

Statutes - Filling Vacancy in the Office of Governor

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United States claimed that in his oath of allegiance the defendant made representations which were false and fraudulent in that, at the time he took the oath, he did not renounce allegiance to Germany but fraudulently reserved it. The defendant moved for a bill of particulars. The court held that although the office of the bill of particulars is fast becoming obsolete because of the easily available and effective discovery procedure, the motion for the bill of particulars would be granted and the defendant would not be required to resort to the discovery procedure. On this point the court said: "There is of course always the choice between a more definite statement in the complaint and disclosure in discovery proceedings. I can see serious objections to allowing the usual sweeping discovery in a case like the present. I think it much the wiser course to proceed with an amplified statement of the charge, sufficient to give the defendant a fair opportunity to prepare for trial, and with as little searching into government evidence later on as many be possible without doing injustice to the defendant."

ANTHONY J. PALASZ.

Statutes — Filling Vacancy in Office of Governor. — Orland S. Loomis, having been elected governor of Wisconsin by defeating the incumbent Julius P. Heil at the November election in 1942, died after certificate of election had been issued to him but before he had taken the oath of office. Walter S. Goodland was elected lieutenant governor in the same election. An original action for a declaratory judgment was brought in the Supreme Court to determine who was entitled to exercise the powers of the governor during the term for which the deceased had been elected. It was *held* that under the provisions of the Wisconsin Constitution the powers, duties and functions of the office of governor devolved upon the lieutenant governor, and not on the incumbent. *State ex rel. Martin v. Heil, et al.*, 7 N.W. (2d) 375 (Wis. 1942).

In reaching this vital conclusion the Court took into consideration four main question:

- (1) Did the incumbent hold over beyond his two year term of office?
- (2) If the incumbent did hold over was it only until a special election for governor was held?
- (3) If the incumbent did not hold over could he appoint a successor as governor?
- (4) Did the lieutenant governor-elect succeed to the powers and duties of the governor?

Due to the dearth of controlling authority the Court based its decision primarily on a reasonable interpretation of the Wisconsin Constitution and on the debates and proceedings of the Constitutional Convention. For this reason, the arguments of the incumbent, the lieutenant governor-elect, and the *amici curiae*, as to what the constitutional interpretation should be, will be reviewed rather than the few decisions which are persuasive but none of which are directly in point.

(1) DID THE INCUMBENT HOLD OVER BEYOND HIS TWO YEAR
TERM OF OFFICE?

The applicable provision of the Wisconsin Constitution is Article V, Section I. "The executive power shall be vested in a governor who shall hold his office for two years; a lieutenant governor shall be elected at the same time and for the same term."

It was argued on behalf of the lieutenant governor that the above clause provides clearly and unambiguously that Governor Heil's term was to last no longer than two years; that in the absence of the clause "and until his successor is elected and qualified" there was no constitutional authority for extending the two-year term of the incumbent. For the latter it was contended that it would be his legal duty to refuse to give up the office of governor to any one except a lawfully chosen successor; that is, one chosen *as governor* and not for some other office. This argument was based on the premise that where the written law contains no provision, either express or implied, to the contrary, an officer holds his office until his successor is elected and qualified. The incumbent relied also on the case of *State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 184 N.W. 683 (1922) where the court construed a constitutional provision that a sheriff should be "chosen by the electors of the respective counties once in every two years" (Article VI, Section 4) to mean that one elected sheriff could hold over until a successor was elected and qualified. As regards this case, however, the lieutenant governor claimed a distinction in that there is no constitutional provision for a "lieutenant sheriff" who is authorized to discharge the duties of the sheriff in case of a vacancy in that office. Thus, if the sheriff were not permitted to hold over there would be a suspension of official functions, which situation could not arise as to the governorship since the Constitution has provided for the devolution of the powers upon a lieutenant governor.

(2) IF THE INCUMBENT DID HOLD OVER WAS IT ONLY UNTIL
A SPECIAL ELECTION WAS HELD?

For the lieutenant governor-elect it was proposed that the constitutional provision as to the election of a lieutenant governor leaves no room for contemplating a special election. Sec. 7.01(4) Wis. Stats. in

providing for special elections to fill vacancies in certain elective offices expressly excepts the offices of governor and lieutenant governor. Attorneys for incumbent argued that although Section 7.01(4) excepts the offices of governor and lieutenant governor, Section 7.02, providing for special elections in particular cases, does not so except these offices and provides that an election shall be held "when the governor, in his discretion, directs such an election to fill any vacancy not provided for by this section and section 7.01." Thus the incumbent would be authorized to call a special election. On behalf of the lieutenant governor it was contended that no special election could be directed until there was a vacancy, that there was no vacancy as long as the present governor continued to be governor, and that after he ceased to be governor he would no longer have power to direct an election.

(3) IF THE INCUMBENT DID NOT HOLD OVER COULD HE
APPOINT A SUCCESSOR AS GOVERNOR?

Here the proponents for the lieutenant governor relied to some extent on the same argument as that presented in opposition to the calling of a special election by the incumbent—that there could be no vacancy in the office of governor until after the present incumbent ceased to be governor, that the present incumbent's authority would have ceased before a vacancy occurred and as a result he would have no power to appoint a successor. *State v. Roden*, 219 Wis. 132, 262 N.W. 629 (1935) was cited as authority for the rule that an appointment may not be made to fill an anticipated vacancy which will not occur until after the one making the appointment has relinquished his authority.

For the incumbent it was argued that under Article XIII, Section 10 of the Wisconsin Constitution ("The legislature may declare the cases in which any office shall be deemed vacant, and the manner of filling the vacancy, where no provision is made for that purpose in the Constitution.") the legislature has been given extensive power to provide for the filling of vacancies; that it has made a provision allowing appointment by the governor of a lieutenant governor to fill a vacancy in that office (Section 17.27(4) Wis. Stats. as construed in *State ex rel Martin v. Ekern*, 228 Wis. 645, 280 N.W. 393 (1938); and that this same provision, since it would authorize the appointment of an officer upon whom the governor's duties might devolve, would also authorize the appointment of a man to fill the office of governor itself.

(4) DID THE LIEUTENANT GOVERNOR-ELECT SUCCEED TO THE POWERS AND DUTIES OF THE GOVERNOR?

This is probably the most important of all the questions presented to the court. The applicable provision of the Constitution is Article V, Section 7. "In case of the impeachment of the governor, or his removal from office, death, inability from mental or physical disease, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the governor, absent or impeached, shall have returned, or the disability shall cease."

Among the many problems presented by this provision are the following: What is meant by the "residue" of the term? Does the word "governor" as used in the clause include a governor-elect? Does the fact that some of the contingencies listed in the clause cannot apply to a governor-elect mean that the provision was not intended to apply to a governor-elect?

The term "residue," it was argued on behalf of the lieutenant governor, may refer to the whole or any part of the term. It is intended merely to limit the time in which the lieutenant governor may act to the governor's two year term; and is not intended to mean that a portion of the term must have elapsed. Also it was contended that "governor-elect" may well be included in the term "governor" as used in the constitutional provision since "governor-elect" is a statutory and not a constitutional word. Section 7 might reasonably be taken to include one who was elected governor and who had not qualified. One of the *amicus curiae* briefs stated the proposition that Mr. Loomis, the deceased governor-elect, "was not elected to become governor, he was elected governor." As to the contingencies on the happening of which the duties of the governor devolve upon the lieutenant governor it was argued that the fact that some would apply only to a governor who has qualified (as impeachment or removal from office) does not mean that the other contingencies are so limited.

Another argument on behalf of the lieutenant governor was this: that the people have elected the lieutenant governor with the knowledge that he might become governor; that they intended him as a substitute in the event that the man who was elected governor could not act; and that the lieutenant governor had to become acting governor if the will of the people was to be given expression.

The incumbent contended, on the other hand, that the term "residue" as used in Article V, Section 7 should be taken strictly, to mean that a term had been commenced and interrupted. They also contended that a governor-elect is not included in the term "governor"; and that the contingencies as provided in the Constitution are only such as may

occur after the term of governor has been commenced. The decision in *State v. Whitman*, 10 Cal. 38 upholds this viewpoint.

The Supreme Court's decision was not based entirely on the exact wording of the constitution and of the statutes. "It is extremely important in the interpretation of constitutional provisions," the court says, "that we avoid determinations based purely on technical or verbal argument and that we seek to discover the true spirit and intent of the provisions examined." Thus, where a constitutional clause presents reasonable ground for difference it must be interpreted in a sense which will bring out the meaning intended by those who adopted the clause.

This case is especially interesting not only because its decision is vital to so many people but also because, being without precedent, its decision is based chiefly upon interpretation rather than citation and upon argumentation rather than quotation—a situation rarely encountered at the present time.

JOAN MOONAN.

Tort Liability — Charitable Corporations.—Plaintiff brought an action against the Young Mens' Christian Association of Chicago for injuries sustained while the plaintiff was a guest in the defendant's hotel, alleging the negligent operation of an elevator in which he was a passenger. In the trial court the defendant moved to strike the complaint, which motion was granted. The decision of both the Superior Court of Cook County and of the Illinois Supreme Court was based upon the fact that the defendant was a charitable corporation and as such was not liable for personal injuries caused by the negligence of its servants or agents, although the injured party paid for its service. *Saffron v. Y.M.C.A. of Chicago*, 45 N.E. (2d) 555 (Ill. App. 1942).

Generally a charitable corporation has been defined by the courts as one operated primarily for the benefit of the public rather than for private gain, but which is not a direct agent of the government. The fact that the institution receives payment for its services from its beneficiaries does not affect its charitable character so long as the fees are for the purpose of enabling it to carry out its charitable purposes and are not for private profit.

A number of the states seem to hold charitable corporations liable almost as though they were operating for private profit, and the question of tort-liability is no different than in the case of any other corporation. However the great weight of authority cannot be said to favor such a rule and in many of the states a charitable corporation enjoys an immunity as to wrongs as to certain classes of persons that a corporation generally does not possess. The conflict among the various