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1. VACANCY—INTERPRETATION, SECTIONS 2397-1, 2397-2 GC—1.24, 305.03 RC.
2. VACANCY—OFFICE OF SHERIFF—DECLARED BY RESOLUTION, COUNTY COMMISSIONERS — SHOULD BE FILLED BY BOARD OF COUNTY COMMISSIONERS — SECTIONS 305.03, 311.03 RC.

SYLLABUS:

1. By reason of the application of Section 1.24, Revised Code, the provisions of Section 305.03, Revised Code, must be deemed to be a mere restatement without substantive change of the provisions of former Sections 2397-1 and 2397-2, General Code.

2. Where a vacancy in the office of sheriff is declared by resolution of the county commissioners as provided in Section 305.03, Revised Code, such vacancy should be filled by the board of county commissioners as provided in Section 311.03, Revised Code.

Columbus, Ohio, November 28, 1955

Hon. Mary N. Snyder, Prosecuting Attorney
Jackson County, Jackson, Ohio

Dear Madam:

This will acknowledge your request for my opinion on the question of whether a vacancy in the office of sheriff should be filled in the manner provided in Section 305.02, Revised Code, or in the manner provided in Section 311.03, Revised Code, in a situation where such vacancy occurs by declaration of the board of county commissioners as provided in Section 305.03, Revised Code.

Section 305.03, Revised Code, provides in part as follows:

“Whenever any county officer is absent from the county for ninety consecutive days, except in case of sickness or injury as provided in this section, his office shall be deemed vacant and the board of county commissioners shall declare a vacancy to exist in such office.

“Such vacancy shall be filled in the manner provided by section 305.02 of the Revised Code.”

Section 305.02, Revised Code, to which reference is thus made in Section 305.03, provides in part as follows:

“If a vacancy in the office of county commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, county auditor, and county recorder, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified.”

This would appear to be a special provision relating only to those cases where a vacancy occurs in a county office by declaration of the board of county commissioners based on an absence of ninety consecutive days.

In Section 311.03, Revised Code, however, there is another provision relating to a vacancy in the office of sheriff reading as follows:

“When the office of sheriff becomes vacant, the board of county commissioners shall appoint a suitable person to fill the vacancy. * * *”

At first impression it might seem that we are here confronted with the question of whether either of these sections is special, and the other general, so as to require the application of the rule that a special provision prevails over a conflicting general provision. It is quite difficult, however, in this instance to classify these two sections in this manner for the reason that Section 311.03 is special in that it applies only to a vacancy in the office of sheriff, whereas Section 305.03 is general in that it applies to all county officers; and Section 305.03 is special in that it relates to a particular manner in which an office becomes vacant whereas Section 311.03 relates to vacancies generally.

It cannot be deemed necessary, however, in the case at hand, to resolve this question of classification for the reason that the provision above noted in Section 305.03 relative to the filling of a vacancy “in the manner provided by Section 305.02, Revised Code,” was inserted in this section in the process of the recodification of 1953. Prior thereto the pertinent provision was set out in Section 2397-1, General Code, as follows:

“Whenever any county officer shall be absent from the county for ninety consecutive days, except in case of sickness or injury

as hereinafter provided, his office shall be deemed vacant and the county commissioners shall declare a vacancy to exist in such office.

“Such vacancy shall be filled in the manner provided by *law*.”
(Emphasis supplied.)

At the time of the enactment of this section, “the manner provided by law” for filling a vacancy in the office of sheriff was set out in Section 2828, General Code, and provided for the filling of such vacancy by the board of county commissioners.

The question here presented, therefore, is whether the change in the language, thus effected in the course of the code revision of 1953, amounts to a substantive change despite the plain legislative intent not to effect such change. In this connection your attention is invited to Section 1.24, Revised Code, as follows :

“That in enacting this act it is the intent of the General Assembly not to change the law as heretofore expressed by the section or sections of the General Code in effect on the date of enactment of this act. The provisions of the Revised Code relating to the corresponding section or sections of the General Code shall be construed as restatements of and substituted in a continuing way for applicable existing statutory provisions, and not as new enactments.”

I am aware of the holding of the court in *Slingluff v. Weaver*, 66 Ohio St., 621, and more specifically of the following language in the second paragraph of the syllabus in that case :

“* * * The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.”

The change here involved, made in the process of the code revision, clearly gives the appearance of a substantive change but because of the plainly expressed legislative denial of any intent to effect such a change in such revision, I am impelled to conclude that no substantive effect should be given to the substituted language. In this connection I recognize the possibility that the courts may refuse to give effect to the provisions of Section 1.24, Revised Code, in a situation where there is not the slightest doubt of meaning of the language which was adopted in the process of the code revision. It seems to me, however, any declaration

as to the inadequacy of the provisions of this section so as to prevent a substantive change in the process of code revision should properly be made by the courts rather than by this office, especially in a situation where the giving effect to a substantive change would leave unresolved the ambiguity raised by the conflict above noted between Sections 305.03 and 311.03, Revised Code.

It is my conclusion, therefore, in specific answer to your inquiry that:

1. By reason of the application of Section 1.24, Revised Code, the provisions of Section 305.03, Revised Code, must be deemed to be a mere restatement without substantive change of the provisions of former Sections 2397-1 and 2397-2, General Code.

2. Where a vacancy in the office of sheriff is declared by resolution of the county commissioners as provided in Section 305.03, Revised Code, such vacancy should be filled by the board of county commissioners as provided in Section 311.03, Revised Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General