

only to execute a bond in the sum of \$50,000.00 or less, while the face of the bond shows that it is in the penal sum of \$66,000.00.

Since the bond filed under the terms of said Section 2319, General Code, is both a bid bond and contract bond, it is essential that the agent who executes it must have had authority at the time it is filed to bind the company in an amount at least equal to the penal sum of the bond.

The bid which was accompanied by said bond was not a legal bid and therefore should not have been considered by your department.

For the foregoing reason, I am compelled to disapprove the contract submitted to me, and am returning to you herewith all the papers submitted in connection with the contract.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2606.

PROBATE JUDGE—RE-ESTABLISHMENT OF SUCH OFFICE BY ELECTORATE—TERM FOR WHICH ELECTED.

SYLLABUS:

The election for the office of probate judge held on November 4, 1930, in Paulding County was for a full term of four years.

COLUMBUS, OHIO, November 29, 1930.

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

DEAR SIR:—This acknowledges your letter of November 13th requesting my opinion as follows:

“The following situation has arisen upon which I would like your legal opinion.

“In Paulding County, Ohio, in 1924 the electors of the county voted for the combination of the Common Pleas and Probate Courts with one judge serving as the judge of both courts. In 1928 another vote was taken upon the proposal of separating the same courts and establishing separate courts again. This proposal was adopted by the vote of the people and following certification of said election the governor of Ohio appointed a probate judge who was commissioned ‘For a term beginning February 9, 1929, and ending when a successor is elected and qualified.’

“The gentleman appointed judge was a candidate at the November 4, 1930, election for probate judge and was elected thereto. Today he presented a certificate of election from the Paulding County Board of Elections certifying that he was duly elected judge of the Probate Court of said county for the term of four years.

“Before issuing a commission the question thereof arises in my mind as to whether or not the gentleman elected is entitled to a commission for a four year term beginning February 9, 1931, or whether or not he is only entitled to a commission as probate judge to fill the period of time between the time his certificate of election was issued and February 9, 1933.

“In submitting this question I respectfully call your attention to the fact

that the usual time for electing probate judges is in presidential years for the term of four years.

"I would, therefore, appreciate your opinion as to the term for which the Commission should be issued by the Secretary of State."

The status of the office of Probate Judge in Paulding County was exhaustively considered in an earlier opinion of mine, dated January 25, 1929, and addressed to the Honorable Myers Y. Cooper, Governor of Ohio. The facts with relation to this situation are therein set forth but may be briefly summarized as follows:

Mr. Shirley was elected in 1924 as Probate Judge, but at the same election the electors voted to combine the Probate Court with the Court of Common Pleas. Had this vote not been taken he would have commenced his term on February 2, 1925.

In 1928, the people voted to re-establish the separate courts; there was, of course, no candidate voted upon for Probate Judge at that election. Governor Donahey assumed a vacancy to exist, which he was authorized to fill, and made an appointment to the office for the unexpired term, but Attorney General Turner, in an opinion to the Prosecuting Attorney of Paulding County, dated November 4, 1928, found in the Opinions of the Attorney General for the year 1928 at page 2620, held that Mr. Shirley having been elected for the term ending February 9, 1929, was entitled to hold office until that time. Accordingly the attempted appointment by Governor Donahey was inoperative.

As I understand the facts, the election in 1930 was held for the office of Probate Judge without any designation as to term. As you state, ordinarily Probate Judges were not elected this year, since they are elected for four year terms, and in most, if not all, of the counties, this election occurred in 1928, so that the next ordinary election for Probate Judge will be in 1932. It remains to be seen, however, whether the election in 1928 was because of mandatory requirement of the law or by reason of the accident of the original election occurring in a year which brought the four year re-election in 1928 rather than 1930. Section 7 of Article IV of the Constitution of Ohio, provides for the Probate Court and also the means whereby the Probate Court is combined with the Court of Common Pleas. That section is 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 four years, and shall receive such compensation, payable out of the county treasury, as shall be provided by law. Whenever ten per centum of the number of electors voting for governor at the next preceding election in any county having less than sixty thousand population as determined by the next preceding federal census, shall petition the judge of the Court of Common Pleas of any such county not less than ninety days before any general election for county officers, the judge of the Court of Common Pleas shall submit to the electors of such county the question of combining the Probate Court with the Court of Common Pleas, and such courts shall be combined and shall be known as the Court of Common Pleas in case a majority of the electors voting upon such question vote in favor of such combination. Notice of such election shall be given in the same manner as for the election of county officers. Elections may be had in the same manner for the separation of such courts, when once combined."

You will note that there is nothing in this section which prescribes when the election shall be held. It is, however, provided in Section 1 of Articles XVII of the

Constitution that state and county officers shall be elected on the first Tuesday after the first Monday in November in the even numbered years.

Section 1580 of the General Code provides as follows:

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

It is apparent, therefore, that, while the Constitution and law make it clear that the term is one of four years and that the election shall be held in the even numbered years, nowhere is there any requirement that the election be held in a specific even numbered year. There is accordingly no obstacle in these sections to holding an election for the full term in the year 1930.

Pursuant to the provisions of Section 7 of Article IV of the Constitution heretofore quoted, the Legislature made provision for the details of submitting the question of combination of the Probate Court with the Common Pleas Court in a group of sections which are found in the General Code as Sections 1604-1 to 1604-6, inclusive. Section 1604-3, which provides for the form of ballot and the conduct of the election for combination, further provides as follows:

“If a majority of the votes cast at such an election shall be in favor of combining said courts, such courts shall stand combined and consolidated at the expiration of the term for which the Probate Judge has been elected in the county wherein such election has been held.”

In the case of *State vs. Corbett*, 113 O. S. 23, this section was held unconstitutional in so far as it attempted to postpone the consolidation of the two courts beyond the time of the ascertainment of the result of the election.

Section 1604-5 is as follows:

“At any time after three years from the date of an election held under the provisions of this act, but not before, another election may be petitioned for and shall be ordered by the judge of the Court of Common Pleas as provided for in this act, either to perfect a combination of said court, or to dissolve said combination and re-establish the Probate Court.”

You will note that this section fails to prescribe how and when the judge of the Probate Court, so re-established, is to be chosen. Applying the reasoning of the *Corbett* case, however, it must be concluded that, by virtue of the constitution, the court was re-established as soon as the result of the election was announced, and accordingly there was an office which was properly filled in accordance with the opinions heretofore referred to. It is, however, in my opinion, a new court and one for which there is a lack of express statutory authority with respect to the method of the election of the judge to administer its functions.

Lacking specific direction, I believe it proper to resort to other sections to gather the intent of the Legislature. Section 1604-6 of the Code is as follows:

“Whenever in any county where such courts have been combined a decennial federal census shows that such county has a population of 60,000 or more, and such fact is certified by the Secretary of State to said Court of Common Pleas and entered upon its journal, the Probate Court shall be re-

established in such county, and a Probate Judge shall be elected for the regular term at the next ensuing election in an even numbered year, and the records of the Probate division of the Court of Common Pleas shall be delivered to such re-established Probate Court upon the entry into office of an elected Probate Judge."

You will observe that here the Legislature has attempted to prescribe the machinery for the automatic re-establishment of separate courts in the event the county has so increased its population as to exceed 60,000 or more. Furthermore, the Legislature has prescribed that the Probate Judge in such an event shall be elected *for the regular term at the next ensuing election in an even numbered year*. There is no need here to consider the possible effect upon this section of the decision in the Corbett case, *supra*. The section does indicate that, in the legislative mind, there is no objection to the election of a Probate Judge for the full term in a year which may not coincide with the time of holding elections for Probate Judge in other counties. In other words, the Legislature in this instance has indicated that the first election in an even numbered year is the proper one to elect a Probate Judge for a full term, and it is immaterial that other Probate Judges may not be elected at that particular time.

The intent expressed in this section may reasonably be extended to the preceding section, although not therein expressed, and the conclusion reached that the election held in Paulding County in 1930, being the first election in the even numbered year, held after the re-establishment of a separate court, was to fill the office for a full term of four years.

As I have before stated, the statute and the constitution are alike indefinite with respect to this particular question. I feel, however, that the conclusion which I have reached is within the general spirit of the law to the effect that when an office is created, it should be filled for the full term at the first available opportunity by proper action by the electors.

Accordingly, I am of the opinion that the election for the office of Probate Judge held on November 4, 1930, in Paulding County was for a full term of four years.

Respectfully,

GILBERT BETTMAN,

Attorney General.

2607.

APPROVAL, TWO GAME REFUGE LEASES IN PREBLE COUNTY.

COLUMBUS, OHIO, November 29, 1930.

HON. JOHN W. THOMPSON, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval the following Game Refuge Leases:

<i>No.</i>	<i>Lessor</i>	<i>Acres</i>
2092	Richard R. Becker, Somers and Gasper Twps., Preble County----	6.74
2093	Richard R. Becker, Somers and Gasper Twps., Preble County----	69.75

Upon examination, I find that the errors in these leases pointed out in my Opinion