2716

OPINION RELATING TO SENATE CONFIRMATION OF APPOINTMENTS BY THE GOVERNOR. ART. III, OHIO CONSTITUTION. SECTION 21, ARTICLE III, OHIO CONSTITUTION. § 3505.35, R.C.

SYLLABUS:

1. While the amendment to Article III, Ohio Constitution, relating to senate confirmation of appointments by the governor, became a part of the Constitution as of the date of its approval by the voters, November 7, 1961, the governor was not required to report appointments made between November 7, 1961 to November 21, 1961, to the November session of the senate (November 14, 1961 to November 21, 1961, inclusive), as the canvassing of the abstracts of vote and the declaration of the secretary of state that the amendment had been approved (Section 3505.35, Revised Code), was not made until December 1, 1961; however, to comply with the spirit of Section 21 of Article III, Ohio Constitution, such appointments should be reported to the next session of the senate.

2. Since Section 21 of Article III, Ohio Constitution, became a part of the Constitution on November 7, 1961, when it was approved by the voters, appointments requiring senate approval, made from November 21, 1961 to December 1, 1961, should be reported to the next session of the senate; and all appointments made after December 1, 1961, should be made in accord with that constitutional provision.

Columbus, Ohio, December 28, 1961

The Honorable Michael V. DiSalle, Governor of the State of Ohio,
State Capitol Building, Columbus 15, Ohio

Dear Sir:

Your request for my opinion is concerned with the effective date of an amendment to the Ohio Constitution, which amendment received a majority vote at the general election of November 7, 1961.

The amendment in question was placed on the ballot pursuant to Amended Senate Joint Resolution No. 23 of the 104th General Assembly. On December 1, 1961, the secretary of state, pursuant to law, canvassed the abstracts of vote from the various counties and declared that the amendment had been approved at the November 7th election.

The amendment to the Ohio Constitution consisted of an insertion of a new section. Section 21, in Article III, the new language reading:

> "Sec. 21. When required by law, appointments to state office shall be subject to the advice and consent of the Senate. All statutory provisions requiring advice and consent of the Senate to appointments to state office heretofore enacted by the General Assembly are hereby validated, ratified and confiirmed as to all appointments made hereafter, but any such provision may be altered or repealed by law.
>
> "No appointment shall be consented to without concurrence of a majority of the total number of Senators provided for by this Constitution, except as hereinafter provided for in the case of failure of the Senate to act. If the Senate has acted upon any appointment to which its consent is required and has refused to consent, an appointment of another person shall be made to fill the vacancy.
>
> "If an appointment is submitted during a session of the General Assembly, it shall be acted upon by the Senate during such session of the General Assembly, except that if such session of the General Assembly adjourns sine die within ten days after such submission without acting upon such appointment, it may be acted upon at the next session of the General Assembly.
>
> "If an appointment is made after the Senate has adjourned sine die, it shall be submitted to the Senate during the next session of the General Assembly.
>
> "In acting upon an appointment a vote shall be taken by a yea and nay vote of the members of the Senate and shall be entered upon its journal. Failure of the Senate to act by a roll call vote on an appointment by the governor within the time provided for herein shall constitute consent to such appointment."

It will be noted that prior to the effective date of this amendment, the many statutory provisions for senate confirmation of appointments to public office, made by the governor, were invalid. In the case of *The State, ex rel. Burns* v. *DiSalle, Governor,* decided on July 5, 1961, the Supreme Court held such a provision to be in conflict with Section 27 of Article II, Ohio Constitution, as being an appointive power prohibited by that section. New Section 21 of Article III, *supra,* does, of course, validate all statutory provisions requiring such senate confirmation.

Further to note in this question is the fact that the senate met in session on November 14, 1961 and adjourned sine die on November 21, 1961, and that since November 7, 1961, you, as governor, have made appointments where senate confirmation is required by statutes which are validated by the amendment to the Constitution.

Section 3.03, Revised Code, one of such statutes, provides:

> "When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advises and consents thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

(Section 3.03, *supra,* must, of course, be read with the new constitutional provision, as there are some conflicts.)

Thus, the question is whether Section 21 of Article III, *supra,* became effective on November 7, 1961, so as to require the governor to report appointments requiring senate confirmation, made during the period November 7, 1961 to November 21, 1961, to the November session of the senate; and so as to require that any appointments made during the period from November 21, 1961 to December 1, 1961, have to be reported to the next session of the senate.

Senate Joint Resolution No. 23, *supra,* which placed the constitutional amendment on the ballot, did not provide for a specific effective date for the amendment, and, therefore, none was adopted by the voters. As to the effective date of such an amendment, Section 1 of Article XVI, Ohio Constitution, provides:

> "Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately."

Here pertinent are the words:

> "If a majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution."

Since it is obviously impossible to get the final vote count on the day of election, there is a question as to whether the amendment becomes a part of the Constitution on election day, or on the day that the vote is declared official, or on some other day.

In Ohio, the secretary of state is, by statute, charged with the duty of canvassing the abstracts of votes cast on the question of adoption of a constitutional amendment, and with declaring the result thereof (Section 3505.35, Revised Code). Such canvassing and declaration must be held within ten days after all abstracts have been received from all of the counties. And even after the result of the election has been declared, a contest of election may be filed in the Supreme Court within fifteen days after the declaration (Sections 3515.08 and 3515.09, Revised Code); and the court hearing is held not less than fifteen nor more than thirty days after the filing of the petition (Section 3515.10, Revised Code).

Thus, while it is obvious that the actual adoption of the instant amendment by the voters was made on November 7, 1961, the fact of such adoption could not have been known until some time after that date. And until the declaration of the secretary of state on December 1, 1961, you, as governor, had no official notice that the amendment had received a favorable vote.

I have been unable to find any Ohio case law dealing directly with the question here in issue. The closest case in point is that of *State, ex rel.* v. *Campbell,* 94 Ohio St., 403, which dealt with the effective date of the constitutional amendment allowing women to hold certain state offices.

In the *Campbell* case, the joint resolution proposing the amendment provided that said amendment would go into effect on and after the first day of January, 1914; however, that provision was not submitted to the electors with the amendment. The election was held in November, 1913, and the relatrix in the case was appointed to one of the offices concerned on December 23, 1913. The court held that the constitutional amendment was in effect on said December 23, 1913, and in so doing, appeared to indi-

cate that said amendment became effective on the day that it was approved by the voters. At page 411, the opinion by Newman, J., states:

> "Section 1 of Article XVI of the Constitution authorizes the general assembly to propose amendments to the constitution. It contains this language: 'If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution.' It is true that in the resolution of the general assembly (103 O. L., 992), under which the amendment under consideration was submitted to the electors, it was provided that if a majority of the electors voting on the amendment should adopt the same it should become a part of the constitution on and after the 1st day of January, 1914. There is nothing in the constitution which authorizes such a postponement on the part of the general assembly. *The constitution is positive in its terms and provides that the amendment shall become a part of the constitution when a majority of the electors voting on the same shall adopt it.* The time when an amendment is to become effective can be submitted to the electors, as in the case of the amendments of 1912 wherein it was expressly provided when they should go into effect, but in the case under consideration all that was submitted to the people was: 'Article XV, Section 4. Eligibility of women to appointment as members of boards of, or positions in, department and institutions affecting, or caring for, women and children.' In some of the states the time when an amendment shall go into effect is postponed by the constitution to a date later than its adoption, as in the state of New York where it is provided that an amendment shall become a part of the constitution from and after the 1st day of January next after its approval. There is nothing in the constitution of this state postponing the operation of an amendment and it cannot be postponed unless the proposition to postpone is submitted to the electors and is adopted by a majority of those voting thereon. So it is clear to us that the relatrix was eligible to appointment to the office on the 23rd day of December 1913." (Emphasis added)

However, since the *Campbell* case did not deal with a question as to the effect on an amendment before the date of the official declaration of result, it cannot be used as the final authority in the case at hand.

In the case of *State, ex rel. Rodocker* v. *Schroy, et al.*, 27 Ohio Law Abs., 161, Court of Common Pleas, Summit County, 1937, the question dealt with the effective date of an amendment to a city charter. Under the amendment, the relator would have been automatically under the classified civil service, and not be subject to dismissal except under prescribed procedure. The election was held on November 2, 1937; the relator was

dismissed on November 7, 1937 (civil service procedure not followed); and the official count of the election was announced by the board of elections on November 10, 1961. *The court held that the amendment to the charter became effective on the day it was voted on favorably, November 7, 1937.*

Section 9 of Article XVIII, Ohio Constitution, consider in the *Rodocker* case, *supra,* reads in pertinent part:

> "If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality."

It will be noted that the above provision is similar to the language of Section 1 of Article XVI, *supra,* as to an amendment becoming a part of the state constitution.

The decision of the *Rodocker* case was affirmed by the Court of Appeals, Summit County, 12 O.O., 173, the *per curiam* opinion stating:

> "Under the constitution of Ohio, an amendment to the charter of a city becomes effective on the day of the election at which it is adopted by the electors, unless the proposition to postpone the taking effect of the amendment is submitted to and adopted by the voters. This proposition is settled by the Supreme Court of Ohio in the case of State ex rel. McNamara v. Campbell et al, 94 Ohio St., 403, and is in accordance with the rulings of the Supreme Court of the United States (see Dillon v. Gloss, 256 U. S. 368, and Druggan v. Anderson, U. S. Marshal et al, 269 U. S. 36.)"

In 1938, the Ohio Supreme Court overruled a motion to certify the record of the case on the grounds that no debatable constitutional question was involved. (See 134 Ohio St., 96.)

The question of effective date has been considered in other jurisdictions. In this regard, it is stated in 11 American Jurisprudence, Section 38, page 645:

> "Similarly, where an existing Constitution provides that proposed amendments, if ratified by the requisite majority, shall become part of the Constitution, it is usually held that amendments take effect from the time of their actual ratification, * * *
>
> "The governor's proclamation as to the adoption of a constitutional amendment in some jurisdictions is conclusive of that fact, and the amendment thereby becomes so instanti a part of the Constitution. Elsewhere, the rule is established that a proposed

> amendment to the Constitution goes into operation on the canvass of the vote, and not at the time it is cast."

In the case of *Mining Co.* v. *Secretary of State,* 82 Michigan Reports, 573 (1890), the court considered a constitutional provision similar to the Ohio provision, and reading:

> " * * and if a majority of electors, qualified to vote for members of the Legislature, voting thereon, shall ratify and approve such amendment or amendments, the same shall become part of the Constitution."

At page 579 of the opinion by Long, J., it is stated:

> "It must be held that the amendment took effect from the time of the ratification by the popular vote."

A somewhat different conclusion was reached in the case of *State,* v. *Kyle,* 166 Missouri Reports, 287 (1901), in which the pertinent constitutional provision read:

> "* * * If a majority of the qualified voters of the State, voting for and against any one of said amendments, shall vote for such amendment, the same shall be deemed and taken to have been ratified by the people, and shall be valid and binding, to all intents and purposes, as a part of this Constitution."

At the time the *Kyle* case was considered, the Missouri statutes provided that election returns should be certified to the secretary of state; that if the secretary of state deemed the amendment ratified, he should certify the result to the governor; and that the governor then should proclam that the amendment is ratified.

At page 301 of said *Kyle* case, the court concluded:

> "The deduction to be drawn from these authorities is, that the amendment in question became a part of the Constitution of this State when adopted by the vote of the people at the election held on November 8, 1900, and took effect and went into operation upon the canvass of the vote on the nineteenth day of December next thereafter, and not before."

At page 295 of the opinion of the *Kyle* case, the following appears:

> "As a general rule a constitutional amendment takes effect from the day of its ratification by the voters to whom it is submitted for that purpose (In re Deckert, 2 Hughes (U.S.), 183),

> but an exception to this rule is when a different provision is made by law."

The court then reviewed the Michigan case of *Mining Co.* v. *Secretary of State, supra,* in which the court had rendered a contra opinion, and the cases of *Advisory Opinion to the Governor,* 34 Florida, 500, *Sewell* v. *The State,* 15 Tex. App. 56, and *City of Duluth* v. *Duluth St. Ry Co.,* 60 Minn., 178, in which the conclusions reached agreed with that of *Kyle, supra.* On pages 300, 301, and 302 of *Kyle, supra,* the court then said:

> "As was said by the Court of Appeals in New York in passing upon a similar subject: 'The result of the election showing the adoption of this article by a majority of the votes cast, must, within the meaning of the rule, be deemed its passage. The canvass of the votes cast by the various boards of canvassers as required by law, and announcing the result and certifying the same as required by law, is as much a part of the election as the casting of the votes by the electors. The election is not deemed complete until the result is declared by the canvassers as required by law. When the result was declared by the state board of canvassers, the article was adopted, and under the rule, became operative at once, unless from the nature of the provisions themselves, or those of some other law, it appears that it was to take effect at some future period, or unless it clearly appears that the intention of the framers of the article, and of those by whom it was adopted, was, that it should not take effect until some definite future time.' (Real v. The People, 42 N.Y. 276.)
>
> "The deduction to be drawn from these authorities is, that the amendment in question became a part of the Constitution of this State when adopted by the vote of the people at the election held on November 8, 1900, and took effect and went into operation upon the canvass of the vote on the nineteenth day of December next thereafter, and not before.
>
> "These observations find support in the fact that at the same election there was submitted to the vote of the people of the State and adopted by them another amendment to the Constitution (Laws 1899, p. 382), by which it was provided that, 'Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or a true bill; Provided, however, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies.' Now, in the absence of a canvass of the vote upon these amendments, courts having criminal jurisdiction had no means of ascertaining the result of the vote of the people upon them whether adopted or not and where simply groping in the dark as to whether or not felonies might be prosecuted by information as

> well as by indictment, or whether as the Constitution was before the amendment, grand juries were usually convened at each regular term, or under the amendment they could only be convened except by an order of a judge of a court having the power to try and determine felonies, and we are satisfied that in order to avoid any embarassments or complications that might arise under such circumstances, the Legislature intended that the amendments should take effect and be operative from the time of the canvass of the vote therein."

In view of the decisions in *State, ex rel.* v. *Campbell* and *State, ex rel. Rodocker* v. *Schroy, supra,* I am constrained to the conclusion that, pursuant to Section 1 of Article XVI, Ohio Constitution, an amendment to the Constitution becomes a part of the Constitution as of the date on which it is approved by the voters.

I think it is obvious, however, that where an officer is directed by such an amendment to perform a certain act, he can not comply with the order until he knows whether the amendment has become a part of the Constitution. In the instant case, since the result of the vote was not official during the time when the senate was in session in November, there was no way of knowing whether the appointments made during the period from November 7, 1961 to November 21, 1961 had to be reported to the November session of the senate.

Using the theory of the *Kyle* case, *supra,* it might be argued that the amendment could be considered to have become a part of the Constitution on November 7th, and to have gone into effect on December 1st. But that conclusion might very well be viewed as in conflict with the reasoning found in *State, ex rel.* v. *Campbell* and *State, el rel. Rodocker, supra.*

I am of the opinion, therefore, that to answer the question here concerned, it is not possible to rely on any set rule of constitutional interpretation, but the pertinent provision must be applied to the existing fact situation so as to arrive at a reasonable result. In 10 Ohio Jurisprudence, 2d, Section 36, page 137, in referring to interpretation of the Constitution, it is stated:

> "* * * Unreasonable or absurd consequences should, if possible, be avoided. Thus, in determining whether the exemption from excise tax of food for human consumption 'off the premises where sold' applied to sales of milk in paper containers sold through vending machines in manufacturing plants the 'premises' was held to be the vending machine and not the manufacturing

plant since unreasonable results would follow from an adoption of a meaning not limited by the actual control of the vendor."

I believe it would be unreasonable to say that you, as governor, were bound by the terms of the amendment before it had been declared officially adopted. If before or during the November session of the senate, a court action had been instituted to compel you, as governor, to follow the new amendment in making appointments, the court would have had to rule against the action, since there would have been no official declaration or vote count showing that the amendment was a part of the Constitution. And the fact that there later was such an official declaration and count can not change the situation then existing.

Accordingly, I conclude that appointments made during the period of November 7, 1961 to November 21, 1961, under statutes requiring senate confirmation, are not invalid because they were not reported to the November session of the senate. However, since the amendment in question did become a part of the Constitution as of November 7, 1961, I believe that the spirit of that amendment (Section 21 of Article III, *supra*) requires that such appointments should be reported to the next session of the senate under the provision pertaining to appointments made when the senate is not in session.

I am further of the opinion that appointments made between November 21, 1961 and December 1, 1961, where senate confirmation is required by statute, should also be reported to the next session of the senate. Since the amendment became a part of the Constitution on November 7, 1961, it applied to appointments made during that period; and the result is not unreasonable since the appointments may be reported to the next session without any question as to whether the amendment was in force at the time the appointments were made.

In conclusion, it is my opinion and you are advised:

1. While the amendment to Article III, Ohio Constitution, relating to senate confirmation of appointments by the governor, became a part of the Constitution as of the date of its approval by the voters, November 7, 1961, the governor was not required to report appointments made between November 7, 1961 to November 21, 1961, to the November session of the senate (November 14, 1961 to November 21, 1961, inclusive), as the canvassing of the abstracts of vote and the declaration of the secretary of state that the amendment had been approved (Section 3505.35, Revised Code), was not made until December 1, 1961; however, to comply with the spirit

of Section 21 of Article III, Ohio Constitution, such appointments should be reported to the next session of the senate.

2. Since Section 21 of Article III, Ohio Constitution, became a part of the Constitution on November 7, 1961, when it was approved by the voters, appointments requiring senate approval, made from November 21, 1961 to December 1, 1961, should be reported to the next session of the senate; and all appointments made after December 1, 1961, should be made in accord with that constitutional provision.

Respectfully,
MARK MCELROY
Attorney General