

4592.

APPROVAL, CONTRACT FOR ROAD IMPROVEMENT IN ERIE COUNTY,
OHIO.

COLUMBUS, OHIO, September 6, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

4593.

APPROVAL, BONDS OF CITY OF AKRON, SUMMIT COUNTY, OHIO—
\$80,000.00.

COLUMBUS, OHIO, September 6, 1932.

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

4594.

APPROVAL, BONDS OF CITY OF SIDNEY, SHELBY COUNTY, OHIO—
\$8,000.00.

COLUMBUS, OHIO, September 6, 1932.

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

4595.

CANDIDATE—COUNTY COMMISSIONER—DEFEATED AT PRIMARY—
MAY BECOME CANDIDATE BY PETITION AT NEXT GENERAL
ELECTION FOR UNEXPIRED TERM OF COUNTY COMMISSIONER.

SYLLABUS:

An elector who was defeated in the primary as a candidate for the office of county commissioner may become a candidate by petition for the office of county commissioner for an unexpired term which it is necessary to fill at the following general election due to the death of the incumbent after the primaries.

COLUMBUS, OHIO, September 7, 1932.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

"May I invite your attention to the last paragraph of Section 4785-69 of the General Code of Ohio Laws, reading as follows:

'No person who seeks nomination for an office or position at a primary and fails to receive such nomination, shall be permitted to become a candidate at the following election for the same office by petition.'

We are asked to advise one of the county Boards of Elections as to whether an elector who was defeated in the primary of May 10th as a candidate for the office of county commissioner could not become a candidate by petition for the office of county commissioner to fill an unexpired term, such term having occurred since the primary, due to the death of the incumbent.

Thanking you to let us have your opinion upon this matter as soon as possible, let me remain,"

In construing a statute, effect must be given to the legislative intent. This intent is, of course, to be determined first, if possible, from the language used, and where that language is clear and unambiguous courts have no authority to change it. *Sipe vs. State, ex rel.*, 86 O. S. 80; *State, ex rel., vs. Brown*, 121 O. S. 329. Where, however, the language is not clear and unambiguous or where a word used may have more than one meaning, the apparent purpose of the legislation should be looked to and the language of the statute given such construction as will carry that design into effect. *Gas & Fuel Company vs. Chillicothe*, 65 O. S. 186.

In the case of *Cochrel vs. Robinson*, 113 O. S. 526, the fourth branch of the syllabus reads as follows:

"In the construction of a statute the primary duty of the court is to give effect to the intention of the Legislature enacting it. Such intention is to be sought in the language employed and the apparent purpose to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained."

Under that part of section 4785-69, General Code, quoted in your letter, a person who was defeated at a primary election for an office cannot be a candidate at the following general election for the *same office* by petition.

As stated in 46 C. J. 921, "the term 'office' is one which is employed to convey various meanings." This term may embrace the sole idea of duties, or it may be construed to embrace the idea of tenure and duration as well as duties. 46 C. J. 922. The purpose of the legislation in question apparently was to prevent a person who sought to be nominated as the candidate of his party for an office, and who was defeated, from running at the following general election as an independent candidate against the candidate of his own party who defeated him at such primary.

In the case you present, the particular place for which the elector desires to become a candidate by petition was not open for nomination at the primary. There was then no vacancy in that particular place to be filled at the general election. Consequently, no party candidates were nominated therefor and no party candidates can be nominated therefor. While there is provision for filling vacancies occurring in party nominations (sec. 4785-94, G. C.), there is no provision for a political party to nominate its candidate in the case you present. A person can become a candidate for the unexpired term of this office only by

petition, the incumbent having died since the primary election. Therefore, the person who was defeated at the primary election will not, by becoming a candidate by petition, be running against the candidate of his own party who defeated him at the primary, nor will he be running against any candidate of his own party as there can be no party candidates for the unexpired term. Bearing in mind the purpose of this legislation, I do not believe that the unexpired term of the office of county commissioner is the same office, within the meaning of the statute, as the four year term for which the elector to whom you refer was defeated at the primary. In Kentucky the statute reads as follows:

"No applicant or candidate for any public office in the state of Kentucky who shall have filed his application or declaration under said section and who shall have been defeated for the nomination for any office thereunder, shall be eligible or permitted to run for the same office for which he was a candidate under said section at any general election in this state to be held during the same year in which his said application and declaration was so filed and in which he was a candidate in any primary election under said act."

This statute was construed in the case of *Halterman vs. Grogan*, 24 S. W. (2d) 921. In that case one Mattison defeated Grogan for nomination to an office. In an election contest Mattison was disqualified because he did not have sufficient residence, and as Grogan had failed to file a pre-primary expense account a vacancy was declared. Thereafter, the County Democratic Committee named Grogan as the candidate for this same office and the court held that the above statute did not prevent him from becoming a candidate. The court said:

"This provision was primarily intended to prohibit a candidate, who had filed his application or declaration under that section and who had received fewer votes than another candidate, from becoming a candidate at the general election against a candidate who had defeated him in the primary election."

In the case of *Armstrong vs. Simonson*, 271 Pac. 627, the Colorado statute read as follows:

"No person who has been defeated as a candidate in a primary election shall be eligible as a candidate for the same office in the next ensuing general election."

The court held that this statute did not operate to prevent one defeated in the primary election from being chosen by those authorized to represent the party to fill the vacancy in the nomination resulting from the death of the nominee of the party after the primary. The court said:

"Standing alone, the words, taken literally, would seem to exclude Simonson's name from the printed ballot. But in construing statutes, words are not always to be given their literal meaning. In order to ascertain the legislative intent, which, when ascertained, must control, words should be considered with reference to the purpose sought to be accomplished by the statute in which they occur."

The court further said:

"Coming now directly to the case before us, it is to be noted that the old law permitted a person who had sought a party nomination and was defeated at the party primary election to run as the candidate of a rival party in opposition to the candidate of his own party, and have his name, as the candidate of such rival party, placed upon the general election ballot. Or he could run independently by petition, in which event his name would appear upon the general election ballot, as such independent candidate, in opposition to the candidate of his own party. Under the old law, there was nothing to prevent members of one party from voting at the primary election of a rival party, and it is a matter of common knowledge that at times they availed themselves of that privilege. The mischief of the old law was that under it there prevailed practices that tended to create dissension within the ranks of each political party, lessened party control, weakened party strength, crippled party activity and sometimes even threatened the disruption of the party. To eliminate these practices, and to lessen the evils believed to exist the statute, of which the section in question is a part, provides, among other things, that each voter at a primary election shall openly announce to the judges of election the name of the political party with which he wishes to affiliate (S. L. 1927, Chap. 98, §3), and that no person who has been defeated as a candidate in a primary election shall be eligible as a candidate for the same office in the next ensuing general election (section 5). To further carry out the purposes of the statute, it provides also for an increase in the number of votes necessary to designate, at a party assembly, the names of candidates to be placed upon the primary election ballot (section 1). And in the case of a candidate for a state office, the statute makes a radical change, the practical effect of which is greatly to increase the number of signatures required to place, by petition, the name of such candidate upon the primary election ballot (section 2).

Where a candidate who has been nominated at a primary election dies, the filling of the vacancy by those who are authorized to represent the party, and to act for it in such matter, does not create any of the mischiefs sought to be remedied by the Act of 1927."

Likewise, the action of the elector to whom you refer in becoming a candidate by petition for county commissioner for the unexpired term does not create any of these mischiefs, as he will not be running against the candidate who defeated him at the primary, nor will he be running against any party candidate.

I am of the opinion, therefore, that an elector who was defeated in the primary as a candidate for the office of county commissioner may become a candidate by petition for the office of county commissioner for an unexpired term which it is necessary to fill at the following general election due to the death of the incumbent after the primaries.

Respectfully,
GILBERT BETTMAN,
Attorney General.