

within Section 486-13, General Code, and governed by the provisions thereof, such probation officers are likewise within the protection of the other provisions of the civil service act.

And by way of specific answer to the question here presented, I am of the opinion that the election and qualification of the additional common pleas judge for Franklin County under the authority of Section 1532-7, General Code, and his exercise of jurisdiction with respect to cases under the juvenile court act in the juvenile court of said county, did not have the effect of abolishing the position of probation officers and other employes in the classified civil service theretofore appointed by the probate judge of said county while sitting by designation in said juvenile court and exercising the jurisdiction thereof.

With respect to the second question here presented, I am of the opinion that the fact, if it be such, that the creation of the new domestic relations judgeship as a branch of the common pleas court of Franklin County, and the transaction by such judge of the court business of which he has jurisdiction, will require the performance by probation officers and other employes of the juvenile court in the classified civil service, of duties not contemplated at the time of their respective appointments to said positions, will not affect the tenure of their positions, nor require them to take new civil service examinations touching the new duties that they may be called upon to perform.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

26.

PROBATE JUDGE—VACANCY IN OFFICE—GOVERNOR'S APPOINTEE  
SERVES UNTIL SUCCESSOR IS ELECTED AND QUALIFIED—WHEN  
NO VACANCY EXISTS APPOINTMENT VOID.

SYLLABUS:

(1) *Where there is no vacancy in the office of Probate Judge, an appointment by the Governor to fill a vacancy is unauthorized and void.*

(2) *Where the office of Probate Judge become vacant by reason of the expiration of the term of the incumbent, and a failure to provide therefor at the preceding election, such vacancy shall be filled by appointment by the Governor. The person so appointed shall hold the office until a successor is elected and qualified.*

COLUMBUS, OHIO, January 25, 1929.

HON. MYERS Y. COOPER, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I hereby acknowledge receipt of your recent communication which reads as follows:

“I desire your opinion as to whether or not I have the right to appoint a Probate Judge in Paulding County for the term, beginning February 9, 1929, and continuing until a Probate Judge in that county shall be elected and qualified.

In 1924, Mr. R. V. Shirley was elected as Probate Judge, but at the same election the electors voted to combine the Probate Court with the Court of Common Pleas. As a result of that election, the Supreme Court determined

that Mr. Shirley was not entitled to hold the office by reason of the fact that the courts would stand combined as soon as the result of the election was certified to the Court of Common Pleas. In 1928, the proposition was submitted to re-establish the Probate Court to the electors and a majority voted in favor thereof.

When Mr. Shirley was elected in 1924, he was issued a commission for a period of four years which expires February 9, 1929. When the voters elected to re-establish the Probate Court last November, the Attorney General rendered an opinion to the effect that Mr. Shirley was entitled to serve the remainder of the term for which he had been elected: to wit, February 9, 1929.

On the same day this opinion was rendered, Governor Donahey, thinking there was a vacancy created in the office of Probate Judge, by the electors, appointed a Mrs. Secrest to serve as Probate Judge until her successor could be elected and qualified.

By virtue of the Attorney General's opinion, Mr. Shirley had already taken the office and is now the Probate Judge of Paulding County, but his time will expire on February 9, 1929.

Am I to understand from the opinion rendered by your predecessor that, because there was no vacancy at the time Governor Donahey made his appointment, the appointment was void and that I now have authority to make a new appointment, beginning on the above date?

Your opinion on this question is respectfully requested."

The opinion of my predecessor to which you refer is numbered 2885, and was rendered November 14, 1928, to Hon. Mervin Day, Prosecuting Attorney, Paulding, Ohio, and held, as stated in the syllabus, as follows:

"(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 commissioner as Probate Judge, said person is entitled to perform the duties of Probate Judge in said re-established Probate Court."

Under the holding in this opinion there was no vacancy in the office of Probate Judge in and for Paulding County, Ohio, as Mr. R. V. Shirley was the duly elected, qualified and acting judge of the re-established Probate Court of Paulding County, Ohio.

You state that Governor Donahey, thinking there was a vacancy created in the office of Probate Judge of said county, appointed Mrs. Secrest to serve as Probate Judge of said county until her successor could be elected and qualified, and you now inquire as to whether said appointment was void and whether you have authority to make a new appointment for said office, beginning February 9, 1929.

Section 7 of Article 4 of the Constitution of Ohio reads in part 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. \* \* \*"

Section 13 of said Article 4 of the Constitution of Ohio reads as follows:

"In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

Under the provisions of this section, the Governor is authorized to appoint, in case the office of the Probate Judge shall become vacant before the expiration of the regular term for which said judge was elected. The regular term for which the said Probate Judge of Paulding County was elected, will not end until February 9, 1929. The commission issued by Governor Donahey was dated December 14, 1928, at which time there was no vacancy in the office of Probate Judge of said Paulding County. In the case of *State vs. Metcalfe*, 80 O. S. 244, page 265, it is stated:

"An unexpired term is not synonymous with a vacancy. The former is the remainder of a period prescribed by law after a portion of such time has passed; a vacancy exists where there is no person lawfully authorized to assume and exercise at present the duties of the office. And if provision, either by constitution or statute, has been made for preventing a vacancy, it is a misuse of terms to assume that a vacancy has occurred."

On page 261, said opinion reads as follows:

"No stronger demonstration of this policy respecting the judiciary could be shown than is given by the constitution of 1851 in direct terms in the section (13 of article IV) hereinbefore quoted. If a vacancy occurs in the office of any judge, it shall be filled by appointment by the governor until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election occurring more than thirty days after the vacancy shall have happened. Two ideas are prominent. One that the office of judge is an elective office, an office that is to be filled by the people. It is not an appointive office to be filled by any other authority save to the extent necessary to prevent a lapse."

In the case of *The State, ex rel. vs. Bryson*, 44 Ohio St. 457, at page 465, it is stated that:

"The office could not be regarded as vacant while filled by one lawfully entitled to it, nor could an appointment made ostensibly to fill a vacancy, create one."

In the case of *The State, ex rel. vs. McCracken, et al.*, 51 Ohio St. 123, at page 129, it is stated that:

"The recognized policy of the state is to avoid, if practicable, the creation of a vacancy in an elective office, and where the right to hold over is given in language that is not limited, and the same is not otherwise qualified, a court would hardly be justified in seeking for an unnatural construction by which a limit would be placed upon the right. \* \* \*

In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties."

It is therefore concluded that the appointment of Mrs. Secrest, as Probate Judge of Paulding County, Ohio, was without authority and that the commission issued to her by Governor Donahey was unauthorized and void.

The term of R. V. Shirley, present judge of the Probate Court of Paulding County, Ohio, expires February 9, 1929. You inquire as to whether you have authority to make an appointment to fill the vacancy beginning on said date.

Section 7 of Article 4 of the Constitution of Ohio, hereinbefore quoted, provides in part that:

"There shall be established in each county, a Probate Court \* \* \* holden by one judge \* \* \*, who shall hold this office for a term of four 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."

Section 7 of Article 4 of the Constitution limits the term, for which a Probate Judge is elected, to four years. Section 1680 of the General Code, provides that said term of four years shall commence on the ninth day of February next following the election of said Probate Judge.

In an opinion of this department, found in Opinions of Attorney General for 1917, page 927, rendered to Honorable James M. Cox, Governor of Ohio, it is stated, on page 929, that:

"The question then is, whether under the facts stated and under the constitution and statutes above quoted, a vacancy exists in the office of the judge of the probate court of Guernsey County. The constitution fixes and limits the term of office of probate judge. There is no holding over and, unless Mr. Dyson is legally the probate judge under the election of November 16, 1916, the office is vacant."

As no person was elected to fill the office of Probate Judge of Paulding County at the general election held in 1928, and as the term of the present judge of said court expires on February 9, 1929, a vacancy will occur in said office, which under the provisions of Section 142 of the General Code, shall be filled by appointment by the Governor. Said section reads as follows:

"If the office of a judge becomes vacant by reason of the expiration of the term of the incumbent, and a failure to provide therefor at the preceding election, such vacancy shall be filled by appointment by the governor. The person so appointed shall hold the office until a successor is elected and qual-

ified. Such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after such appointment."

In view of the foregoing discussion and authorities cited, and specifically answering your questions, it is my opinion :

(1) There was no vacancy in the office of Probate Judge at the time Mrs. Secrest was appointed to fill said vacancy, and, therefore, the appointment made by Governor Donahey was void, and the commission issued to said appointee was and is inoperative and invalid.

(2) The term of office of the present Probate Judge of Paulding County, Ohio, expires February 9, 1929. As no person was duly elected at the preceding election, the office of said judge will become vacant by reason of the expiration of the term of the incumbent, on said date, and the Governor is authorized to fill such vacancy by appointment. The person so appointed shall hold the office until a successor is elected and qualified.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

27.

APPROVAL, DEEDS TO MIAMI AND ERIE CANAL LANDS IN THE CITY  
OF CINCINNATI—5 GRANTEES.

COLUMBUS, OHIO, January 25, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of even date herewith transmitting for my examination and approval five deeds of the State of Ohio conveying certain parcels of surplus Miami and Erie Canal lands relinquished by the city of Cincinnati to the State of Ohio pursuant to the provisions of the Act of April 20, 1927 (112 O. L. 210).

The deeds transmitted are as follows:

<i>Parcel No.</i>	<i>Names and Addresses of Grantees.</i>	<i>Consideration.</i>
22	John G. and Magdalena Hirsch, 439 W. McMicken St., Cincinnati, Ohio-----	\$272 00
142	Chas. and Kathrina Benkeser, 1608 West Belmar Place, North College Hill, Cincinnati, Ohio-----	52 00
188	Charles H. Schwegman, c/o Heilker & Heilker, Schmidt Building, Fifth and Main Sts., Cincinnati, Ohio-----	8,636 00
189	Richard J. Coates, c/o Heilker & Heilker, Schmidt Building, Fifth and Main Sts., Cincinnati, Ohio-----	6,464 00
190	Richard J. Coates, c/o Heilker & Heilker, Schmidt Building, Fifth and Main Sts., Cincinnati, Ohio-----	1,175 00

I have examined the forms submitted and am of the opinion that they are in conformity to law with the exception of the third deed above listed. As to this deed, it appears from the recital therein as to payment of the consideration of the convey-