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1. GOVERNOR, SUCCESSION TO OFFICE—DEVOLUTION OF POWERS AND DUTIES—DEATH OF PERSON ELECTED GOVERNOR PRIOR TO INDUCTION INTO OFFICE—LAW FOUND IN CONSTITUTION OF OHIO, ARTICLE III, SECTION 2—FORCE AND EFFECT OF ANY LAW ENACTED BY GENERAL ASSEMBLY.

2. PERSON ELECTED GOVERNOR—ENTITLED TO HOLD OFFICE, DISCHARGE DUTIES AND RECEIVE EMOLUMENTS, TERM OF TWO YEARS, COMMENCING ON SECOND MONDAY OF JANUARY, NEXT AFTER ELECTION AND UNTIL SUCCESSOR ELECTED AND QUALIFIED.

3. WHERE PERSON ELECTED GOVERNOR DIES SUBSEQUENT TO ELECTION AND PRIOR TO SECOND MONDAY IN JANUARY NEXT FOLLOWING—PERSON HOLDING OFFICE ENTITLED TO CONTINUE UNTIL SUCCESSOR ELECTED AND QUALIFIED.

4. "GOVERNOR" — "GOVERNOR-ELECT" — IF PERSON ELECTED GOVERNOR SHOULD DIE BEFORE INDUCTION INTO OFFICE, DUTIES AND POWERS OF OFFICE WOULD NOT DEVOLVE UPON LIEUTENANT GOVERNOR.

SYLLABUS:

1. The entire law governing the succession to the office of governor and the devolution of the powers and duties thereof in the event of the death of the person elected to such office prior to his induction thereinto is set out in the Constitution of Ohio and, consequently, an act prescribing a method of such succession or devolution different from that provided for by the Constitution, would, if enacted by the General Assembly, be unconstitutional and without any force and effect in law.

2. Under Section 2 of Article III of the Constitution of Ohio, a person elected to the office of governor is entitled to hold such office and discharge the duties and receive the emoluments thereof for a term of two years commencing on the second Monday of January next after his election, and until his successor is elected and qualified.

3. Where the person elected to the office of governor dies subsequent to his election thereto and prior to the second Monday in January next following, the person holding said office is entitled to hold the same beyond the term for which he was elected and continue therein until his successor is elected and qualified.

4. The term "governor," as the same appears in Section 15 of Article III of the Constitution of Ohio, does not include "governor-elect" and, consequently, if a person elected to the office of governor should die before being inducted into said office, the duties and powers thereof would not devolve upon the lieutenant governor.

Columbus, Ohio, February 3, 1947

Hon. Thos. E. Bateman, Clerk of the Senate
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of a copy of Senate Resolution No. 21, adopted by the Senate of the 97th General Assembly, which resolution reads as follows:

> "Relative to a successor to a governor in case of death of a governor-elect prior to taking office.
>
> WHEREAS, The importance of deciding the successor to a governor-elect who dies before the term of office for which he was elected commences is being forcibly brought to the attention of the public, and

WHEREAS, The constitution of Ohio, in Article 3, Section 2, seems to indicate that the incumbent governor might hold his office until a successor is elected and qualified, and

WHEREAS, This constitutional provision is ambiguous when applied to the situation above stated, and

WHEREAS, It is desirable that this question be determined in order that the orderly processes of the state government might continue in the event of such happenings, now

THEREFORE BE IT RESOLVED, By the Ohio Senate that the attorney general of Ohio is hereby requested for an opinion as to the constitutional authority of the General Assembly to enact laws designating the person to assume the office of governor in the event that the governor-elect should die between the date of his election and the date of the beginning of the term of office for which he was elected."

A search of the Constitution and the statutes of Ohio reveals but three sections of the former which appear to be pertinent to the question concerning the devolution of the duties of the office of governor in the event of the death of the governor-elect before being inducted into office. Said sections, to-wit, Sections 1, 2 and 15 of Article III of the Constitution of Ohio, read as follows:

Section 1. "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general assembly."

Section 2. "The governor, lieutenant governor, secretary of state, treasurer, and attorney general shall hold their offices for two years; and the auditor for four years. Their terms of office shall commence on the second Monday of January next after their election, and continue until their successors are elected and qualified."

Section 15. "In case of the death, impeachment, resignation, removal, or other disability of the governor, the powers and duties of the office, for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor."

It is apparent from an examination of the above sections that if the answer to the aforesaid question is to be found at all, it must be found therein. In such case, there is left no room for the operation of statutes

prescribing the manner in which such duties shall devolve upon the happening of said contingency. In other words, if the above provisions of the Constitution, in their operation, are thought to be unsatisfactory, the power to effect a change therein rests with the people themselves and not with the General Assembly.

Therefore, if the question presented by your resolution is to be answered categorically, it must be stated that the General Assembly is without constitutional authority to enact laws designating the person to assume the duties of the office of governor in the event the governor-elect should die between the date of his election and the date of the beginning of the term of office for which he was elected, or perhaps, expressed more accurately, any laws which might be enacted by the General Assembly which would prescribe a method other than that provided for by the Constitution would be unconstitutional and, consequently, without any force and effect.

However, since your resolution calls attention to the importance of deciding who the successor to a governor-elect would be in the event of his death prior to the commencement of the term for which he was elected, and in order that the initial steps to effectuate a constitutional amendment may be taken by the General Assembly in the event that body, in its wisdom, decides that the constitutional procedure now in force is unsatisfactory, I shall proceed with a consideration of said question.

First, and possibly of paramount importance in the resolution thereof, are the concluding words of Section 2 of Article III of the Constitution. Said section, if dissected and only those parts thereof pertaining to the office of governor exposed, would read:

> "The governor shall hold his office for two years and his term of office shall commence on the second Monday of January next after his election and continue *until his successor is elected and qualified.*"

From this it is manifest that unless a successor to an incumbent governor has been elected and is qualified to enter upon the office of governor on the date of the commencement of the term, such incumbent governor will hold over beyond the term for which he was elected. There is certainly no ambiguity of language here which can cast doubt on such conclusion.

It becomes necessary, then, to determine the scope in meaning of the word "successor". The question is: Does such word include, under certain circumstances, the person elected as lieutenant governor for a term commencing at the expiration of the term for which the incumbent governor was elected? I find myself unable to reach such conclusion.

Webster's New International Dictionary, Second Edition, defines "successor" as "* * * one who succeeds to a throne, title, or estate, or is elected or appointed to an office. * * * vacated by another." It will be noted that under the provisions of Section 15 of Article III of the Constitution, the lieutenant governor does not, in case of the happening of any of the contingencies enumerated therein, succeed to the office of governor. Said section provides "* * * the powers and duties of the office * * * shall devolve upon the lieutenant governor." The definition of "devolve" appearing in Webster's New International Dictionary, Second Edition, is "To transfer from one person to another." Therefore, since the lieutenant governor, when called upon to exercise the powers and duties of the office of governor which may have devolved upon him by reason of said constitutional provision, in no sense becomes governor, it is difficult to perceive how he can, in such case, be regarded as a "successor to the governor."

This precise question was before the Supreme Court of Wisconsin in State, ex rel. Martin v. Ekern, 228 Wis., 645, wherein constitutional provisions similar to those of Ohio were under consideration. In said case, decided by the court in 1938, it was held:

> "3. Under Section 7, Article V, Constitution, the powers and duties of the office of governor devolve on the lieutenant governor during a vacancy in the office of governor, but the lieutenant governor does not become governor, and remains lieutenant governor, on whom devolves the powers and duties of governor, and in such contingency no vacancy occurs in the office of lieutenant governor; but under Section 8, Article V, there may be a vacancy in the office of lieutenant governor as a result of impeachment, displacement, resignation, death, or incapacitating disease."

See also: State, ex rel. Lamey v. Mitchell, 97 Mont., 252; State, ex rel. Hardin v. Sadler, 23 Nev., 356; People, ex rel. Lynch v. Budd, 114 Cal., 168.

This brings me to the next point. In order to conclude that the lieu-

tenant governor would succeed to the office of governor in the event of the death of the person elected to the latter office prior to the commencement of the term for which he was elected, it would, of course, be necessary to construe the word "governor" as it appears in Section 15 of Article III of the Constitution as including "governor-elect."

The word "governor" appears throughout the Constitution in numerous sections. Section 5 of Article III of the Constitution provides that the supreme executive power of this state shall be vested in the governor. Certainly, nobody would contend for one moment that the supreme executive authority of this state is vested in the person elected to the office of governor prior to the time that he is inducted into said office.

Section 8 of Article III of the Constitution empowers the governor to convene the General Assembly in special session. In view of this, could it be tenably argued that the governor-elect could exercise this power? The Constitution (Section 16, Article II) provides that if the governor signs a bill passed by the General Assembly it shall become law. It would certainly require no argument to convince a court that an act of the General Assembly, signed by the governor-elect, has no force and effect. In Section 11 of Article III of the Constitution it is provided that the governor shall have power, after conviction, to grant reprieves, commutations and pardons for crimes. No argument, ingenious though it might be, could release a convict from the penitentiary on a pardon signed by the governor-elect. Section 2 of Article XVII of the Constitution empowers the governor to fill by appointment any vacancy which may occur in any elective state office, other than that of a member of the General Assembly or of governor. Certainly, no one could be found who is bold enough to assert that an appointment to fill a vacancy in a state office could be made by the governor-elect.

Therefore, if the word "governor," as the same appears in the above, and many other sections of the Constitution, can only mean the person who, after being elected to the office of governor, has entered upon his term, no logical or sensible argument could be advanced why said word should be given a different and broader meaning when it appears in Section 15 of Article III of the Constitution.

It is a familiar rule of construction that the same word or phrase, when used in different statutes, should be given the same meaning in each. In this regard, it is stated in 37 O. Jur., 573:

> "The same word or phrase when employed in different acts by the same body ought generally to be understood to mean the same thing. Indeed, where the language of an existing statute is ambiguous and the legislature by a previous enactment upon the same subject has, in express language or by clear and indubitable inference, clearly indicated the meaning of the ambiguous word or phrase used in such statute, it will be presumed, in the absence of a later expression to the contrary, to have used the word or phrase in subsequent legislation in the same sense. Accordingly, the meaning of similar terms in other statutes has been used as an aid in determining the meaning of such ambiguous term in the statute under consideration—especially where the statutes containing the similar provisions have been the subject of judicial interpretation. * * *"

See: State, ex rel. v. Tomlinson, 99 O. S. 233; Iroquois Co. v. Meyer, 80 O. S. 676; Heckman v. Adams, 50 O. S. 305; State, ex rel. v. Conn, 110 O. S., 404; Cincinnati Traction Co. v. Public Utilities Commission, 113 O. S. 618.

It is likewise well settled that the rules governing the construction of statutes are applicable to the construction of constitutions. McMahon v. Keller, 11 O. App. 410; Miami County v. Dayton, 92 O. S. 215; Shryock v. Zanesville, 92 O. S. 375. In the latter case, it was stated at page 383:

> "In construing constitutional provisions the court must apply the same general rules governing the construction of statutes, mindful, however, of the limitation that in such construction a strict rather than a liberal construction should be had; but after all, the real intention of the body framing the law, be it constitutional convention or general assembly, must be ascertained, if humanly possible, and gives full effect."

An officer-elect is defined in Webster's New International Dictionary, Second Edition, as "A person chosen to an office, but not yet actually inducted into it."

In the case of Cordiell v. Frizell, 1 Nev. 130, decided by the Supreme Court of Nevada in 1865, the court, in commenting on the distinction between an officer and an officer-elect, stated at page 132:

> "The only question for us to determine is, was the relator, on the 31st day of October, 1864 (the day the Constitution took effect), a county officer under the laws of the territory of Nevada? Counsel for relator say the Constitution applies the term 'officer,' as well to those elected as to those who are actually in office, and refer us to several sections where the word *officer*

> is used when alluding, not to those in office, but to those elected to fill an office at a future day. Those who have been elected but not inducted into office, are, properly speaking, *officers-elect*—those in office are simply *officers*—those who have been in office, but have gone out, are properly *ex-officers*. It is very proper, in either conversation or writing, when speaking of an *officer elect,* to leave off the suffix, and style him simply an officer, if the context of the sentence shows you are speaking of one not yet inducted into office, but who is to be at a future day; so, too, in speaking of an ex-officer, you may leave off the prefix under like circumstances. But if the term 'officer' is used in a sentence where there is nothing to qualify or control its meaning, everybody understands it refers to an officer then holding and enjoying the office."

In view of the above, I find myself impelled to the conclusion that the word "governor", as used in Section 15 of Article III of the Constitution, means the person holding the office of governor and not the person elected thereto who has not yet entered upon his term.

In reaching the above conclusion, I am not unmindful of the case of State, ex rel. Martin v. Heil, 242 Wis. 41, wherein it was held by the Supreme Court of Wisconsin that:

> "The word 'governor,' in general, means the person elected as chief executive official of a state, and the word 'governor,' as used in Section 7, Article V, Constitution, includes, not only a qualified and acting governor, but also a governor-elect who has not qualified and who dies before the beginning of the term for which he was elected."

In discussing the meaning of the word "governor" in Section 7 of Article V of the Constitution of Wisconsin, which contains provisions substantially similar to those of Section 15 of Article III of the Constitution of Ohio, it was stated by Wickhem, J., at page 52:

> "* * * The first question to be answered is whether the language of Section 7 so clearly and unambiguously supports the position of counsel for the incumbent that it is not open to construction. It is our conclusion that it does not. The use of the word 'governor' in Section 7 does not unambiguously exclude 'governor-elect.' The term 'governor-elect' is a merely statutory designation, and not a constitutional word. There is no reason, so far as rules having to do with the use of language generally are concerned, why the term 'governor' may not include 'governor elect' for a particular term, and it is a particular term that the Constitution deals with in Section 7. Webster's dictionary

> defines governor as 'the person elected as chief executive official of a state in the United States. * * *' It requires no more interpolation to hold that the term 'governor' includes 'governor-elect' than it does to limit it to 'qualified and acting' governor. We see no reason why the word 'governor' as used in Section 7 may not reasonably be taken to include an elected governor who has not qualified."

Since the above statement, which has utterly failed to work conviction in my mind, is all that appears in the opinion as a basis for the holding of the court on this point, I feel that such holding can be cast aside with perfect impunity and without qualm of conscience.

There remains one more cogent reason why the powers and duties of the office of governor would not, under the circumstances set out in your resolution, devolve upon the lieutenant governor. It is to be noted that Section 15 of Article III of the Constitution provides that in case of the death, etc., of the governor, the powers and duties of the office, "for the residue of the term," shall devolve upon the lieutenant governor.

"Residue" is defined in Webster's New International Dictionary, Second Edition, as "that which remains after a part is taken, separated, removed or designated; remnant; remainder; rest." "Residue," as defined by Bouvier, is that which remains of something after taking away some part of it. See also: Stevens v. Flower, 46 N. J. Eq. 340; Morgan v. Huggins, 48 Fed. 3; Ricker v. Brown, 183 Mass. 424; United States v. Crary, 2 F. Supp. 870.

Therefore, since "residue" in its natural and popular sense signifies what is left of a number or quantity or period of time after something has been taken therefrom, the duties of the office of governor, were they to devolve upon the lieutenant governor immediately upon the latter's induction into office, which, under Section 2 of Article III of the Constitution, is simultaneous with the induction of the governor into office, clearly would not devolve for the *residue* of the term of the governor. The fact that the word "residue" is written into the section clearly indicates that a part of the term must have elapsed before the powers and duties of the office of governor could devolve upon the lieutenant governor, and, consequently, it would follow that the governor must have entered upon his term of office before the constitutional provision under discussion would apply.

Up to this point, with the exception of State, ex rel. Martin v. Heil, supra, wherein constitutional provisions unlike those in Ohio govern, I

have not brought attention to any decisions dealing with the main question before me. While neither of the following cases is exactly in point with the factual situation presented in your resolution, I, nevertheless, feel that the reasoning in each is pursuasive and should be given consideration.

In State, ex rel. Thayer v. Boyd, 31 Neb. 682, the Supreme Court of Nebraska had before it a case wherein the person receiving the highest number of votes for the office of governor was ineligible, under the constitution, to be elected. The constitutional provisions applicable were set out in Sections 1 and 16 of Article V of the Constitution of Nebraska then in force (1891). Said sections read:

> "Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings, who shall each hold his office for the term of two years from the first Thursday after the first Tuesday in January next after his election, and until his successor is elected and qualified, * * *."

> "Section 16. In case of the death, impeachment, and notice thereof to the accused, failure to qualify, resignation, absence from the state, or other disability of the governor, the powers, duties, and emoluments of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the lieutenant governor."

Notwithstanding the fact that the latter section, above quoted, named as one of the contingencies upon the happening of which the duties of the office of governor would devolve upon the lieutenant governor, the failure of the governor to qualify, the court held that the incumbent governor held over for the full term succeeding that for which he was elected. In commenting on the import of the above constitutional provisions the court stated:

> "The provisions of the first section are plain and unambiguous. It provides that the governor shall hold his office for two years, 'and until his successor is elected and qualified.' If Section 1 stood alone it could not be successfully disputed that it was not only the privilege, but the duty of the governor to hold the office until his successor shall be duly elected and qualified. (People v. Osborne, 7 Col., 605; Tappan v. Gray, 9 Paige, 506; People v. Bissell, 49 Cal., 407; People v. Whitman, 10 Id., 38; State v. McMullen, 46 Ind., 307; State v. Lusk, 18 Mo., 333; Commonwealth v. Hanley, 9 Pa. St., 513; State v. Jenkins, 43 Mo., 261; State v. McMillen, 23 Neb., 389; Carr v. Wilson, 32 W. Va., 419.)

> Under the provisions of Section 16, quoted above, the duties of the office of governor devolve upon the lieutenant governor in certain contingencies, among which are the failure of the governor elect to qualify, and disability of the governor. The words 'other disability,' as used in the section, have no reference to the ineligibility of the person to be elected to the office, but were intended by the framers of the constitution to cover any disability of the governor not specifically enumerated in the section, occurring after the commencement of his term of office. The failure to elect a governor, on account of the ineligibility of the person receiving the highest number of votes for the office, is not a disability of the governor."

Another case which should be given consideration is Ex parte Lawhorne, 18 Grattan 85, decided by the Court of Appeals of Virginia in 1868. Since the constitutional provisions in this case made the governor ineligible for the same office for the term next succeeding that for which he was elected, and notwithstanding this fact the court held that the governor, whose term had expired, held over until his successor was elected and qualified, I am constrained to regard the same as of compelling force in the instant case.

The report of that case shows that Francis Pierpont was elected and qualified as governor of that state for the term of four years from the 1st day of January, 1864. On the 13th day of January, 1868, no successor to him having been elected or qualified, Governor Pierpont granted a full and immediate pardon to James Lawhorne, who was then confined in the penitentiary under a sentence for grand larceny. The superintendent of the penitentiary refused to release him on the ground that Pierpont's term of office had expired on January 1, 1868. Lawhorne applied to the court for a writ of habeas corpus.

Section 22 of Article VI of the Constitution of Virginia, then in force, provided that "judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices, after their terms of service have expired, until their successors are qualified."

Section 1 of Article V of that constitution fixed the term of governor at four years, commencing on the first day of January succeeding his election, and made him ineligible to the same office for the term next succeeding that for which he was elected.

Section 8 provided for the election of a lieutenant governor at the same time, and for the same term as the governor.

Section 9 provided that "In case of the removal of the governor from office, or of his death, failure to qualify, resignation, removal from the state, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the lieutenant governor; and the General Assembly shall provide by law for the discharge of the executive functions in other necessary cases."

The court held that the Constitution made it obligatory upon Pierpont to discharge the duties of the office of governor until his successor was qualified, and that the pardon granted by him was valid.

With respect to the governor's right to hold over, the court stated at page 87:

> "* * * It is important, as before stated, that there should be some person always ready to perform the duties of every office; and when an incumbent has served out the term for which he was elected or appointed, who can be more suitable than he, as a general rule, to continue to discharge the duties of his office until his successor is qualified? He has been once elected or appointed to the office, and is therefore presumed to be fit for it. He has served out his term, and is therefore presumed to be familiar with its duties."

In the course of the court's discussion concerning the constitutional provisions prohibiting two successive terms of office, it was stated:

> "Much stress is laid on the first of these sections, which declares the governor, after holding the office for the term of four years, to 'be ineligible to the same office for the term next succeeding that for which he was elected,' &c., from which an intention is inferred to make him incapable of continuing to discharge the duties of his office after the expiration of his term of service. But this is not a well-founded inference. The policy of making him ineligible to the same office for the next succeeding term was to avoid exposing him to the tempeation of using means afforded him by his office to secure his re-election to the same office, or his election to another office during his term of service. There was no reason whatever for rendering him incompetent to continue to discharge the duties of his office after the expiration of his term of service and until the qualification of his successor. No policy of the law requires it. He cannot be supposed to have any agency, official or otherwise, in bringing about the occasion for such continuance. There is not a word in the constitution which either expresses or implies an intention to render him incompetent to continue to discharge the duties of his office on such an emergency. The words, 'and be ineligible to the same office for the term next succeeding that for which he

> was elected,' refer solely to a popular re-election for a full term of service, and not to his continuing, *ex officio,* when the occasion requires it, to discharge the duties of his office after his term of service has expired, and until his successor is qualified—an occasion which is not likely often to arise, nor to be of long continuance; but however often it may arise, or however long it may continue, or whatever may have produced it, the same principle applies to the case. * * *"

Before concluding, I might also invite attention to the fact that of the contingencies enumerated in Section 15 of Article III of the Constitution, only two, to-wit, death and other disability, can apply to a governor-elect. Impeachment, resignation and removal, if any one of such events occur, can operate only against the person holding the office and not the person elected thereto who has not yet entered upon the term. Certainly the person elected to the office of governor can not be impeached prior to the time that he is inducted into such office, nor can he resign from said office before such time, and obviously he can not be removed therefrom before he occupies it. To me it seems unlikely that the framers of the Constitution, when they named certain contingencies and then used the term "governor", intended such term to include persons who under no circumstances could have the contingencies named happen to them.

In view of the above, and without further prolonging this discussion which has perhaps been unduly extended, you are advised that in my opinion:

1. The entire law governing the succession to the office of governor and the devolution of the powers and duties thereof in the event of the death of the person elected to such office prior to his induction thereinto is set out in the Constitution of Ohio and, consequently, an act prescribing a method of such succession or devolution different from that provided for by the Constitution, would, if enacted by the General Assembly, be unconstitutional and without any force and effect in law.

2. Under Section 2 of Article III of the Constitution of Ohio, a person elected to the office of governor is entitled to hold such office and discharge the duties and receive the emoluments thereof for a term of two years commencing on the second Monday of January next after his election, and until his successor is elected and qualified.

3. Where the person elected to the office of governor dies subsequent to his election thereto and prior to the second Monday in January next

following, the person holding said office is entitled to hold the same beyond the term for which he was elected and continue therein until his successor is elected and qualified.

4. The term "governor," as the same appears in Section 15 of Article III of the Constitution of Ohio, does not include "governor-elect" and, consequently, if a person elected to the office of governor should die before being inducted into said office, the duties and powers thereof would not devolve upon the lieutenant governor.

Respectfully,

HUGH S. JENKINS,
Attorney General.