

frequent use is made of the words probate judge and unless in these instances there is meant to include the common pleas judges with probate powers there would be no sufficient machinery for the collection of inheritance taxes in those counties where the two courts are combined. In the particular section there is required to be taxed in the costs in inheritance tax proceedings the fee fixed for probate judges and no other disposition is fixed for the fee but that it shall be retained by that officer. If the common pleas judge is not a probate judge within the intendment of the statute there would be either no costs assessed in such proceeding in counties where the courts are combined, or if assessed there would be no way to dispose of the fee when collected. We conclude that the words probate judge in one part of the chapter refer to the same officer as in other parts of the chapter and that wherever used they apply to the common pleas functioning as a probate judge.

No constitutional question has been argued or suggested. Quære: Does the allowance of a greater fee where tax is assessed than where one is not assessed violate the constitutional principle developed in the Tumey case?"

In view of the foregoing decision of said Court of Appeals and for the reasons therein stated, I am of the opinion that where the Probate Court has been combined with the Common Pleas Court the Common Pleas Judge becomes the Probate Judge, within the meaning of Section 5348-10a, General Code, and is entitled to the fees as provided in said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2211.

ELECTION—SPECIAL ELECTION DEFINED—LAWS GOVERNING SPECIAL
ELECTION TO UNITED STATES SENATE.

SYLLABUS:

1. A special election is one provided for by law under special circumstances. It is an election held to supply a vacancy in office before the expiration of the full term for which the incumbent was elected, or an election at which some question or proposition is submitted to the vote of the qualified electors, or an election for some particular emergency.

2. Where, pursuant to the provisions of Section 4828-3, General Code, a special election is to be held at the election of state officers in November, for the purpose of filling a vacancy in the representation of this state in the senate of the United States, the candidates to be voted for at such special election must be nominated on the second Tuesday in August of the same year, and the primaries at which such candidates are nominated, are to be governed by the same laws and regulations and conducted in the same manner as is provided for the nomination of candidates at regular elections.

3. A special election held pursuant to the provisions of Section 4828-3, General Code, for the purpose of filling a vacancy in the representation of this state in the United States Senate, is to be governed in all respects by the laws of this state controlling regular elections for United States Senator, including Sections 5016 and 5017, General Code, which provide *inter alia* that the names of all candidates, whose nominations for any office specified in the ballot have been duly made, shall be placed on the same ballot, arranged in tickets or lists under the respective party or political or other designation certified.

COLUMBUS, OHIO, June 7, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date requesting my opinion, which letter reads as follows:

“We are enclosing herewith copy of the writ of election issued by the Governor to fill the vacancy in the office of United States Senator occasioned by the death of Honorable Frank B. Willis. We request your opinion on the manner of conducting a primary for the nomination also the election to fill this vacancy.”

The copy of the Writ of Election and Proclamation issued by the Governor, which you enclose, is in the following language:

“WRIT OF ELECTION AND PROCLAMATION

To the

HON. CLARENCE J. BROWN, *State Supervisor of Elections, Columbus, Ohio.*

Whereas, a vacancy has occurred in the office of United States Senator for Ohio.

Now, therefore, I, Vic Donahey, Governor of Ohio, by virtue of the powers vested in me by Section 4828-3, General Code, hereby direct that a special election be held to fill the vacancy, in Ohio, on Tuesday, November 6, 1928.

I further direct that on Tuesday, the fourteenth day of August, 1928, a special primary be held for the purpose of nominating candidates for such election.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, Ohio, this 2nd day of May in the year of our Lord, one thousand nine hundred and twenty-eight.

(Signed)

VIC DONAHEY,
Governor.”

Section 4828-3 of the General Code, expressly referred to in the above Writ of Election, provides that:

“When by death, resignation or otherwise, a vacancy occurs in the representation of this state in the senate of the United States, the same shall be filled forthwith by appointment by the governor who shall have power to appoint to fill such vacancy some suitable person having the necessary qualifications for senator, which appointee shall hold office until the fifteenth day of December next succeeding the next election of state officers which occurs more than one hundred and eighty days after such vacancy happens. At such next election of state officers a special election to fill such vacancy in the office of United States senator shall be held, which special election shall be governed in all respects by the laws of this state controlling regular elections for such office. Candidates to be voted for at such special election shall be nominated in the same manner as is provided for the nomination of candidates at regular elections.

At least one hundred and eighty days prior to the date of such election of state officers the governor shall issue a writ, directing that a special election be held

to fill such vacancy as herein provided. Such writ shall be directed to the state supervisor of elections and a copy thereof sent by mail to the sheriff of each county in the state who shall give notice of the time and place of holding such special election in the same manner and at the same time provided in Section 4827 for giving similar notice for regular elections." (Italics the writer's.)

The above section was enacted in an act passed February 2, 1914, "relative to the nomination and election of United States Senators", Section 4828-2, General Code, enacted at the same time and in the same act reading as follows:

"On the first Tuesday after the first Monday in November, 1914, and every sixth year thereafter, and on the first Tuesday after the first Monday in November, 1916, and every sixth year thereafter, the electors of the state shall vote for a member of the senate of the United States, each for the term commencing on the 4th day of March next succeeding his election. Notice of such elections shall be given by the proper sheriffs of the several counties of the state at the same time and in the same manner as is provided for in Section 4827 for the election of state officers."

This act was passed in conformity with the provisions of the Seventeenth Amendment to the Constitution of the United States, adopted in 1913, which amendment provides in part as follows:

"The Senate of the United States shall be composed of two Senators for each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

Where vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct. * * *"

By the terms of Section 4828-3, above quoted, when a vacancy occurs in the representation of this state in the Senate of the United States, such vacancy shall be filled forthwith by appointment by the Governor, the appointee to hold office until the fifteenth day of December next following the next election of state officers, which occurs more than one hundred and eighty days after the vacancy happens. The section further provides that at such next election of state officers a *special election* to fill the vacancy "*shall be held, which special election shall be governed in all respects by the laws of this state controlling regular elections for such office.*" It is further provided that the candidates to be voted for at such special election shall be nominated "*in the same manner*" as is provided for the nomination of candidates at regular elections."

It will be observed that the Legislature has definitely fixed the time when an election to fill a vacancy in the representation of this state in the United States Senate may be held, and that under the express provisions of the section under consideration such election must be held on the *same* day as the election for state officers is held. This election to fill a vacancy in the office here involved is designated a "special election"; and it is my opinion that the term "special election" is here used in contradistinction to the term "regular election" rather than the term "general election." That is to say, it is a special election, not because of the manner of holding the same and the provisions of law controlling the conduct thereof, but for the reason that it is held

to supply a vacancy in office and at a time an election for senator would not ordinarily be held.

In 9 R. C. L. 978, the distinction between special and general elections is pointed out in these words:

*"Elections are frequently referred to as special and general. Any election which is not regularly held for the election of officers or for some other purpose which shall come before the electors at regular fixed intervals is a special election. It is opposed in meaning more particularly to regular than to general elections, and so where elections are classified as general and special, a regular annual municipal election cannot be included in the latter class, but must be treated as a general election. Distinctions between special and general elections concern only the steps taken in advance of the election, such as giving notice of time, place of holding, and objects of the election. As to the validity of the election held after proper notice and for lawful purposes, after authorization by the constituted authority, and regularly conducted, no distinctions can be drawn between special and general elections. * * *"* (Italics the writer's.)

In 20 C. J. 56, a special election is defined as follows:

*"A special election is one provided for by law under special circumstances. It is an election held to supply a vacancy in office before the expiration of the full term for which the incumbent was elected, or an election at which some question or proposition is submitted to the vote of the qualified electors, or an election for some particular emergency. It is not necessarily the time or manner of holding an election to fill a vacancy that makes it a special election, but the fact that it is held at a time other than the time fixed by law to elect an officer for the regular or defined term; an election to fill a vacancy is a special election, although held on the same day as a general election. * * *"* (Italics the writer's.)

In your communication you request my opinion as to the manner of conducting both the primary for the nomination of candidates and also the election to fill the vacancy, which will exist in Ohio's representation in the Senate of the United States at the expiration of the term of the present incumbent, temporarily appointed to serve until December 16, 1928.

As to your first question, it is my opinion that under the provisions of Section 4828-3, supra, the primary in question must, as a matter of law, be held on the second Tuesday in August of this year, and that the candidates to be voted for, at the special election to be held in November, are required to be nominated in the same manner as is provided for the nomination of candidates at regular elections.

While Section 4964, General Code, provides that:

"When a call is issued for a special election, except as otherwise provided by law, the date of the primary shall be fixed at the same time and in the same manner by the authority calling such special election, which primary shall be held at least two weeks prior to the time fixed for such special election. Declarations of candidacy and certificates for such primary shall be filed and fees shall be paid at least ten days before the date of holding the same and such election shall be called so as to allow at least five days for preparing and filing such nomination papers."

it is my opinion that this section has no application to special elections or special primaries held for the purpose of filling vacancies in the office of United States Senator.

The context of this section contemplates both a "call" for a special election and the fixing of the date upon which the same is to be held. As above pointed out, the date of the special election under consideration is not fixed in any call therefor. In fact, there is no "call" for any such election, Section 4828-3, specifically providing when such an election shall be held and fixing the date thereof, and making it the *mandatory* duty of the Governor to issue a writ therefor, when there is a vacancy as described in the statute.

Even if it were to be held that Section 4964 is applicable to an election held under the provisions of Section 4828-3, by the express terms of Section 4964, such an election would be excepted from the operation thereof. You will note the words contained in the first sentence of Section 4964, supra, "except as otherwise provided by law". Since Section 4828-3 expressly provides that candidates to be voted for at the special election "shall be nominated in the same manner as is provided for candidates at regular elections", it seems clear that the Legislature intended the party nominee for United States Senator to be selected at the regular primary and under the same laws and regulations and in the same manner as is provided for the nomination of candidates at regular elections.

Certainly this is the more reasonable construction, for if Section 4964 be applicable, then the primary might be held as late as two weeks prior to the date of the special election and in such case declarations of candidacy and certificates for such primary would not have to be filed until ten days before the date set for holding the primary. The undesirability of having such provisions apply to a state-wide election for the purpose of selecting a person to fill the important office of United States Senator is obvious. The electors would have practically no opportunity to inform themselves as to the respective merits of the various candidates and the practical difficulties surrounding the printing and distribution of the ballots under such circumstances would almost be insurmountable. In addition it is a matter of common knowledge that only a fraction of the electorate records its preferences on any other than the regular ballot, containing the names of all the candidates. Experience has shown that but about two-thirds of the voters express their choice for the candidates for the judiciary appearing on the separate judicial ticket, and that often even less than this number mark the separate ballots, on which questions to be decided by the voters are submitted.

The cardinal principle of statutory construction and interpretation is to ascertain and give effect to the intention of the law makers. And in determining this intention, the object sought to be accomplished by the Legislature, in the enactment of a statute, is a most important factor in determining the meaning of such statute. As said by Sutherland in his work on Statutory Construction, page 375:

"When the meaning of a statute or any statutory provision is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. *The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but also the minor provisions of a statute.* To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment. * * *"

In 36 Cyc. 1111, it is said:

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils on the former law, and the remedy provided by the new one; and the statute should

be given that construction which is best calculated to advance its objects, by suppressing the mischief and securing the benefits intended. For the purpose of determining the meaning, although not the validity, of a statute, recourse may be had to considerations of public policy, and to the established policy of the Legislature as disclosed by a general course of legislation. * * *

Unquestionably the purpose of the Legislature in the enactment of Section 4828-3 was to permit the people of Ohio to elect the representatives of their state in the United States Senate in accordance with the provisions of the Seventeenth Amendment. The word "elect" means "to choose"; and an election by the people means an expression of choice by the people. It can not be gainsaid that the nomination of the candidate for the special election to fill the vacancy in question at the regular primary in August, on the regular ballots and in the ordinary way will secure and will greatly facilitate the expression of their choice by a much greater proportion of the electors, than would the holding of a special primary or the use of separate ballots. And this, together with the fact that the construction here adopted affords ample time for the voters to inform themselves and exercise their right of suffrage intelligently, in my opinion, is not the least of the reasons supporting the conclusions herein reached.

In specific answer to your first question, therefore, for the reasons above set forth, it is my opinion that where, pursuant to the provisions of Section 4828-3, General Code, a special election is to be held at the election of state officers in November, for the purpose of filling a vacancy in the representation of this state in the Senate of the United States, the candidates to be voted for at such special election must be nominated on the second Tuesday in August of the same year, and that the primaries, at which such candidates are nominated, are to be governed by the same laws and regulations and conducted in the same manner, as is provided for the nomination of candidates at regular elections.

As to your second question, you will note that Section 4828-3, General Code, expressly provides that special elections of the kind under consideration "shall be governed in all respects by the laws of this state controlling regular elections for such office."

I find no sections of the General Code, making special provisions with reference to the manner in which these special elections shall be conducted and, by reason of the language just quoted, reference must be had to the sections of the Code controlling regular elections.

Your attention is directed to Sections 5016 and 5017, which provide as follows:

Section 5016. "Except as in this chapter provided, the names of all candidates to be voted for on the first Tuesday after the first Monday in November shall be placed upon the same ballot."

Section 5017. "Every ballot intended for the use of electors, printed in accordance with the provisions of this chapter, shall contain the names of all the candidates whose nominations for any office specified in the ballot have been duly made and not withdrawn in accordance herewith, arranged in tickets or lists under the respective party or political or other designation certified; except that at the election when presidential electors are to be voted for the names of all candidates for presidential electors shall be printed on a separate ballot.

On the separate ballot for presidential electors the Secretary of State shall place the names of the candidates for president and vice-president on the proper ticket, immediately following the name of the party, and immediately preceding the names of the presidential electors."

Both of these sections were in existence at the time of the enactment of Section 4828-3, supra, by the Legislature, which acted with full knowledge of the existing condition of the law and with reference to it. It must be said, therefore, that the Legislature was familiar with the provisions of Sections 5016 and 5017, above quoted, and with the provisions of all the other sections relating to regular elections. And since the Legislature did not see fit to make any special provisions with reference to the printing of the ballots and the other matters pertaining to the holding of special elections of the kind under consideration, it follows that, in view of the provisions of Section 4828-3, General Code, above commented upon, the special election for United States Senator should be conducted in all respects as are the regular elections for such office.

That the Legislature intended the sections governing the regular elections to control this special election is further shown by the provisions of the last sentence of Section 4828-3 to the effect that a copy of the Writ of Election issued by the Governor should be "sent by mail to the sheriff of each county in the state who shall give notice of the time and place of holding such special election *in the same manner and at the same time provided in Section 4827 for giving notice for regular elections.*" Here the Legislature has by specific reference referred to and incorporated the provisions of one of the sections relating to regular elections.

Much of the discussion pertaining to your first question is here applicable, and I desire to repeat that that construction should be adopted which best serves efficiently to secure the fullest expression of choice by the people of Ohio, as to who should serve the state as its representative in the United States Senate.

I am not unmindful of the opinion reported in Opinions, Attorney General, 1918, Vol. 1, page 981, in which it was held as follows:

"Where a vacancy in the office of representative to congress occurs and the governor issues a writ of election directing that a special election be held to fill such vacancy, and in such writ fixes a date for the primary as provided for in Section 4964 G. C.; and where the date so fixed for said primary is the date for holding the regular primary election, the special primary election for nominating candidates to fill the vacancy in the office of representative to congress shall be conducted separately from the regular primary election; that is, there should be a separate ballot, poll books and ballot box for said special election, although conducted by the same election officers.

In the conduct of a special election on the 5th of November, for the election of a member to congress to fill a vacancy, there should be a separate ballot, poll books and ballot box for said special election, and the election officers at the general election shall conduct said special election."

In that opinion, however, the election was held under the provisions of Section 4829, General Code, which reads as follows:

"When a vacancy in the office of representative to congress or senator or representative to the General Assembly occurs, the governor, upon satisfactory information thereof, shall issue a writ of election, directing that a special election be held to fill such vacancy in the territory entitled to fill it on a day specified in the writ. Such writ shall be directed to the sheriff or sheriffs within such territory who shall give notice of the time and places of holding such elections as in other cases. Such election shall be held and conducted and returns thereof made as in case of a regular election."

The provisions of that section are entirely different from Section 4828-3, General Code, in that the Governor is empowered to fix the time of holding an election to fill a vacancy in the office of representative to Congress or senator or representative in

the General Assembly. As above pointed out, in the instant case, the time of holding a special election to fill a vacancy in the office of United States Senator is fixed by statute and such election can be held at no other time than when an election for state officers is held.

In the opinion referred to, the then Attorney General said as follows:

“* * * Ordinarily, special elections are called for voting on questions or propositions, and Section 5020 G. C. provides that ‘when the approval of a question, other than a constitutional amendment, is to be submitted to a vote, such question shall be printed on a separate ballot and deposited in a separate ballot box, to be presided over by the same judges and clerks of election.’

There does not seem to be any special section of the statute making similar provisions when candidates are to be voted for at a special election, *but since it is only rarely that such special election would be called for the regular election day, and since such election must be a special election, it necessarily follows that while it is held upon the same days as the primary and the regular election, it is entirely separate and distinct from the primary and the regular election, and, while conducted by the same election officers, must be kept separate and apart.* This necessitates a separate ballot, poll books and ballot box for the special election.” (Italics the writer’s.)

You will note that one of the reasons given in the opinion for holding that separate ballots, poll books and ballot boxes were necessary was that special elections of the kind there involved were rarely called for the regular election day. That reason for the conclusion could never exist in the instant case, since a special election of United States Senator can only be held on the day of the regular election of state officers. For these reasons I think it clear that the above opinion is not pertinent here.

Specifically answering your second question, for the reasons above set forth, it is my opinion that a special election, held pursuant to the provisions of Section 4828-3, General Code, for the purpose of filling a vacancy in the representation of this state in the United States Senate, is to be governed in all respects by the laws of this state controlling regular elections for United States Senator, including Sections 5016 and 5017, General Code, which provide *inter alia* that the names of all candidates, whose nominations for any office specified in the ballot have been duly made, shall be placed on the same ballot, arranged in tickets or lists under the respective party or political or other designation certified.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2212.

APPROVAL, CERTIFICATE OF AMENDMENT TO THE ARTICLES OF
INCORPORATION OF THE COMMERCIAL MUTUAL INSURANCE
COMPANY.

COLUMBUS, OHIO, June 7, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning to you herewith the certificate of amendment of the articles of incorporation of The Commercial Mutual Insurance Company, changing its location, with my approval endorsed thereon.

Respectfully,

EDWARD C. TURNER,
Attorney General.