

5666

1. PROBATE COURT—JUDGE IS A COUNTY OFFICER—SECTION 309.09 RC.
2. WHEN JUDGE OF PROBATE COURT FILED AN ACTION WITH AID OF PRIVATE COUNSEL—AGAINST BOARD OF COUNTY COMMISSIONERS—COURT OF COMMON PLEAS MAY UPON APPLICATION OF PROSECUTING ATTORNEY AND BOARD OF COUNTY COMMISSIONERS, AUTHORIZE COMMISSIONERS TO EMPLOY LEGAL COUNSEL TO ASSIST JUDGE OF PROBATE COURT IN LITIGATION.

SYLLABUS:

1. The judge of the probate court is a county officer, within the intent and meaning of Section 309.09, Revised Code.
2. When a judge of the probate court has filed an action with the aid of private counsel, against the board of county commissioners, the court of common pleas may, if he deems it for the best interests of the county, upon the application of the prosecuting attorney and the board of county commissioners, authorize said commissioners to employ legal counsel to assist said judge of the probate court in such litigation.

Columbus, Ohio, August 24, 1955

Hon. Danny D. Johnson, Prosecuting Attorney
Tuscarawas County, New Philadelphia, Ohio

Dear Sir:

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

“I have received the following request from R. F., Probate Judge of Tuscarawas County, to-wit:

‘I am writing you to request that your office cause legal counsel to be provided in accordance with the provisions of law in the case of R. F., Probate Judge vs. the Board of County Commissioners, with which we are both quite familiar.’

“This request was prompted by an action filed in the Court of Appeals for Tuscarawas County designated No. 822. I am also enclosing a copy of the record of the Supreme Court Case No.

34205 which was reported in the Ohio Bar, April 18, 1955, 163 Ohio St. 157. Subsequent to the order remanding the case to the Court of Appeals of the 5th Judicial District, the plaintiff R. F., through his counsel, was granted leave to file a second amended petition, said petition being filed to which the office of the Prosecuting Attorney representing the Board of County Commissioners moved that it be stricken from the records on the grounds that it was not a second amended petition but a supplemental petition. The above are the facts of the case.

"I am therefore requesting your opinion as to what my duties are under the law with regard to affording R. F., Probate Judge, counsel at this time. My observations are that :

"1. He has chosen his own counsel and means of proceeding.

"2. Section 309.09 of the Revised Code sets forth my duties, which says:

"* * * He shall *prosecute* and *defend* all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney *at the expense of the county*, except as provided in Section 305.14 of the Revised Code.'

(Underscoring my own.)

"Section 305.14 of the Revised Code reads as follows:

'If it deems it for the best interests of the county, the court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to *employ legal counsel to assist the prosecuting attorney*, the board, or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest, in its official capacity.'

(Underscoring my own.)

"Under Item No. 2 hereinabove, I request an opinion as to whether the Probate Judge comes within the intent of Section 309.09 of the Revised Code, is he a county officer or not, etc?.

"Under Item 3 hereinabove, Section 305.14, of the Revised Code says that the court may authorize the board to employ legal counsel to assist the prosecuting attorney. My query is, how can I legally or ethically represent both sides in this cause?"

You have set out the two sections of the statutes which appear to me to govern, to wit, Sections 309.09 and 305.14, Revised Code.

1. Your first question is whether the probate judge is a county officer. I find no positive provision in the law which furnishes an answer to

this question. I note the discussion in 11 Ohio Jurisprudence, at page 268, of the question: "Who are county officers?" Attention is there called to Division II of Article X, of the General Code, which was headed "County Officers." In that Division the following are dealt with as county officers: county commissioners, county auditor, county treasurer, sheriff, county coroner, clerk of the court of common pleas, and prosecuting attorney. The probate judge, however, was included with the county officers in the chapter of the General Code relating to salaries of county officers. See Section 2992, General Code. It may be added that in the Revised Code, Chapter 325, Title III, which is entitled "Counties" the compensation of all county officers is set out and the probate court is included as shown by Section 325.05.

In the case of *State ex rel. Justice v. Thomas*, 35 Ohio App., 250, the court had occasion to discuss the status of the court of common pleas as a county officer, and referring to the judge of the common pleas court said:

"This officer is provided for by the State Constitution and by Section 1532 of the Code. He is elected in the county in which he resides, and normally serves there, but is vested with state-wide jurisdiction. The state pays by far the greater part of his compensation; so that it is doubtful if he is, within the strict interpretation of the law, a county official."

The same might be said of the probate judge, as his office, also, is provided for by Section 7 of Article IV, of the Constitution, as follows:

"There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one judge, *elected by the electors of the county*, who shall hold *his office* for the term of six years, and shall receive such compensation as shall be provided by law." (Emphasis added.)

His salary also is paid in part by the state and the balance by the county. See Sections 141.04 and 141.05, Revised Code. A somewhat analogous question was considered in Opinion No. 208, Opinions of the Attorney General, for 1933, page 299, wherein it was held:

"1. Since justices of the peace are township officers by virtue of section 1711-1 of the General Code, the county prosecuting attorney is required by section 2917 to advise such officers upon matters pertaining to their ministerial functions.

"2. Section 2917 of the General Code does not require the prosecuting attorney to advise justices of the peace upon questions

of procedure and substantive law involved in cases before such justices, these matters being among the judicial functions of magistrates.”

The fact that the probate court is a part of the judicial system of the state does not prevent the judge of such court from being considered as a county officer. The case of *State ex rel. Stanley v. Bernon*, 127 Ohio St., 204, appears to be in point. There the question arose whether a police judge of the City of Cleveland Heights should be nominated as prescribed by state law or in accordance with the provisions of the charter of that city, relative to the nomination of city officers. The real question in the case was whether a judge of a police court is or is not a municipal officer. The court recognized the decision in the case of *State ex rel. Cherrington v. Hutsinpillar*, 112 Ohio St., 468, to the effect that a city could not create a municipal court, but held as shown by the fourth paragraph of the syllabus:

“A judge of the Police Court of the City of Cleveland Heights is an elective municipal officer, whose nomination is governed by the charter of that city.”

See also 28 Ohio Jurisprudence, page 302.

My conclusion is, that within the intent of Section 309.09 of the Revised Code, the probate judge is a county officer.

2. Upon that assumption let us inquire what are his rights and what is your duty under the circumstances set out in your letter. The judge has begun an action against the board of county commissioners of his county, being represented by an attorney of his own choosing. You and your assistant have represented the county commissioners in the trial of the case in the Court of Appeals. The probate judge has taken an appeal to the Supreme Court. He now demands that you “cause legal counsel to be provided in accordance with the provisions of law.”

In the phrasing of your second question you say: “My query is, how can I legally or ethically represent both sides in this cause?” That question is, as I believe, based on several erroneous assumptions. In the first place, the judge is not requesting that you represent him. He realizes that you and your staff have engaged in a spirited resistance of his petition. The probability is that he would not accept your assistance if it were offered. Your emphasis in quoting Section 305.14, Revised Code, on the words “employ legal counsel to assist the *prosecuting attorney*” overlooks the further provision that such legal counsel may be furnished to “assist any

officer in the prosecution of any action in which he is a party or has an interest." Section 305.14, Revised Code, reads as follows:

"If it deems it for the best interests of the county, the court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel *to assist* the prosecuting attorney, the board, or *any other* county board or *officer*, in any matter of public business coming before such board or officer, and *in the prosecution or defense of any action or proceeding in which such county board or officer is a party* or has an interest, in its official capacity."
(Emphasis added.)

Consequently, I change your query to a consideration of your authority and duty in response to the judge's request, and his rights in the matter.

Plainly, this controversy is of such a character that you could not, even if requested, ethically undertake to represent both sides of the controversy. I recognize that many suits are filed by city attorneys, prosecuting attorneys, and even by the attorney general, in which both sides are represented by those officers, respectively, and the courts recognize the propriety of such procedure. Such actions are, however, what are commonly known as "friendly suits," the purpose of which is, in effect, to get a declaratory judgment settling some legal question about which there is a difference of opinion, or which is essential to establish the validity of a contract or procedure, such as the issuance of bonds. The present case is evidently not of that character.

The law, however, does not put it within the power of the prosecuting attorney to provide such legal counsel for the benefit of a county officer. The only thing that the prosecuting attorney can do is to join with the county commissioners in a request to the court of common pleas, and the law leaves it within the discretion of that court to allow such employment "if it deems it for the best interests of the county."

The question may arise whether there is any duty devolving upon you to make this request to the court of common pleas. I cannot see that there is anything in the statute that imposes a mandatory duty upon you to do so. You could very properly base your action on the same test which the court is to apply viz., if you deem it for the best interests of the county. It may be observed further that there is no duty imposed by the law on the county commissioners to join with you in such request even if you were disposed to make it.

Accordingly, in answer to your question it is my opinion:

1. The judge of the probate court is a county officer, within the intent and meaning of Section 309.09, Revised Code.

2. When a judge of the probate court has filed an action with the aid of private counsel, against the board of county commissioners, the court of common pleas may, if he deems it for the best interests of the county, upon the application of the prosecuting attorney and the board of county commissioners, authorize said commissioners to employ legal counsel to assist said judge of the probate court in such litigation.

Respectfully,

C. WILLIAM O'NEILL

Attorney General