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1. REGISTRATION—PROVISION, SECTION 4785-39 G. C. THAT NO REGISTRATION OR CHANGE IN REGISTRATION OF ELECTORS MAY BE MADE DURING PERIOD FORTY DAYS PRECEDING OR TEN DAYS FOLLOWING PRIMARY OR GENERAL ELECTION IS EXCEPTION TO GENERAL PROVISION—ELECTORS MAY REGISTER AND MAKE CHANGES IN REGISTRATION—OFFICE, BOARD OF ELECTIONS—STATUTE STRICTLY CONSTRUED.
2. CHARTER, CITY OF DAYTON—SPECIAL ELECTION CALLED—“SPECIAL MUNICIPAL ELECTION” NEITHER “A PRIMARY” NOR “GENERAL ELECTION”—SECTION 4785-39 G. C.—REGISTRATION AND CHANGE—ACCEPTANCE BY BOARD OF ELECTIONS—PRIMARY ELECTION—TIME.

SYLLABUS:

1. The provision contained in Section 4785-39, General Code, that no registration or change in registration of electors may be made during the period forty days preceding or ten days following a primary or general election is an exception to the general provision that electors may register and make such changes in registration at the office of a board of elections at any time such office is open, and therefore must be strictly construed.

2. A special election called, pursuant to the provisions of the Charter of the City of Dayton, and therein designated in Section 12 of said Charter as a “special municipal election” is neither “a primary” nor “general election” within the meaning of Section 4785-39, General Code, and registration and change thereof should be accepted by the board of elections at the office thereof at any time when such office is open, which is more than ten days after the primary election on May 2, 1950, and up to the time for closing such office on the day prior to the said special municipal election.

Columbus, Ohio, April 26, 1950

Hon. Mathias H. Heck, Prosecuting Attorney
Montgomery County, Dayton, Ohio

Dear Sir:

Your request for my opinion is as follows:

“In re: Application of Section 4785-39, G. C., to Special Elections held under Charters.

"I am asking your opinion in this matter in order to give some assistance in enabling the City to get relief from an income tax levy. I am enclosing a copy of the Charter of the City of Dayton.

"Under the provisions of Sections 21 to 32, both inclusive, of the Charter of the City of Dayton, petitions have been circulated and filed with the clerk of the City Commission of the City, submitting a proposed ordinance to the City Commission levying an income tax of one-half of one percent on all the net profits of all unincorporated businesses, professions or other activities conducted in the City of Dayton by non-residents and on all salaries, wages, commissions and other personal service compensation earned and received after a specified date.

"Section 171 of the Charter of the City of Dayton provides as follows:

'Unless authorized and approved by a vote of the electors conformably with the general laws of this state, the city commission shall levy no tax outside of the limitations set forth in this section.'

"As this levy will be a levy outside of the limitations set forth in Section 171 of the Charter, it must be submitted to the electors of the City for their approval. It is the plan of the City Commission to reject this proposed ordinance. The committee of the petitioners is then to require that it be submitted to a vote of the electors by filing with the clerk of the Commission a petition for such election bearing additional signatures of fifteen (15) percent of the electors of the city.

"It seems to be conceded that this latter step can be successfully accomplished within time. The City Commissioners have tentatively set May 23, 1950, as the day for submitting this proposed ordinance to the electors at a special election to be held on that day.

"Since the regular primary election is to be held on May 2, 1950, and since Section 4785-39, G. C., as amended January 1, 1950, contains the following provision:

'Persons qualified to register or to change their registration may register or change their registration at the office of the board at any time such office is open except forty days preceding or ten days following a primary or general election.'

"the Board of Elections of Montgomery County desires to be informed if it is your opinion that Section 4785-39, G. C., applies to special elections held under the Municipal Charter of Dayton. * * *"

The problem with which you are confronted, I assume, had its origin with the decision of the Supreme Court of Ohio in *Zimmer, et al., v. Hagerman, Director of Finance for the City of Dayton, et al.*, 153 O. S. 187, decided March 8, 1950. In this case the court invalidated an ordinance of the City of Dayton levying what is commonly referred to as an income tax, for the reason that the question had not been submitted to a referendum of the voters of the city as provided in the Dayton City Charter.

As I understand it, a proposed ordinance to levy such a tax has been initiated by petition of the requisite number of electors, has been or will be rejected by the City Commission, and a supplementary petition bearing the requisite number of signatures will be filed to require the submission of the proposed ordinance to the electors. I further understand that the City Commission proposed to fix May 23, 1950, as the date for a special election on this proposed ordinance. Your inquiry is whether the provisions of Section 4785-39, General Code, are applicable to such a municipal election.

You are aware, of course, that municipalities have the authority to exercise "all powers of local self-government." The Constitution of Ohio, Article XVIII, Section 3, provides as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

In 28 O. Jur. 244, *Municipal Corporations*, Section 129, it is stated:

"Among various other particular matters which have been deemed to fall within the powers of local self-government conferred upon municipalities by Section 3 of Article 18 of the Constitution are: The conduct of municipal elections; * * *"

Municipalities had the right and power to confer upon women the right to vote for all municipal elective officers, and to be appointed or elected to and hold any municipal office provided for in the city charter, at a time when the state constitution conferred such rights only on men possessing the qualifications of electors. In the case of *State, ex rel., Taylor v. French, et al.*, 96 O. S. 172, the second branch of the syllabus is as follows:

"The Constitution itself having by Article XVIII committed

to any municipality the power to frame and adopt a charter for its government and to exercise thereunder all powers of local self-government, subject to the limitations expressed in that article, a provision in the charter of a municipality, adopted in full compliance with the article referred to, which confers upon women the right to vote for all municipal elective officers and to be appointed or elected to and hold any municipal office provided for in such charter, is valid. (Mills v. City Board of Elections et al., 54 Ohio St., 631, and State, ex rel., v. City of Cincinnati et al., 19 Ohio, 178, approved and followed.)”

The rule is otherwise as to the conduct of state and county elections. See State, ex rel. Automatic Registering Machine Co., v. Green, Dir. of Finance, 121 O. S. 301. In this case the second branch of the syllabus is as follows :

“A charter city is not authorized, under Section 3 of Article XVIII of the Ohio Constitution, to prescribe a method of conducting state and county elections.”

You have submitted with your letter a copy of the Charter of the City of Dayton. Sections 7 to 20, both inclusive, are listed as “Election Provisions.” Section 7A thereof deals with primary elections for the nomination of candidates for Commissioners, which are held on the second Tuesday of August of the odd numbered years.

Section 12 thereof deals with “Regular and Special Elections.” After providing for “a regular election” to choose Commissioners, which is to be held on the first Tuesday after the first Monday in November in odd numbered years, this section continues :

“* * * Elections so held shall be known as regular municipal elections. All other elections held under the provisions of this charter, excepting those for the nomination of candidates for the office of Commissioner, shall be known as special municipal elections. *All elections shall be conducted and the results canvassed and announced by the election authorities prescribed by General Election Laws, and, except as otherwise provided herein, the General Election Laws shall control in all such elections.*”

(Emphasis mine.)

Section 11 thereof with reference to deciding tie votes also makes reference to the General Election Laws of the State of Ohio.

In Section 171 of said Charter, the next to the last paragraph, I find the following provision :

“* * * Unless authorized and approved by a vote of the electors conformably with the general laws of this State, the City Commission shall levy no tax outside of the limitations set forth in this Section. * * *”

You have not pointed out, nor have we been able to find, any provision of the Dayton City Charter providing that the election laws of the state shall not apply. Assuming this to be true, it follows that the state election laws do apply and that, in so far as applicable, they are controlling. In other words, there is no necessity to determine the effect of a conflict unless one is present.

You have stated that the City Commission proposes to hold a special election on May 23, 1950. The primary election for the purpose of nominating candidates for election to state and county offices and electing members of controlling committees of political parties will be held on May 2, 1950.

You ask whether Section 4785-39, General Code, relating to registration and change of registration, is applicable to the special municipal election proposed to be held on May 23rd. In view of the provisions of the said section banning registration during the period of forty days before and ten days after a primary or general election, I assume that you are primarily concerned with the dates, if any, on which registration may take place in advance of said special municipal election.

A somewhat similar question arose in 1947 when the then Governor of Ohio called a special primary and special election for the purpose of nominating and electing a member of Congress from the 4th Congressional District of Ohio. The nomination of candidates by said proclamation was to take place at an election to be held on October 7, 1947, which was not the date for the regular primary election that year, and the special election to elect the member of Congress was set for November 4, 1947, the same date as the general elections for municipal and township offices that year. The proclamation of the Governor was issued on September 9, 1947.

Section 4785-39, General Code, at that time provided that no registration should take place during a period twenty-eight days prior to and ten days after either a primary or a general election. It was decided that the provisions of Section 4785-39, General Code, did not apply to the special election called for the purpose of nominating Congressional candi-

dates. In the case of *State, ex rel. Campbell v. Durbin*, 81 O. App. 398, the Court of Appeals, in the first branch of the syllabus, held as follows:

“When a vacancy occurs in a congressional district that requires an election for the nomination of candidates for the office of representative of the United States House of Representatives at a time other than the time when the General Code provides for the regular nominations for members of the United States House of Representatives, such an election is a special election and governed by the pertinent General Code provisions as to a special election rather than the General Code provisions relating to a primary election.”

While this decision turned on the applicability of certain sections of the election laws, notably Sections 4785-97 and 4829, General Code, dealing with filling vacancies in the office of Representative to Congress, the observations of the court in the course of the opinion are pertinent here. At p. 406 the court says:

“Section 1 of Article V of the Constitution of Ohio provides:

‘Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.’

“The rights conferred by those constitutional provisions are recognized as an essential part of our liberties. The General Assembly, under the grant of legislative power secured to it by the Constitution, has power by statute to provide for the registration of voters, and to direct that all electors must register before being permitted to vote. Such an act, however, to be valid, must be reasonable and impartial and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert or injuriously, unreasonably, or unnecessarily restrain, impair or impede the right. *Daggett v. Hudson*, 43 Ohio St., 548, 3 N. E., 538, 54 Am. St. Rep., 832.

“The rule applicable to the construction of statutes regulating those rights is that such statutes must be so construed as to insure, rather than defeat, exercise thereof when and where possible. *Manning v. Young et al., Bd. of Election Commrs.* (1933), 210 Wis., 588, 247 N. W., 61. The decision in this case is in conformity with this rule.”

The provisions of Section 4785-39, General Code, are as follows:

“Persons qualified to register or to change their registration

may register or change their registration at the office of the board at any time such office is open except forty days preceding or ten days following a primary or general election, provided that any registered elector who removes from one precinct to another in the same political subdivision after the close of such registration period shall have the right to vote at the next succeeding election in the precinct from which he moved, wherein he was legally registered.”

It will be noted that this section permits registration or change of registration at the office of the board of elections “at any time such office is open,” except during the forty days preceding or ten days following “a primary or general election.” Section 4785-34, et seq., General Code, require registration in all municipalities having a population in excess of 16,000, and obviously registration is required in the City of Dayton.

The provision closing registration before and after a primary or general election, namely Section 4785-39, General Code, is an exception to the general provision and hence must be strictly construed. It should be made applicable only in the cases mentioned therein, namely primary and general elections. As stated in *State, ex rel. Campbell v. Durbin*, supra, such statutes “must be so construed as to insure, rather than defeat, exercise thereof when and where possible.” The Charter of Dayton, in Section 12 cited above, denominates the proposed May 23rd election as a special municipal election.

Section 4785-3, General Code, as amended by the 98th General Assembly in Am. S. B. 206, effective September 26, 1949, provides in part as follows:

“The terms hereinafter specified, when used in the statutes of Ohio relating to elections, the nomination of persons as candidates in elections, the registration of persons to qualify them as electors, and other related matters, shall have the meanings hereinafter specified unless the context of the words with which they are used shall clearly indicate another meaning.

“a. The term ‘general election’ shall mean any election held on the first Tuesday after the first Monday in November.

“b. The term ‘regular municipal election’ shall mean the election held on the first Tuesday after the first Monday in November in odd-numbered years.

“c. The term ‘regular state election’ shall mean the election held on the first Tuesday after the first Monday in November in even-numbered years.

“d. The term ‘special election’ shall mean any election other than the elections required by law to be regularly held on the day of a general or primary election, provided, however, that a special election may also be held on the day of a general or primary election.

“e. The term ‘primary’ or ‘primary election’ shall mean an election held for the purpose of nominating persons as candidates of political parties for election to offices, and for the purpose of electing persons as members of the controlling committees of political parties and as delegates and alternates to the conventions of political parties. *Primary elections shall be held on the first Tuesday after the first Monday in May of each year.*”

(Emphasis mine.)

It will be apparent to you, and it is my opinion, that :

1. The provision contained in Section 4785-39, General Code, that no registration or change in registration of electors may be made during the period forty days preceding or ten days following a primary or general election is an exception to the general provision that electors may register and make such changes in registration at the office of a board of elections at any time such office is open, and therefore must be strictly construed.

2. A special election called, pursuant to the provisions of the Charter of the City of Dayton, and therein designated in Section 12 of said Charter as a “special municipal election” is neither “a primary” nor “general election” within the meaning of Section 4785-39, General Code, and registration and change thereof should be accepted by the board of elections at the office thereof at any time when such office is open, which is more than ten days after the primary election on May 2, 1950, and up to the time for closing such office on the day prior to the said special municipal election.

Respectfully,

HERBERT S. DUFFY,
Attorney General.