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PROBATE JUDGE, IN ABSENCE OF MUNICIPAL COURT JUDGE, MAY APPROVE BOND OF TOWNSHIP TRUSTEES—COUNTY COURT JUDGE WITHOUT AUTHORITY—SECTION 505.02 R.C.

SYLLABUS:

Under the provisions of Section 505.02, Revised Code, in those townships in which there are no municipal court judges the probate judge may approve the bonds of township trustees, and county court judges are without authority to approve such bonds.

Columbus, Ohio, October 8, 1959

Hon. Gale B. Weller, Prosecuting Attorney  
Morrow County, Mount Gilead, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I have been requested by Probate Court of Morrow County, Ohio, to request an informal opinion of you with regard to the effect the amendment of Revised Code Section 503.24, effective January 1, 1958, has, if any, upon the interpretation and application of Revised Code Section 505.02.

“Briefly stated, should the Probate Court continue to approve the bonds of trustees or should the County Court now exercise that authority?”

Section 505.02, Revised Code, to which you refer, provides for the giving of a bond by each township trustee, and for approval of such bond. This section reads:

“Each township trustee, before entering upon the discharge of his duty, shall give bond to the state for the use of the township, in the sum of five hundred dollars, conditioned for the faithful performance of his duty as trustee, with at least two sureties, who shall be residents of the same township with the trustee. Such bond shall be approved by a justice of the peace of the township in which the bond is given. Wherever, in any township, a municipal court has replaced the justices of the peace, the municipal judge, or the presiding municipal judge if there is more than one may approve such bonds. *In those townships in which*

*there are no justices of the peace or municipal judges the probate judge may approve such bonds.* (Emphasis added)

Justice of the peace courts were abolished by the 102nd General Assembly, effective January 1, 1958, and were replaced by county courts (Am. H. B. No. 914, Am. H. B. No. 937—1957). County courts are established in those areas of counties not within the territorial jurisdiction of municipal courts (see Section 1907.011, Revised Code). Thus, each township of the state is within either county court or municipal court jurisdiction but there is no justice of the peace jurisdiction.

In creating the county courts and abolishing the justice of the peace courts it was the evident intention of the legislature to give such county courts all of the powers formerly exercised by justices of the peace. Because of the difficulty of locating all pertinent code sections, however, all references to justices of the peace were not eliminated. The references in Section 505.02, *supra*, are in this category.

Although I believe that the legislature would have changed the references in Section 505.02, *supra*, from “justice of the peace” to “county court” if such references had been known at the time of the adoption of Am. H. B. No. 914 and Am. H. B. No. 937, *supra*, in 1957, the fact is that the legislature *did not* so amend the section and made no references to such section in either of the bills. Moreover, I cannot say that such section was so amended by inference or implication.

In order to hold that county court judges have authority under Section 505.02, Revised Code, it would be necessary to read something into the statute that is not there, such procedure actually being an attempt to legislate. In this regard it is stated in 37 Ohio Jurisprudence, Section 267 at page 488:

“The courts have no legislative authority and should avoid judicial legislation. They should not make their office of expounding statutes a cloak for the exercise of legislative powers. It is the province of the courts to construe, not to make, the law. To supply the intention, and then give the statute effect according to such supplied intention, would not be construction, but legislation.”

And, in Section 271 at page 500, it is stated:

“\* \* \* It is sometimes said that what the legislature omits the courts cannot supply. These principles are to be adhered to

notwithstanding the fact that the legislature intended to enact something very different from that which it did enact, or that certain words were omitted by mistake in copying the bill before its passage. It has been declared that it is better to endure temporary inconvenience than to correct by judicial construction such a supposed mistake in the statute. \* \* \*

You will note that we are not here concerned with a conflict between sections of law as I have been unable to find any other section dealing with the approval of the bonds of township trustees.

I must conclude, therefore, that under the provisions of Section 505.02, Revised Code, in those townships in which there are no municipal court judges, the probate judge may approve the bonds of township trustees; and county court judges are without authority to approve such bonds.

Section 503.24, Revised Code, to which you refer, provides a method for the filling of a vacancy in a township office and was amended in 1957 (Am. Sub. H. B. No. 737, *supra*) to allow the county court to make appointments in certain instances. Although such amendment was made in accord with the general intent of the legislature to replace justice of the peace jurisdiction with county court jurisdiction, the provisions of said Section 503.24, Revised Code, do not pertain to Section 505.02, *supra*, in any way and could not be construed to have any effect upon the interpretation and application of said Section 505.02, *supra*.

In passing, I might note that House Bill No. 868 of the 103rd General Assembly proposed to eliminate many references to justice of the peace courts, the references in Section 505.02, *supra*, being included. If enacted, this bill would have given county court judges the authority to approve the bonds of township trustees. The bill, however, failed of passage.

Accordingly, answering your specific question, it is my opinion and you are advised that under the provisions of Section 505.02, Revised Code, in those townships in which there are no municipal court judges the probate judge may approve the bonds of township trustees, and county court judges are without authority to approve such bonds.

Respectfully,  
MARK McELROY  
Attorney General