

298.

PROBATE JUDGE—VACANCY IN OFFICE—WHEN ELECTION HELD
TO FILL UNEXPIRED TERM.

SYLLABUS:

Where a vacancy occurred in the office of probate judge on March 7, 1929, an election should be held to fill the unexpired term at the November election in 1930.

COLUMBUS, OHIO, April 12, 1929.

HON. JOHN R. PIERCE, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—In your recent communication you request my opinion on the following statement of facts:

“The probate judge of Mercer County died on March 7th, 1929, vacancy filled by appointment by the Governor.

Section 13, Article Four, of the Constitution of the State of Ohio is as follows, to wit:

‘VACANCIES HOW FILLED.

In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the Governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened.’

Section 10, of the General Code is as follows, to wit:

‘TERM OF APPOINTEE TO ELECTIVE OFFICE.

When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy.’

You will observe that the Constitution provides that in such cases a successor shall be elected for the unexpired term at the next annual election occurring more than thirty days after the vacancy shall have happened.

The statute provides that the election of the successor where a vacancy occurs shall be held at the first *general* election that occurs more than thirty days after the vacancy shall have occurred, unless otherwise provided by law.

The clause ‘Unless otherwise provided by law’ I interpret to mean an exception in case of vacancies occurring in judicial offices as provided for in the Constitution.

There seems to be some difference in opinion on this point, and I am asking your opinion, as to whether or not an election shall be held this fall at the annual election for probate judge in Mercer County or at the next General election.”

Section 1580 of the General Code, which relates to the term of office of a probate judge, reads :

“Quadrennially, one probate judge shall be elected in such county, who shall hold his office for a term of four years, commencing on the ninth day of February next following his election.”

Section 4826 of the General Code provides in part :

“All general elections for elective state and county offices and for the office of judge of the Court of Appeals shall be held on the first Tuesday after the first Monday of November in the even numbered years.”

In connection with your inquiry, your attention is directed to Opinion No. 2682 issued by the Attorney General under date of October 8, 1928, to Honorable Clarence J. Brown, Secretary of State, in which it was held as stated in the first branch of the syllabus :

“Where a vacancy occurs in the office of judge of the Court of Common Pleas, a successor to fill his unexpired term should be elected at the first general election occurring in an even numbered year more than thirty days after such vacancy may have occurred.”

The opinion above referred to contains a rather comprehensive discussion relative to the constitutional provisions and statutes with reference to elections for the unexpired terms of judicial officers. Said opinion refers to the case of *State ex rel. vs. Metcalf*, 80 O. S. 244, which is a leading case upon the subject, and also refers to an opinion of the Attorney General found in the Opinions of the Attorney General for 1915, Volume I, page 862, which considered the Metcalf case, and also Article XVII, of the Constitution, adopted November 7, 1905, which article, in Section 2, provides in part as follows :

“Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law. (As adopted November 7, 1905; 97 v. 641.)”

The conclusion reached by the Attorney General in the 1928 opinion *supra*, was to the effect that Section 4, of Article XIII, and Section 2, of Article XVII, when construed together, required a Common Pleas judge to fill an unexpired term, to be elected at the first general election occurring in an even numbered year more than thirty days after a vacancy may have occurred in the office.

In this connection, it will be noted that the statutes expressly provide that a vacancy in the office of a Common Pleas judge shall be filled at the election occurring in the even numbered years. Your attention is also directed to an opinion of the Attorney General, Opinions of the Attorney General for the year 1927, Volume I, page 157, which contains an extensive consideration of the question of the time for holding elections to fill vacancies, although in that opinion the specific facts involved

a vacancy in the office of a county auditor. However, this opinion refers to many opinions construing the constitutional provisions and statutes relative to the time of holding elections to fill vacancies generally.

Without undertaking to set out the said 1927 opinion at length, it is believed sufficient to state that it properly points out that Section 10, of the General Code, in referring to "the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred" has reference to elections held in the even numbered years and in the odd numbered years. That is to say, unless it is otherwise provided by law, the intent of the language of Section 10, General Code, means that a vacancy in an office shall be filled at the first general election that is to be held for the office that is vacant.

Without further discussion, it may be stated that the courts have pointed out that Section 4, of Article XIII, of the Constitution, which relates to "annual election" must be construed in connection with Article XVII, of the same instrument, and therefore vacancies in judicial offices shall be filled at general elections in even numbered years, unless otherwise provided by law. In the case of a probate judge, there is no specific statutory provision relative to the time of election to fill a vacancy, and therefore we must turn to the provisions of Section 10, of the General Code, and the constitutional provisions hereinbefore mentioned.

In view of the foregoing, it is my opinion that where a vacancy occurred in the office of probate judge on March 7, 1929, an election should be held to fill the unexpired term at the November election in 1930.

Respectfully,
GILBERT BETTMAN,
Attorney General.

299.

COUNTY MEMORIAL BUILDINGS—CONSTRUCTED PRIOR TO AMENDMENT OF SECTION 3068, GENERAL CODE, IN 109 OHIO LAWS—UNDER JURISDICTION OF COUNTY COMMISSIONERS.

SYLLABUS:

County memorial buildings constructed, equipped or decorated prior to the amendment of Section 3068 in 109 Ohio Laws, continue to be under the jurisdiction of the county commissioners as provided in Section 3068 prior to such amendment.

COLUMBUS, OHIO, April 13, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your recent communication, which reads as follows:

"We respectfully request you to furnish this department your written opinion on the following:

Under an act of the General Assembly, passed March 12, 1902, 95 O. L. 41, memorial buildings were constructed. Under Section 10 of this act, such memorial buildings were under the jurisdiction of the county commissioners. This act was carried into the code as Section 3059 et seq., and in 109 O. L. 284, several of the sections were amended so as to provide for the appointment by the Court of Common Pleas of a board of trustees for the operation of memorial buildings.