

with the use of these lands and the waters thereon as a public park and reservoir. Relating to the purchase of these buildings you have submitted to me a contract encumbrance record No. 27 executed by the Superintendent of Public Works as director of said department and by the responsible heads of the Division of Conservation. This contract encumbrance record has likewise been signed by the Director of Finance and the same shows a sufficient unencumbered balance in the proper appropriation account to the credit of the Conservation Division of the Department of Agriculture to pay the purchase price of said buildings which purchase price, as above noted, is the sum of \$5000.00. It appears further from said contract encumbrance record as well as from other evidence at hand that the purchase of these buildings for the price stated has been approved by the Controlling Board and that said board has released from the appropriation account the money necessary to cover the purchase price of the buildings, in the amount above stated. The purchase of these buildings is, therefore, approved by me and you are requested to issue the voucher of your department to the end that a warrant may be drawn for the amount of said encumbrance, payable to the Pymatuning Land Company as the purchase price of these buildings. I am herewith enclosing said contract encumbrance record No. 27.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

3727.

PROBATE JUDGE—PAULDING COUNTY ELECTION NOVEMBER
 6, 1934, FOR FULL FOUR YEAR TERM.

SYLLABUS:

The election for the office of probate judge held on November 6, 1934, in Paulding County was for a full term of four years.

COLUMBUS, OHIO, December 31, 1934.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

“Will you please advise me as to the official status of the term of office of the present Probate Judge, elected on November 6, 1934, in Paulding County?”

We are setting forth quite fully matters which we believe will furnish you full information relative to this matter.

In the November election of 1924, the proposal to combine the Probate Court with the Common Pleas Court of Paulding County, was submitted to the electors and the two courts were thus combined. At the same election a Probate Judge was elected and a commission

issued to the successful candidate, R. V. Shirley, for a term of four years, said term beginning February 9, 1925, and ending February 9, 1929. This term followed in regular sequence the preceding four year terms for a number of years past.

The question at that time was raised as to when the existence of the Probate Court of Paulding County terminated, and in an opinion of the Attorney General, as found in Opinions of 1924, page 670, a conclusion was reached that said Probate Court ended its existence February 9, 1925, due to the vote of the electors decreeing that said Probate Court should be combined with the Common Pleas Court of Paulding County.

The Probate Judge elected at that time was commissioned and later brought an action in quo warranto in the Supreme Court of Ohio, testing the right of the Judge of the Common Pleas Court to serve as Judge of said Probate Court. In this case, *State, ex. rel. Shirley vs. Corbett*, 113 O. S., page 23, decided June 2, 1925, the Court held that the provisions of the Constitution, Article 4, Section 7, control the time at which a Probate and Common Pleas Court would stand combined, that is, that the combined courts would be established as soon as the will of the electors was determined after the election at which such question was submitted.

The combination of said courts was therefore effected, but in the election of November 6, 1928, the question of the separation of said courts was submitted to the electors and the election resulted in favor of the reestablishment of the Probate Court.

The question was raised and your opinion requested as to when the separation of the courts under consideration would become effective and when the Probate Court would become reestablished.

Basing his opinion upon the decision of the Supreme Court just referred to, the Attorney General, in Volume 4 of the Opinions of 1928, page 2620, reached the conclusion that the Probate Court and the Common Pleas Court of Paulding County would stand separated immediately upon the determination that the electors had voted in favor of such separation, and it was also determined that R. F. Shirley was at that time, due to his election in 1924, entitled to assume the duties of the office of Probate Judge of Paulding County.

Regardless of this opinion, Zona Secrist was appointed Probate Judge and commission issued under date of November 14, 1928. I might also advise that no election was held on November 6, 1928, for the office of Probate Judge in Paulding County. The appointment of Zona Secrist was evidently made to fill out the short term from the date of the separation of the courts until the beginning of the regular four year term of Probate Judge, beginning with February 9, 1929. In the meantime, it must have become apparent that a Probate Judge would have to be appointed for said term, beginning February 9, 1929, which term would eventually end February 9, 1933.

Our records show that Mr. R. V. Shirley was appointed such Probate Judge, and was commissioned on February 26, 1929, to serve until a successor should be elected and qualified.

Under the provisions of Section 10, General Code, a Probate Judge would in due time, be elected for the unexpired term and at the

election of November 4, 1930, Mr. Shirley became a candidate for this office and was elected.

Inadvertently it seems, a certificate of elections was issued to Mr. Shirley by the Board of Elections of Paulding County under date of November 10, 1930, stating that, 'R. V. Shirley was duly elected Judge of the Probate Court of Paulding County for the term of four years,' and it seems that a commission was issued for the term beginning February 9, 1931, and ending February 9, 1935. This certificate of elections and commission should have undoubtedly been for the unexpired term ending February 9, 1935.

Mr. Shirley continued in office until his death, March 19, 1934, and O. E. White was appointed on the 28th day of March, and commissioned on April 20, 1934, to serve until his successor would be elected and qualified.

At the election of November 6th, just passed, Fred Carr was elected Probate Judge of Paulding County. The non-partisan ballot setting forth the names of the candidates did not specify 'For the Unexpired Term', but in common with other designations, set forth the title of the office as 'For Judge of the Probate Court'.

We are now asked to advise as to whether Fred Carr was elected to fill an unexpired term ending February 9, 1937, or for a full term of four years, such term ending February 9, 1939. If the latter is the case, the county of Paulding would be the only county in the state claiming the right or privilege of electing a Probate Judge for a term of four years, beginning February 9, 1935."

Section 7 of Article IV of the Constitution of Ohio reads 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 1 of Article XVII of the Constitution of Ohio provides for the election of state and county officers on the first Tuesday after the first Monday in November in the even numbered years.

Section 10501-1, General Code, reads 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.”

Section 10501-49, General Code, which provides for the conduct of the election for the combination of the probate court with the common pleas court, was held unconstitutional in *State, ex rel., vs. Corbett*, 113 O. S. 23, in so far as this statute attempts to postpone the consolidation of the two courts after the time of the official ascertainment of the result of the election.

Section 10501-51, General Code, 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 re-establish the probate court.”

I am of the view that after the probate court has been combined with the common pleas court, and the probate court is thereafter re-established, a new court is thereby recreated. In the absence of any constitutional or statutory authority such position should be filled for the full term at the first available opportunity which would be the next general election in an even numbered year. The same question was submitted to this office with reference to the term of office of the probate judge of Paulding County, who was elected on November 4, 1930, and it was then held that such election was for a full term of four years. In referring to former section 1604-5, General Code, which is now section 10501-51, that opinion which is found in Opinions of the Attorney General for 1930, Volume III, page 1725, reads as follows:

“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."

I agree with said opinion in its conclusion that the election for said office held on November 4, 1930, was for a full term of four years, and, consequently, the election for said office held on November 6, 1934, was likewise for a full term of four years.

Respectfully,

JOHN W. BRICKER,
Attorney General.