold the office of governor until an elected governor could be inaugurated it follows that Ben W. Olcott can hold the office of governor not only until the first Monday in January, 1921, the date when his term as secretary of state expires, but also until such time as an elected governor can take the oath of office and assume the duties of the position. The case of Chadwick v. Earhart does not afford any foundation for the doctrine of stare decisis and the instant case is not governed by the rule of stare decisis. The governing facts in the Chadwick case are materially different from the controlling facts in the instant case. In the Chadwick case the only question for decision was whether Chadwick who had been elected secretary of state could hold the office of governor during the brief period of two days which intervened between the end of his term as secretary of state and the inauguration of an elected governor. Here the question is whether Ben W. Olcott, whose term as secretary of state will end on the first Monday in January, 1921, can hold the office of governor for a period of two years after the end of his term as secretary of state, in spite of the fact that there will be a regular biennial election in November, 1920, as well as one in November, 1922; there a governor had in truth been elected, while here no governor has yet been elected; there the only question which was decided was that the secretary of state could hold the office of governor until an elected governor could be inaugurated, while here it is conceded that the secretary of state can hold the office of governor until an elected governor can be inaugurated; there a governor was elected at the very first election occurring after the office of governor became vacant, while here no governor has yet been elected, and the only question to be decided is whether a governor can be elected; there the court was not called upon to decide when a governor could be elected, while here that is the sole question for decision. Since the Chadwick case does not decide or attempt to decide when a governor can be elected, our investigation and decision of the question presented here is unhampered and uncontrolled by any prior adjudication; and therefore we must first look to the constitution itself and see whether it tells us when the governor is to be elected. Upon turning to that instrument we find that Article V, section 4 tells us that "the governor shall be elected by the qualified electors of the state at the times and places of choosing members of the legislative assembly"; and upon further investigation we find that November, 1920, is the time when and the voting places throughout the state are the places where the qualified electors of the state will choose members of the legislative assembly. The constitution does not state in express terms, nor does it impliedly say, that a governor cannot be elected at the next election; and therefore we must, on that account, ascertain what the general rules of law are. The rule in this jurisdiction has always been that when an elective office becomes vacant the legal voters have the right in the absence of a statute to the contrary, at the next election, if there be sufficient time to make use of the election machinery, to elect some person to the office. This rule has been enforced by this court in previous cases; and it has been observed by the voters notably when Ben W. Olcott was elected secretary of state to fill a vacancy caused by the death of Frank W. Benson. Applying the general rule which governs elective offices we are then brought to the conclusion that the legal voters are entitled to elect a governor in November, 1920.

For the reason which I expressed in Olcott v. Hoff and for those given herein I am unable to agree with the conclusion reached by a majority of my associates.

Benson, J. concurs.

By Justice Burnett

Burnett, J.

I concur in the argument of Mr. Justice Harris in his limitation of Chadwick v. Earhart, and likewise I concur in the result of his opinion.

If the present secretary of state is now indeed the governor, he can resign the latter office. Such a resignation would not affect the duties imposed upon a governor, for there would still be in office the present elected, qualified and acting secretary of state, who is charged by the constitution with the performance of those duties until a governor shall be elected. The secretary of state's tenure of office as such is the utmost limit of his authority to discharge the duties of the governor's office. It is further limited by the right of the people to choose their governor at the first opportunity afforded by a general election. The secretary of state has no other or additional hold on the gubernatorial office. It is only because he is secretary that he can perform the duties of governor.

Election is the rule and appointment is the exception in filling vacancies in constitutional offices. The exception ought not to be expanded by construction so as to narrow the rule. For these reasons I am of the opinion that the people are entitled to elect a governor at the next general election and that the writ should be made peremptory.

Flor—You can't believe everything you hear.

Gertie—No, but you can repeat it. —Sydney Bulletin.