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PROBATE JUDGE — OFFICE ABOLISHED — COMBINED COURTS, PROBATE AND COMMON PLEAS — COMMISSION ON JUSTICE COURTS—WILL CONSIST OF TWO MEMBERS, PRESIDING JUDGE OF COMMON PLEAS COURT AND PRESIDENT OF BOARD OF COUNTY COMMISSIONERS—SECTION 1907.01 RC — AMENDMENT EFFECTIVE JANUARY 1, 1956 — AM. SB 319, 101 GA.

SYLLABUS:

In counties when the office of probate judge has been abolished by the combining of the probate court with the court of common pleas, under the provisions of Section 2101.43, et seq., Revised Code, the "commission on justice courts" created by the terms of Section 1907.01, Revised Code, as amended effective January 1, 1956 by the enactment of Amended Senate Bill No. 319, 101st General Assembly, will consist of two members only, i.e., the presiding judge of the common pleas court and the president of the board of county commissioners.

Columbus, Ohio, October 4, 1955

Hon. Harold D. Roth, Prosecuting Attorney
Wyandot County, Upper Sandusky, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"I have been asked to secure an interpretation from your office in connection with the first paragraph of Revised Code Section 1907.01 (amended Senate Bill No. 319) effective January 1, 1956.

"The section reads as follows: 'There is hereby created in each county of the state a commission to be known as the Commission on Justice Courts consisting of the presiding Judge of the Court of Common Pleas, the Probate Judge and the President of the Board of County Commissioners.'

"Wyandot County some years ago combined the Court of Common Pleas with the Probate Court under Revised Code Section 2101.43 et seq. and is presently operating as a combined Court. One judge acts as both Common Pleas Judge and Probate Judge. The above Section creates a Commission on Justice Courts consisting of the Judge of the Court of Common Pleas,

the Probate Judge and the President of the Board of County Commissioners.

“Your attention is called to Revised Code Section 2101.45 wherein by virtue of the law, there is established a Probate Division in the Court of Common Pleas.

“The question raised is ‘How can compliance be had with Revised Code Section 1907.01 in creating a three member commission on justice courts by a County operating under a combined court system authorized by Revised Code Section 2101.43 et seq.’”

Section 2101.45, Revised Code, mentioned in your inquiry, provides in part:

“When the probate court and the court of common pleas have been combined as provided in sections 2101.43 and 2101.44 of the Revised Code, there shall be established in the court of common pleas a probate division and all matters of which the probate court has jurisdiction shall be filed and separately docketed in said division. * * *”

Section 7, Article IV, Ohio Constitution, provides in part:

“* * * such courts shall be combined and shall be known as the court of common pleas in case a majority of the electors * * * vote in favor of such combination.”

In considering this constitutional language in *State, ex rel. Shirley, v. Corbelt*, 113 Ohio St., 23, the court evidently regarded such a combination as having the effect of abolishing the office of probate judge. On this point it was said by Robinson, J. pages 31, 32:

“* * * The effect of the abolition of an office is always to terminate the term of the incumbent, since he cannot be an officer or incumbent of an office which has ceased to exist, and what has been said as to the incumbent of course is equally applicable to the officer elect.

“The office having been created by Constitution of course can be abolished only by the Constitution, and the power to abolish by the Constitution is not limited to an abolition taking effect immediately, but extends to abolitions taking effect at some future date, or upon the happening of a contingency. The contingency in this case was the majority of the electors duly voting for the combination of the two courts, and the effect of that vote is in no sense neutralized, or the operation of the Constitution stayed, by the fact that at the same election the relator was elected probate judge for a four-year term, since the electors of a county having created the contingency are without power to neutralize the constitutional effect thereof. * * *”

It is evident, therefore, that in the case you describe there is no existing office of "probate judge" in your county and it is clear that a third member of the commission created under the provisions of the enactment in question has not been provided for. It does not follow, however, that this enactment is wholly inoperative as to such a county, simply because it is impossible to give it complete effect. The rule in this regard is stated in 37 Ohio Jurisprudence, 614, 615, Section 339, as follows:

"To interpret a law as to make it wholly nugatory is the last extremity to which judicial construction should go. When the act or section under consideration is equally susceptible of two constructions, one of which will maintain and the other destroy it, the courts should adopt the former. * * *"

It would appear to be necessary, therefore, in a case of this sort to regard the statute as effective so far as it is possible to do so even though some portion of it may be inoperative, especially where the portion remaining is capable of being "operative as a law." See Crawford on Statutory Construction, 218, Section 144.

In the case here under consideration it would seem readily possible to give operative effect to that portion of Section 1907.01, Revised Code, as amended, which provides for two members of the commission, i.e., the presiding judge of the common pleas court and the president of the board of county commissioners, for there is no reason in law why a two-member commission could not act as effectively within the field of the commission's jurisdiction as a three-member agency. Moreover, if we are to indulge the presumption, as many authorities are inclined to do, that the legislature was aware of the condition of the law in existence at the time of a particular enactment it becomes necessary to conclude that it was the legislative intent to provide for a two-member commission in those counties where the office of probate judge has been abolished under the provisions of Section 2101.43 et seq., Revised Code.

Accordingly, in specific answer to your inquiry, it is my opinion that in counties when the office of probate judge has been abolished by the combining of the probate court with the court of common pleas, under the provisions of Section 2101.43, et seq., Revised Code, the "commission on justice courts" created by the terms of Section 1907.01, Revised Code, as amended effective January 1, 1956 by the enactment of Amended

Senate Bill No. 319, 101st General Assembly, will consist of two members only, i.e., the presiding judge of the common pleas court and the president of the board of county commissioners.

Respectfully,

C. WILLIAM O'NEILL

Attorney General