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This opinion is issued in response to questions presented by the Honorable Victor Atiyeh and the Honorable Anthony Yturri, State Senators.

FIRST QUESTION PRESENTED

In an election for President of the Senate, if Candidate A receives 15 votes and Candidates B and C receive 15 votes between them, is Candidate A elected?

ANSWER GIVEN

No.

SECOND QUESTION PRESENTED

If, in such an election only 29 members are present and voting, are 15 votes sufficient to elect?

ANSWER GIVEN

Yes. A majority of those voting is sufficient to elect; members present but not voting are disregarded in determining whether a majority exists.

THIRD QUESTION PRESENTED

May less than a majority of those present and voting require the presence of absent members?

ANSWER GIVEN

No. While the Constitution permits less than a quorum to act to compel the attendance of absent members, such action

requires a majority of those present and voting.

FOURTH QUESTION PRESENTED

If in such an election one or more members are present but do not choose to vote, may they be compelled to vote?

ANSWER GIVEN

Members who are present may be required to vote unless excused. In the absence of any special rule adopted by the particular session of the Senate, a member may be excused from voting only by the vote of a majority of those voting on the question.

DISCUSSION

Article IV, Section 11 of the Oregon Constitution provides:

"Each house when assembled, shall choose its own officers, judge of the election, qualifications, and returns of its own members; determine its own rules of proceeding . . ."

Under this provision, it would be competent for the Senate to establish rules governing all of the matters which are the subject of this opinion. The Senate may adopt such rules to govern its 1971 session immediately upon assembling, in which case all of the questions discussed in this opinion will become moot.

Even if the Senate does not immediately adopt rules, and a dispute exists as to whether the election of a Senate President has been achieved, or concerning powers of the Senate over its members, it may be that Article IV, Section 11 would be held to preclude court review of such questions. See Combs v. Groener, 90 Adv. Sh. 1845, ____ Or. ____, 472 P.2d 281 (1970).

The courts will ordinarily not rule upon purely parliamentary questions relating to the internal procedures of a legislature body, 67 C.J.S. Parliamentary Procedure, § 6 (1950); although it has been held that courts have power to determine whether an organization of a branch of the legislature has been made in violation of the constitution. 81 C.J.S. States, § 30 (1953). It is quite possible that the Oregon Supreme Court would decline jurisdiction of a dispute arising out of these matters. Nevertheless, our opinion has been requested, and we furnish it for such guidance as the Senate may accept.

The Senate is not a continuous body, and rules adopted in previous sessions do not bind or govern it, except insofar as they may do so through force of custom. "Rules of procedure passed by one legislature are not binding upon a subsequent legislature operating within the same jurisdiction." Mason, Manual of Legislative Procedure, § 22(5) (1962 ed.).

> "Each legislative body, after it meets, and unless restrained by the authority which created it, is without rules of procedure, and has inherent power to make its own rules without reference to the action of preceding bodies." South Georgia Power Co. v. Bauman, 169 Ga. 649, 654, 151 S.E. 513, 515 (1929).

Until the 1971 session adopts rules of procedure, its proceedings will instead be subject to common principles of parliamentary law in use in all deliberative bodies, in the absence of superseding constitutional or statutory provisions. Marvin v. Manash, 175 Or. 311, 153 P.2d 251 (1944).

The first question presented is whether a plurality of

votes, less than a majority of all votes cast, is sufficient to elect a President of the Senate. If there are no superseding constitutional or statutory provisions, it is clear that such a plurality would not be sufficient.

> "In the absence of a special rule, a majority vote is necessary to elect officers and a plurality is not sufficient. A vote for the election of officers, when no candidates receives a majority vote, is of no effect and the situation remains exactly as though no vote had been taken." Mason, supra § 553(1).

Mason states that the requirement of majority vote is a "fundamental and seemingly universal principle," with the only deviation being that a plurality is sometimes sufficient to elect under a special rule. Mason, supra § 50(1); see also § 510. A "special rule" would be one adopted by the 1971 Senate to govern its proceedings.

We place special reliance on Mason, supra, since it has been adopted as the governing authority in all matter of parliamentary procedure not covered by specific rules, by each session of the Oregon Senate since 1961. However, other generally recognized authorities on parliamentary law unanimously concur.

> "The basic principle that the decision of the majority is accepted as the decision of the assembly, has long been recognized." Roberts' Rules of Order Revised, p. 5 (1951 ed.).

Robert's goes on to state at page 191 that a plurality is never sufficient to adopt a motion or elect anyone to office, in the absence of a special rule previously adopted. See also Tilson, Parliamentary Law and Procedure, pp. 7-11 (1935); Cushing's Manual

of Parliamentary Procedure, pp. 39, 42 (rev. ed. 1925); Cushing, Legislative Procedure, p. 115 (9th ed. 1874); Demeter's Manual of Parliamentary Law and Procedure, pp. 5-6, 246 (rev. ed. 1969).

This rule has much more than tradition to commend it; it is virtually compelled by the practical necessities inherent in operation of a legislative body. A presiding officer elected by a plurality might be immediately removed by a contrary majority, even though that majority cannot agree on its own choice for presiding officer. Even if not removed, the presiding officer cannot be sure that any of his rulings or actions will be sustained in the absence of a supporting majority. A legislative body cannot act except through consent of a majority, and a presiding officer has no powers (beyond his single vote as a member) except through that consent.

Thus in countries in which several parties are usually represented in the legislative assembly, the largest single party never achieves control or elects the presiding officer unless it constitutes a majority of the assembly, except by agreement with other parties until it does achieve a majority. For any minority to achieve control through attainment of a mere plurality would be contrary to the philosophy and objectives of representative democracy.

However, whenever there is a conflict between a rule derived from the authority of general parliamentary law and a provision of the constitution, the latter must prevail. Mason, supra §§ 2(4), 3(1), (4). We must therefore consider whether this principle of parliamentary law is superseded by another

provision of the Oregon Constitution. Article II, Section 16 provides:

> "In all elections authorized by this constitution until otherwise provided by law, the person or persons receiving the highest number of votes shall be declared elected . . . For an office which is filled by the election of one person it may be required by law that the person elected shall be the final choice of a majority of the electors voting for candidates for that office. . . ."

If this provision is applicable, a plurality is sufficient to elect, and a majority is not required.

In our opinion this provision does not restrict the power of the Senate to adopt rules governing the election of its officers under Article IV, Section 11; at most, it may be applicable only when the Senate has not adopted its own rules. Such action by the Senate would be equivalent to "otherwise provid(ing) by law," just as a city charter adopted under authority granted by the constitution which provided for proportional representation, was held to be equivalent to "law" under Article II, Section 16. State v. Portland, 65 Or. 273, 133 P. 62 (1913).

Assuming that the 1971 Session does not take such action immediately upon convening, we must consider whether the election of a Senate President is an election covered by Article II, Section 16. At first impression, it seems that it is, since it is "authorized by this constitution" (Article IV, Section 11). In State v. Compson, 34 Or. 25, 54 P. 349 (1898), the court indicated that the most obvious meaning of "elections by the Legislative Assembly," as used in Article II, Section 15, the immedi-

ately preceding section, was the election of officers by each house. Section 15 provides that elections by the Legislative Assembly shall be by viva voce forever, and elections by the people by viva voce until otherwise provided by law. The immediately following reference in Section 16 to "all elections" would seem conclusively to include elections by the Legislative Assembly; and if Sections 15 and 16 had been adopted at the same time, we would so hold. Section 15, however, was in the original constitution; Section 16, in its present form, was proposed by initiative petition and adopted by the people in 1908. We cannot therefore presume that "elections" must have the same meaning in the two sections.

The original Article II, Section 16 read as follows:

> "In all elections held by the people, under this Constitution, the person, or persons who shall receive the highest number of votes shall be declared duly elected." (emphasis supplied)

This provision was, of course, not applicable to election of officers of the Legislative Assembly. The 1908 amendment deleted the phrase "held by the people," and had that been the only change it would be obvious that the effect of the amendment was to make the provision applicable to elections by the houses of the legislature.

It was not the only change, however, and the significance of this particular change in wording becomes questionable in light of other changes. In the immediately preceding election, one party received a healthy majority, almost 60%, of the votes cast for state representatives; and elected no less than 59 of

the 60 representatives. The amendment was initiated, advocated and adopted as a direct result of this occurrence. In addition to the previously quoted language, virtually the same as the original except for deletion of "by the people," and addition of "until otherwise provided by law," it reads:

> " . . . but provision may be made by law for elections by equal proportional representation . . . Provision may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates . . . it may be required by law that the person elected shall be the final choice of a majority of the electors voting . . ."

It seems most unlikely that the proponents of the amendment, which while retaining the rule of election by plurality, authorized its future abandonment in favor of proportional representation, preferential voting or majority election, would have intended the amendment to <u>extend</u> the disfavored rule of election by plurality to elections conducted by the Legislative Assembly, in which the rule of election by majority was already in effect. In light of other available evidence, it seems more likely that the phrase "held by the people" was dropped in the belief that it was surplusage.

The ballot title under which the amendment was presented to the people read as follows:

> "For constitutional amendment giving the people power to make laws for election of public officers by majority vote instead of pluralities; to provide that political parties and voters' organizations shall be proportionally represented in all offices filled by the election of two or more persons, and that a voter shall vote for only one person for any one office,

> and may indicate his second, third, etc., choice; and to provide for a simple method of precinct residence and registration."

It is significant that there is no indication that the provisions of the amended article are extended to elections other than by the people.

Careful examination of the 1908 Voter's Pamphlet and of contemporary newspaper accounts shows no indication of any reason for deletion of the reference to "the people." All contemporary discussion focussed on the fact that the amendment would allow proportional representation, preferential voting, etc. The argument in favor of the measure in the Voter's Pamphlet dwelt upon the allegedly unfair result of the 1906 election, and upon the asserted need for a more truly representative legislature. Even the synopsis of the amendment contained in Carey, A History of the Oregon Constitution, (1926), merely stated "Article II, Section 16, proportional representation, 1908." Synopses of other amendments are also brief but fairly complete.

From all the evidence, we conclude that neither the drafters of the amendment nor the voters had any intention to make Article II, Section 16 applicable to elections by the legislature, nor did they imagine that they might be doing so. They were only concerned with elections by the people. There is ample evidence of unskillful draftsmanship in the amendment, and if deletion of the words "held by the people" was not purely inadvertent, it was probably done because these words were thought to be unnecessary since the amendment so clearly dealt with elections by the people, and since elections by the legislature

that the principles stated would inevitably and strictly be applied to a constitutional amendment as unskillfully drawn as this one, in the face of strong evidence that the deletion in question was not intended to change the law. It would take not only a strict but an artificial construction to apply Article II; Section 16 to election of officers of the legislature, and in our opinion a court would not do so.

This conclusion is supported by resort to practical construction, i.e. examining the results of application of Article II, Section 16 to legislative elections. The provision contemplates enactment of laws, i.e. statutes adopting election plans other than simple plurality election, to remain in effect indefinitely until again changed by affirmative action. Such a rule adopted by the Senate, however, would not remain in effect indefinitely, but would expire at the end of each session. Even if successive Senates had adopted and re-adopted rules requiring majority election at every session since 1908, yet in the initial assembly of each session the Senate would again be bound by the rule of plurality election. This frustration of the continuing custom of the Senate by always requiring plurality election at opening sessions would also be in contradiction of the purpose of the amendment to Article II, Section 16, which as previously noted was not to require plurality election, but to permit other forms of election.

It may even be asserted that use of the word "until" instead of "unless" in the amendment ("In all elections . . . until otherwise provided by law") has special significance to

were already covered by Article IV, Section 11.

Strict application of the usual rules of construction, however, would nevertheless require a holding that Article II, Section 16 is applicable to elections by the legislature. It may be asserted that the words "all elections authorized under this constitution" are plain, understandable and unambiguous, and if so, we may not resort to construction or to extrinsic evidence at all. Feero v. Housley, 205 Or. 404, 288 P.2d 1052 (1955); State v. Tollefson, 142 Or. 192, 16 P.2d 625 (1933). We may only examine the constitution and statutes enacted thereunder to determine what elections are authorized under it.

If we do resort to construction, we must examine Article II, Sections 15 and 16 together, and give the same meaning to the word "elections" in both sections. State v. Popiel, 216 Or. 140, 337 P.2d 303 (1959). We may not read into this provision words ("by the people") which have been omitted from it. Rosentool v. Bonanza Oil & Mine Corp., 221 Or. 520, 352 P.2d 138 (1960). Since words used in the prior provision were omitted from the amendment, it is to be presumed that a change of meaning was intended. Roy L. Houck & Sons v. Ellis, 229 Or. 21, 366 P.2d 166 (1968). The fact of an amendment demonstrates the intent to change pre-existing law, and the presumption must be that it was intended to change the meaning of the law in all the particulars in which there is a material change in language. Rieger v. Harrington , 102 Or. 603, 203 P. 576 (1922).

Of the foregoing cases, however, only State v. Tollefson dealt with a constitutional provision. We do not believe

the Legislative Assembly, and that the requirement of plurality elections thus retained (and assertedly imposed on the legislature) was to remain in effect only until a law or rule equivalent to a law provided otherwise. It would then pass out of the picture as a constitutional requirement for the particular type of election, even though the law so doing might later be repealed or expire. If that is the case, the first time the Senate adopted a rule requiring majority election of its officers, or a rule adopting Mason's Manual to govern matters not specifically covered by special rules, Article II, Section 16 ceased to impose the requirement of plurality elections for Senate Officers upon any future sessions. We do not rely heavily on this use of the word "until," however, since it may merely be another manifestation of unskillful draftsmanship. It does cast additional doubt on the intended applicability of the provision to elections by the legislature.

We give great weight to the requirement of majority vote for election of officers of the legislature as a "fundamental and seemingly universal principle of parliamentary law,"; to the longstanding custom of the Senate to require majority vote; to the adoption by the Senate in each of the past several sessions of Mason, Manual of Legislative Procedure, [1] which requires such majority vote for all cases not specifically covered by its rules; and to the fact that application of this provision of Article II,

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[1] E.g., Rule 2.01, Rules of the Senate (1969); Rule 56, Rules of the Senate (1967); Rule 56, Rules of the Senate (1965); etc.

Section 16 to the Senate would be at best incongruous. In these circumstances, we conclude that it would be inappropriate and artificial to strictly and narrowly follow the usual rules of construction, in the fact of the strong evidence that the drafters of amended Article II, Section 16 did not intend to make its provisions applicable to the Legislative Assembly.

We accordingly conclude that in the absence of any special rule adopted by the Senate, a majority of the votes cast is necessary to elect the President of the Senate and a plurality is not sufficient.

We are also asked whether a majority of the entire Senate, i.e. 16 votes, is necessary for such election, or whether if less than 30 votes are cast a majority of those voting is sufficient. It was held in 28 Op. Att'y Gen. 62 (1957) that a vote of 15-14 was sufficient to elect a Senate President. We affirm that previous opinion. Under general principles of parliamentary law, so long as a quorum is present, a majority of those voting, even if not all who are present vote, is sufficient to elect an officer of the legislature. Mason, supra Sections 510, 553. Thus a vote of 15-14, even if 30 are present, would be sufficient. A lesser number than 15 would also be sufficient if it constituted a majority, provided a quorum were present. Under Article IV, Section 12 of the Constitution, two-thirds (20) of the Senate constitutes a quorum and thus a vote of 11-10 would be sufficient to elect, or even 10-9, if one member were present but not voting.

Article IV, Section 25 of the Oregon Constitution requires a majority of the members elected (i.e., 16) in order to

pass any bill or joint resolution; but this provision is obviously not applicable to other actions by the Senate, such as the election of its officers.

We are asked whether less than a majority of those present may require the attendance of absent members by a call of the house. Article IV, Section 12 of the Oregon Constitution provides that "a smaller number (than a quorum) may meet; adjourn from day to day, and compel the attendance of absent members." This simply authorizes the Senate to act, in this very limited manner, even though a quorum is not present, and does not supersede the rule of parliamentary law that every act by a legislative body requires the affirmative vote of a majority of those voting, in the absence of a special rule or other superseding authority. Mason, supra § 50.

The attendance of absent members is required by a "call of the house," which would be initiated by motion, as in the case of any other action by the house, and become effective on the affirmative vote of a majority. Mason, supra §§ 50, 194.

The custom and rules of the Senate have in the past provided for call of the house by demand, rather than motion. Within the memory of the present Secretary of the Senate, which extends for more than two decades, any two members of the Senate have had the right to demand a call of the Senate. Special rules of the Senate adopted in recent sessions specifically provided that upon such a demand by two members the doors would immediately be closed, with no action by the Senate as such, and no other business could then be transacted until proceedings

on the call were terminated; i.e., until all members were present. The only exceptions provided for were adjournment and removal of the call, which required the vote of 20 members of the Senate. Rule 3.55, Rules of the Senate (1969); Rule 63(1), Rules of the Senate (1967); Rule 63(1), Rules of the Senate (1965); etc.

These rules are, of course, not in effect as such for the 1971 session, nor will they be unless adopted by the 1971 session. They are also expressions of long-standing Senate custom, recognized by Mason as an appropriate authority for the governing of a legislative body. However, Mason states that parliamentary law (i.e. the requirement of majority action) supersedes custom, if inconsistent. Mason, supra § 3. We accordingly conclude that until and unless the 1971 session of the Senate adopts a rule providing otherwise, the presence of absent members may be required only by majority vote of the members present and voting upon a motion for a call of the house.

Finally, as indicated in discussion of previous questions, it is possible that members who are present may abstain from a vote on a particular matter. This may change the result, since with 30 present and voting, 15 votes are not sufficient to elect, but with 30 present and 29 voting, 15 votes is a majority and sufficient to elect. Such abstention is not unusual, and is recognized by Mason as not affecting the validity of the result, even though because of abstentions less than the number required for a quorum may vote, and even though it reduces the number necessary for the majority required to elect or otherwise

act. Mason, supra §§ 503(2), 510(1), 535(2), 553(2).

However, the general rule of parliamentary law is that a legislative body may require its members to vote unless excused. Mason, supra § 521(1).

> "Ordinarily no question is raised when a member fails to vote, but, especially when a particular number of votes are required, one member may raise the question and insist that another member vote or state his reason for not voting and be excused." Mason, supra § 521(4).

The act of the body in excusing the member, as every other act by it, requires a majority vote in the absence of a special rule. Mason, supra § 50.

The Oregon Senate has in the past adopted rules providing that every member who is on the floor shall vote unless excused by the Senate. Rule 3.20, Rules of the Senate (1969); Rule 59, Rules of the Senate (1967); etc. While these rules will not be in effect at the beginning of the 1971 session, they are further evidence of the custom of the Senate to follow parliamentary law in this respect, and such parliamentary law as reinforced by custom would govern in the absence of any superseding constitutional or statutory provision or a special rule. Mason, supra § 3.

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