2885.

PROBATE COURT—WHEN COUNTIES OF LESS THAN SIXTY THOUSAND POPULATION COMBINE WITH COMMON PLEAS COURT—RIGHTS OF PROBATE JUDGE AFTER SEPARATION THEREFROM.

SYLLABUS:

1. *Immediately upon the due determination of the fact that a majority of the persons voting upon the question of the separation of the Probate Court from the Court of Common Pleas voted in favor of such separation at a general election where the question was duly submitted, the office of Probate Court stands separated from the Court of Common Pleas in counties containing less than sixty thousand population.*

2. *When a person is duly elected, commissioned and qualified as judge of a Probate Court and said Probate Court has been combined with the Common Pleas Court in counties having less than sixty thousand population as determined by the next preceding Federal census, upon the determination of the due separation of said Probate Court from the Court of Common Pleas within the four years for which said person had been duly qualified and commissioned as Probate Judge, said person is entitled to perform the duties of Probate Judge on said re-established Probate Court.*

COLUMBUS, OHIO, November 14, 1928.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

> "At the November election in 1924 the question of combining the Probate Court of Paulding County, with the Court of Common Pleas was submitted to the electors of this county and the vote thereon resulted in favor of such combination.
>
> At the same election there were candidates running for the office of Probate Judge of Paulding County for the term of four years beginning February 9, 1925. At this same election R. V. Shirley received a majority of the votes cast and he was duly certified elected by the board of elections. Thereafter a commission as Probate Judge of Paulding County for a term of four years beginning February 9, 1925, was duly issued to said Shirley.
>
> At the November election just held the question of separating the Probate Court and the Common Pleas Court was again submitted to the electors of Paulding County and the voters by a majority vote decided that said court should be separated and the Probate Court re-established.
>
> I might further add that said Shirley duly filed his official bond prior to the 9th day of February, 1925. The Attorney General of Ohio rendered an opinion on December 6, 1924, which is found at page 670 of the Attorney General's Opinions of 1924, to the effect that the office was abolished and the Probate Court ceased to exist on February 9, 1925.
>
> Judge W. F. Corbett, Common Pleas Judge of this county assumed charge of the Probate Court in connection with the Common Pleas Court on February 9, 1925. Thereupon and thereafter said Shirley brought an action in quo warranto in the Supreme Court of Ohio to test the right of Judge Corbett to act and the Supreme Court of Ohio decided that the courts stood combined in pursuance to said vote under authority of the Constitution of Ohio. You will find a report of the case in Vol. 113, Ohio State Reports, page 23.
>
> Mr. Shirley then withdrew his bond theretofore filed. On November 6, 1928, believing that said Probate Court would be established said Shirley filed another official bond as required by law in said matter.

We wish the following questions answered:

1. When under the above state of facts does the separation of the courts become effective and the Probate Court re-established?

2. Is said Shirley now entitled to assume the duties of the office of Probate Judge of Paulding County, and if not, by what manner in your opinion, should the office be filled?

A very early reply to the above questions seems to be required for reasons quite apparent."

The constitutional authority for combining and for a separation of the Common Pleas and Probate Courts is contained in Section 7, Article IV of the Constitution of Ohio, which provides 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."

Section 1604-3, General Code, in part provides:

"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."

Section 1604-4, General Code, provides in substance that when the combination has been effected there shall be established in the Court of Common Pleas a probate division for separately docketing all matters of which the Probate Court theretofore had jurisdiction, and for the appointment of necessary deputies, clerks and assistants, and for their salaries.

Section 1604-5, General Code, providing how a Probate Court may be reestablished reads 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 to re-establish the probate court."

The Supreme Court of Ohio had occasion to construe the constitutional and statutory provisions hereinbefore quoted in a case involving the combining of the Probate with the Common Pleas Court of Paulding County, Ohio. The case is entitled, *The State, ex rel. Shirley* vs. *Corbett*, 113 O. S. 23, the syllabus of which reads as follows:

> "1. The provision of Section 1604-3, General Code, '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,' fixes a time when such courts shall stand combined as a result of such election different from the time fixed in Section 7, Article IV, of the Constitution of Ohio, and is to that extent in contravention of that section of the Constitution.
>
> 2. The office of probate court stands combined with the court of common pleas in counties containing less than 60,000 population, immediately upon the due determination of the fact that a majority of the persons voting upon the question of the combination of such courts voted in favor of such combination at a general election where the question was duly submitted."

The court held in substance that the provision of Section 1604-3, General Code, that said courts should stand combined and consolidated at the expiration of the term for which the probate judge had been elected wherein such election had been held, fixes the time when such courts shall stand combined as a result of such election different from the time in Section 7, Article IV of the Constitution of Ohio, and is to that extent in contravention of said section of the Constitution.

The court further held that immediately upon the due determination of the fact that a majority of the persons voting on the question of the combination of such court voted in favor of such combination at a general election where the question was duly submitted, the office of Probate Court stands combined with the Court of Common Pleas.

Section 7, Article IV of the Constitution of Ohio which authorizes the combining of the Probate Court with the Court of Common Pleas concludes as follows:

> "Elections may be had in the same manner for the separation of such courts, when once combined."

It seems clear therefore, that the same construction must be given the constitutional provision in regard to the separation of said courts that was given to the combining of them in so far as the effective date of said separation, and I therefore conclude, specifically answering your first question, that immediately upon the due determination of the fact that a majority of the persons voting upon the question of the separation of such courts, voted in favor of separation at a general election where the question was duly submitted, the office of Probate Court stands separated from the Court of Common Pleas in counties with less than sixty thousand population.

It is stated in your communication that at the November election in 1924, R. V. Shirley was duly elected probate judge of Paulding County for the term of four years beginning February 9, 1925; that his election was duly certified by the board of elections and a commission as probate judge of Paulding County for a term of four years beginning February 9, 1925, was duly issued to him, and he duly filed his official bond prior to the ninth day of February, 1925; and in view of the decision of our Supreme Court in the case of *State ex rel. Shirley* vs. *Corbett*, supra, Shirley then withdrew his said bond theretofore filed.

Your letter further states that at the November election of 1928, the question of separating the Probate Court and the Common Pleas Court was submitted to the electors of Paulding County and that a majority of the voters decided that said Court should be separated and the Probate Court re-established. You also state that Shirley, who was duly elected probate judge of said county at the November election in 1924 and duly commissioned as a probate judge of said county for a term of four years beginning February 9, 1925, did on the 6th day of November, 1928, file an official bond as required by law, as probate judge of Paulding County, and you then inquire whether Shirley is now entitled to assume the duties of said office of probate judge.

It is noted that Shirley was duly elected as probate judge of Paulding County and was duly commissioned as said probate judge for the term of four years beginning February 9, 1925, which term of four years would not expire until February 9, 1929. The question therefore arises as to what effect, if any, the combining of the Probate Court of Paulding County with the Court of Common Pleas and the later separation of said Probate Court from the Common Pleas Court had upon the rights of said Shirley.

It is evident from the statement of facts herein presented that R. V. Shirley was duly elected, commissioned and qualified to enter upon the duties of judge of the Probate Court of Paulding County on February 9, 1925, had not the Probate Court of said Paulding County by a vote of the majority of the electors voting upon such question voted in favor of the combination of said Probate Court with the Court of Common Pleas. The reason, therefore, why said Shirley is not acting as Probate Judge of said county is because said Probate Court was transferred to and became a division in the Common Pleas Court of said county.

As before stated herein under the ruling of the Supreme Court in the case of *State ex rel. Shirley* vs. *Corbett*, supra, the Probate Court of said county was re-established and separated from the Court of Common Pleas upon the due determination of the fact that a majority of the persons voting upon the question of the separation of such courts voted in favor of such separation at the recent general election where the question was duly submitted. A separate Probate Court is now existing in said Paulding County and said Shirley is now the duly elected, commissioned and qualified Probate Judge of said county. It is, therefore believed that said R. V. Shirley is now entitled to assume the duties of the office of Probate Judge of Paulding County, Ohio.

In considering the foregoing question I have given consideration to the case of *The City of Elyria* vs. *Vandemark*, 100 O. S. 365, wherein it is stated in the first paragraph of the syllabus that:

> "1. When a public office is abolished by duly constituted authority, the incumbent thereof ceases to be an officer, for he cannot be a *de facto* officer of an office no longer in existence."

In said case the Mayor of the City of Elyria on January 11, 1916, appointed R. F. Vandemark, Director of Public Safety. Vandemark duly qualified as provided by law and entered upon the discharge of his duties. The Court say:

> "The City of Elyria under the last Federal census had a population of less than twenty thousand. The council of the city on January 10, 1917, duly passed an ordinance providing that the office of Director of Public Safety be merged with that of the Director of Public Service, and that one director be appointed for and assigned the duties of the department so merged. Such ordinance became effective February 11, 1917. The mayor of the city did not appoint a director of the merged departments, and the defendant in error

continued to perform the duties which had theretofore devolved upon the director of public safety and continued to discharge such duties until he resigned December 31, 1917."

Said opinion also states:

"* * * Said ordinance provided that the office of director of public safety be merged with the office of director of public service, and that one director be appointed for the departments so merged, who should perform such duties as are required by law of the director of public safety and the director of public service. If the provisions of the General Code above referred to, pursuant to which said ordinance was enacted, constituted a valid and constitutional law, then the passage of such ordinance served to effect a valid merger of the two offices specified into one office, and consequently abolished the separate offices of director of public service and director of public safety in the City of Elyria, and from the date such ordinance became effective there was no longer such an office in the City of Elyria as the director of public safety.

We cannot concur in the view adopted by the court of appeals and urged in argument in this court by counsel for the defendant in error that because of the fact that in this instance a director for the merged department was never appointed as contemplated by the provisions of the act of the general assembly under consideration, Vandemark would continue in office until the date of his resignation, December 31, 1917. The authority to create an office and the power to abolish the same are co-existent, and hence the tribunal authorized to create an office may abolish such office at any time it chooses, either during or at the end of the term of any incumbent of such office. The incumbent would not be entitled to compensation thereafter, for he could not be a *de facto* officer of an office which was no longer in existence. It is well settled in this state that when an office is abolished by duly constituted authority the incumbents thereof cease to be officers, for there can be no incumbent without an office. *State ex rel. Attorney General* vs. *Covington, et al.*, 29 Ohio St., 102; *The State* vs. *Brown*, 38 Ohio St., 344, and *State ex rel. Attorney General* vs. *Jennings et al.*, 57 Ohio St., 415. * * *"

While this case holds that the office of Director of Public Safety was abolished under the provisions of the statute, it also states that said ordinance abolished both the office of Director of Public Service and the Director of Public Safety, and that there was no longer such an office in the City of Elyria as the Director of Public Safety, and while it also holds that when an office is abolished by duly constituted authority the incumbent thereof ceased to be an officer, for the reason that there can be no incumbent without an office, yet it does not go so far as to hold that if the office were re-established within the commissioned term of the former officer that said officer would not be entitled to said office upon the re-establishment thereof.

I have also given consideration to the statement in the opinion of the court in the case of *State ex rel.* vs. *Corbett*, supra, at page 31 that:

"* * * 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 tak-

ing 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. * * *"

The Court's language in this case, however, does not seem to justify the conclusion that upon the re-establishment of the Probate Court that said Shirley would not be entitled to said office having theretofore been duly commissioned and qualified.

It is therefore my opinion, specifically answering your second question, that said R. V. Shirley is now entitled to assume the duties of the office of probate judge of Paulding County, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2886.

ELECTION—PRESIDENTIAL BALLOT—EFFECT OF CROSS MARK IN CIRCLE AT HEAD OF TICKET AND BEFORE PRESIDENTIAL CANDIDATE ON ANOTHER TICKET.

SYLLABUS:

Where a voter makes a cross mark in the circle at the head of a party presidential ticket and also makes cross marks before the names of candidates for president and vice president on another party presidential ticket, the voter has thereby made it impossible to determine his choice for the office to be filled and the ballot should not be counted for such office.

COLUMBUS, OHIO, November 14, 1928.

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

DEAR SIR:—This is to acknowledge the receipt of your recent communication in which my opinion is requested on a question therein stated, as follows:

" 'A voter in marking his Presidential ballot puts a cross mark in the circle at the head of the Democratic Ticket and then goes over and puts a cross mark in front of the names of Herbert Hoover and Charles Curtis on the Republican Ticket, even though there be no squares for the cross marks there.' The question is: How shall the ballot be counted or shall the ballot be thrown out and not counted at all? "

Statutory provisions applicable to the consideration of the question here presented are hereby noted as follows:

Section 5017, General Code, provides that:

"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."