25.

PROBATION OFFICER—EMPLOYE OF CLASSIFIED SERVICE IN FORMER FRANKLIN COUNTY JUVENILE COURT—POSITION NOT ABOLISHED BY CREATION OF NEW DOMESTIC RELATIONS DIVISION.

SYLLABUS:

1. *The positions of probation officers of the juvenile court of Franklin County in the classified civil service, heretofore appointed by the Probate Judge of said county, while sitting by designation in said juvenile court and exercising the jurisdiction thereof, are not abolished by the election and qualification of the additional common pleas judge, division of domestc relations, provided for by Section* 1532-7, *General Code, and his exercise of the jurisdiction of said juvenile court.*

2. *The fact 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, may require the performance by probation officers 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.*

COLUMBUS, OHIO, January 25, 1929.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge the receipt of your recent communication which reads:

> "We are attaching hereto a copy of a communication from Judge E. V. Mahaffey of the Franklin County Common Pleas Court, Domestic Relations Branch, containing two questions upon which we desire to respectfully request your opinion.
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> An early opinion would be very much appreciated in view of the fact that this Court is already established and operating and has been since January 1st of this year and the first pay period is January 15th."

With the above communication, you have submitted a copy of a letter from the Honorable E. V. Mahaffey, judge of the Court of Common Pleas of Franklin County, Division of Domestic Relations, addressed to your commission under date of January 4, 1929, which reads:

> "As judge of the newly created Court of Common Pleas, Division of Domestic Relations for Franklin County, Ohio, I hereby submit to you for your opinion, the following questions:
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> 1. Does Section 1532-7 of the General Code of Ohio, creating the Court of Common Pleas, Division of Domestic Relations for Franklin County, abolish the former Juvenile Court of Franklin County, together with classified civil service positions thereunder?
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> 2. If, in your opinion, the former Juvenile Court and all positions thereunder are not abolished by the creation of the new Common Pleas Court, Division of Domestic Relations, have the assistant probation officers of the former Juvenile Court been properly tested as required by the civil service laws of Ohio, in view of the fact that the following new, different and

additional duties will be required of them, in the Court of Domestic Relations, to-wit: Conciliation work with reference to divorce proceedings; investigation and adjustment of domestic difficulties wherein adults only are involved; investigation of the respective financial conditions and needs of husband and wife in alimony matters and the possible adjustment of such; investigation of the past conduct and character of the parties to divorce and alimony proceedings wherein the rights of adults only are involved, investigation as to whether there is collusion or connivance between the parties in order to obtain a divorce; investigation with reference to whether or not plaintiffs in divorce actions are bona fide residents of the state and county at the time of the institution of suit and many other matters necessarily incident to divorce and alimony proceedings."

Section 1532-7, General Code, referred to by Judge Mahaffey, was enacted by the 87th General Assembly (112 O. L. 58) and said section provides:

"From and after the passage and taking effect of this act there shall be one additional judge of the Court of Common Pleas in and for Franklin County who shall reside therein.

Such additional judge shall be elected in 1928 and every six years thereafter, for a term of six years, commencing on the first day of January next after such election.

Vacancies occuring in the office of such additional judge in Franklin County shall be filed in the manner prescribed for the filing of vacancies in the office of judge of the Court of Common Pleas.

Such judge shall have the same qualifications and shall receive the same compensation as is provided by law for the judges of the Court of Common Pleas in Franklin County. Such judge shall exercise the same powers and have the same jurisdiction as is provided by law for judges of the Court of Common Pleas. Such judge and successors shall, however, be elected and designated as a judge of the Court of Common Pleas, Division of Domestic Relations, and all the powers provided for in Title 4, Chapter 8 of the General Code or elsewhere in said Code, relating to juvenile courts, shall be exercised in Franklin County by such judge of said Court of Common Pleas, and on and after the beginning of the term for which such judge is elected, there shall be assigned to said judge and successors elected or appointed in pursuance of this act, all cases under the juvenile court act, all bastardy cases over which the juvenile court of Franklin County now has jurisdiction and all divorce and alimony cases in said county."

In discussing the questions raised by Judge Mahaffey's letter, we must do so without the benefit of any court decisions on the same or similar questions. Provisions similar to those found in Section 1532-7, supra, are found in Section 1532-1, General Code, pertaining to Montgomery County; Section 1532-2, pertaining to Summit County; Section 1532-4, pertaining to Mahoning County; Section 1532-6, pertaining to Lucas County; and Section 1639, the latter part of which makes provision for a similar court for Hamilton County. However, the questions raised by Judge Mahaffey apparently did not arise in any of those cases.

Prior to the enactment of Section 1532-7, supra, the jurisdiction of the juvenile court of Franklin County was exercised by the Probate Judge by designation under the provisions of Section 1639, General Code, which section provides in part:

"Courts of Common Pleas, Probate Courts, and insolvency courts and

superior courts, where established, shall have and exercise, concurrently, the powers and jurisdiction conferred in this chapter. The judges of such courts in each county, at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner.

In the case of the temporary absence or disability of the judge so designated another designation shall be made in like manner to cover the period of such absence or disability.

The words, juvenile court, when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words 'judge of the juvenile court' or 'juvenile judge' as meaning such judge while exercising such jurisdiction.

* * * "

It will be unnecessary to discuss or cite authority for the proposition that Section 1639, supra, is repealed by Section 1532-7, supra, to the extent of any inconsistency between the sections. The specific provision referred to as being repealed is the provision authorizing the designation by the courts of a county of one judge to exercise jurisdiction over juvenile matters. Section 1532-7, General Code, specifically confers such jurisdiction upon the additional judge of the Common Pleas Court whose office is created by that section. In the case of Franklin County, therefore, the Probate Court has been divested of jurisdiction over juvenile cases and that jurisdiction has been transferred to and vested in the newly created judgeship of the Common Pleas Court.

While Judge Mahaffey's inquiry relates to positions in the classified service generally, I am informed that the particular positions in question are those of chief probation officer and assistant probation officers. The question which then presents itself is whether or not the positions of probation officers and assistant probation officers fall within the classified civil service.

The authority for the appointment of probation officers and their assistants is found in Section 1662, General Code, which provides in part as follows:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be one or more assistants. Such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment; provided, however, that such compensation may be increased or decreased at any time by said judge, but the compensation of the chief probation officer shall not exceed four thousand dollars per annum and that of the assistants shall not exceed twenty-four hundred dollars per annum. The judge may appoint other probation officers, with or without compensation, when the interest of the county requires it.

* * * "

This section of the General Code was originally enacted as Section 22 of the act of April 23, 1908, "to regulate the treatment of dependent, neglected and delinquent children", 99 O. L., 192, 197, the provisions of which act were carried into the General Code as Sections 1639 to 1683, inclusive. Under the provisions of this section as enacted and until the enactment of the civil service act of 1913, the judge desig-

nated to exercise the jurisdiction of the juvenile court, so-called, could appoint persons as probation officers in said court and remove such persons at his pleasure. On April 28, 1913, the General Assembly, pursuant to the mandate of Section 10 of Article 15 of the State Constitution, adopted September 3, 1912, enacted an act "to regulate the civil service of the State of Ohio, the several counties, cities and city school districts thereof" (103 O. L. 698). The provisions of this act, amended from time to time, have been carried into the General Code as Sections 486-1a to 486-31, inclusive. Section 486-1a, General Code, by the first paragraph or sub-section thereof, provides that:

> "The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof."

Section 486-8, General Code, so far as is pertinent, provides:

> "The civil service of the State of Ohio and the several counties, cities and city school districts thereof, shall be divided into the unclassified service and the classified service.
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> The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.
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> * * *
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> 8. Three secretaries, assistants or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer.
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> * * *
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> 10. Bailiffs, constables, official stenographers and commissioners of courts of record, and such officers and employes of courts of record as the commission may find it impracticable to determine their fitness by competitive examination.
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> * * *
>
> The classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class."

Without further quotation of the provisions of the civil service act, "it may be said that the classified service, as defined and provided for in the civil service act, includes all those public offices, positions and employments to which appointment or election is made to depend on the merit as determined by examinations, and with few exceptions, competitive examination, and from which incumbents cannot be discharged, suspended or reduced except for cause." *State ex rel.* vs. *Schneller*, 15 O. N. P. (n. s.) 438, 440.

With respect to the question here presented, it is obvious that the provision of Section 1662, General Code, (contained therein at the time of the original enactment in 1908), that the judge designated to exercise jurisdiction in the juvenile court "may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the judge", is in conflict with the later provisions of the civil service act; and that effect cannot

be given to the above quoted language of Section 1662, General Code, without taking probation officers in the juvenile court out of the classified civil service provided for by the civil serice act. The civil service act, however, is a comprehensive act of which it is, perhaps, not too much to say that it constitutes a general system of statute law applicable to the appointments and promotions in every department of the civil service of the State and with such exceptions only as are specified or otherwise provided for in the statute itself. See *State ex rel.* vs. *Schneller, supra; People ex rel.* vs. *Roberts,* 148 N. Y. 360. In their application to the question at hand, I am inclined to the view that effect must be given to the later provisions of the civil service act as against the above quoted conflicting provision of Section 1662, General Code, as enacted by the act of April 23, 1908, and that by force of the provisions of the civil service act of 1913, probation officers in the juvenile courts of the several counties of the state were employed within the classified civil service except, perhaps, as to particular probation officers, who, by designation of the judge under sub-section 8 of Section 486-8, General Code, or by determination of the Civil Service Commission under sub-section 10 of said section, were placed in the unclassified service. The question of the civil service status of probation officers was before this department on two previous occasions. In an opinion directed to the prosecuting attorney of Butler County under date of March 8, 1917, Opinions of the Attorney General, 1917, Vol. 1, page 209, it is held:

> "Whether the chief probation officer and first assistant probation officer of juvenile courts are in the classified or unclassified service of the state, is a question of mixed law and fact to be submitted, in the first instance, to the Civil Service Commission.
>
> Such officers are assistants of such courts and may be appointed as such, under favor of sub-section 8 of the civil service law, as in the unclassified service."

The above ruling was followed and approved by this department in an opinion directed to the prosecuting attorney of Warren County under date of April 2, 1927, Opinions of the Attorney General 1927, Vol. 1, page 462, the syllabus of which opinion reads as follows:

> "A chief probation officer appointed by the juvenile court under the provisions of Section 1662, General Code, is within the unclassified or classified civil service depending upon whether he is selected as one of the exemptions of the court under favor of sub-section 8 of Section 486-8a, General Code."

There is nothing in your communication or the correspondence therewith enclosed showing that any attempt has been made to exempt any of the probation officers of the juvenile court of Franklin County from the classified civil service under favor of sub-sections 8 and 10 of Section 486-8, General Code, and no opinion is here expressed with respect to the application of either of said sub-sections to the question at hand.

Having determined that the provisions of the civil service act of 1913 had the effect of bringing probation officers of juvenile courts within the classified civil service of the state, it is pertinent to note in consideration of the present status of such probation officers in their relation to the civil service law, that since the enactment of the civil service act, Section 1662, General Code, has been amended from time to time; and in each instance said section as amended contained in identical language the provision of the original section that the judge designated to exercise jurisdiction "may appoint one or more discreet persons of good moral character, one or more of

whom may be a woman, to serve as probation officers, during the pleasure of the judge." Section 1662, General Code, containing the above quoted provision, was last amended by the act of April 4, 1923, 110 O. L. 155. No significance can be attached to this fact with respect to the question at hand for the reason that the above quoted provision contained in the section as amended which was in the section as originally enacted, is not to be considered as repealed and again re-enacted in the act of April 4, 1923, but is to be regarded as having been continuous and undisturbed by the mandatory act. In Re Allen, 91 O. S., 315. The above quoted provision of said section relating to the appointment of probation officers remained in legal effect as first enacted, and it is not correct to assume that it is in that respect a new statute or a later statute than the sections of the civil service act above referred to. In Re Hesse, 93 O. S. 230, 234. It is clear, therefore, that the fact that Section 1662, General Code, containing as it does the above quoted provision relating to the appointment of probation officers, was amended by an act passed after the act enacting the civil service law, does not have the effect of excepting probation officers from the operation of the civil service law.

In consideration of the status of probation officers with respect to the civil service law, a question of some difficulty arises in the fact that in the amendment of Section 1662, General Code, by the act of January 29, 1920, 108 O. L. Pt. 2, 1164, there was incorporated therein a provision not found in the section as originally enacted, and which may be thought incompatible with pertinent provisions of the civil service act of 1913. The new provision placed in said section by the act of January 29, 1920, is "provided, however, that such compensation may be increased or decreased at any time by said judge". The pertinent provisions of the civil service act with respect to this matter are those of Section 486-17, General Code, that no person shall be reduced in pay or otherwise discriminated against by an appointing officer for religious or political reasons or affiliations, and that in all cases of reduction of an employe or subordinate, the appointing authority shall furnish such employe or subordinate with a copy of the order of reduction and his reasons for the same, and give such employe or subordinate a reasonable time in which to make and file an explanation; which order together with the explanation, if any, of the subordinate, shall be filed with the civil service commission. The above quoted proviso in Section 1662, General Code, with respect to the compensation of the chief probation officer and assistants was obviously inserted in said section for the purpose of qualifying and correcting the provision therein that such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment; and the whole of the provisions now contained in said section with respect to the compensation of the chief probation officer and assistants have no other meaning than that such probation officer and assistants shall receive such compensation as the judge appointing them may designate within the maximum amounts therein prescribed.

Moreover, in the consideration of the effect of the amendatory provision of Section 1662, General Code, above quoted, with respect to the question at hand, it is recognized as a cardinal rule of statutory construction that "where, in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy. And it is only when, after appyling these rules in the endeavor to harmonize the general and particular provisions of the statute, the repugnancy of the latter to the former is clearly manifest, that the intention of the Legislature as declared in the general language of the statute is superseded." *City of Cincinnati* vs. *Connor,* 55 O. S. 82, 89. Applying this rule of statutory construction to the amendatory provision of Section 1662, General Code, above quoted, it follows that, though the judge of the juvenile court may increase or decrease the compensation

of the probation officers of said court, a reduction in the compensation of any such probation officer shall not be for religious or political reasons or affiliations, and the action of the judge in ordering such reduction should otherwise comply with the provisions of Section 486-17, General Code. On the considerations above noted, I am inclined to the view that there is nothing in the amendatory provision of Section 1662, General Code, relating to the authority of the judge of the juvenile court to increase or decrease the compensation of probation officers which, in any wise, affects the application of the civil service law to such probation officers; and that said probation officers are in the classified civil service where they were placed by the civil service act of 1913.

Having concluded that probation officers are within the classified civil service, the further question is here presented whether the enactment of Section 1532-7, General Code, providing for the election of an additional judge of the Court of Common Pleas of Franklin County, to be elected and designated as a judge of a Court of Common Pleas, Division of Domestic Relations, and vesting jurisdiction in all cases under the juvenile court act in such judge, had the effect of abolishing the positions of probation officers in the classified service theretofore appointed by the Probate Judge of the said county in the exercise of such jurisdiction, on the election and qualification of such additional common pleas judge. In consideration of this question, it is to be recognized that the juvenile court is not an office, separate and distinct from the judge who may be designated to exercise the prescribed jurisdiction of such court. Touching this point, Section 1639, General Code, contains the provision that "the words juvenile court when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words 'judge of the juvenile court' and 'juvenile judge' as meaning such judge while exercising such jurisdiction." Section 1640, General Code, provides that "the seal of the court, the judge of which is designated to transact such business, shall be attached to all writs and processes." In an opinion under date of March 16, 1914, directed to the prosecuting attorney of Hamilton County, Reports of Attorney General, 1914, Vol I, page 357, this department had under consideration the question of the authority of a common pleas judge of Hamilton county, sitting by designation in the juvenile court of said county, to appoint a court constable for service in the juvenile court. In said opinion of this department, after quoting from the opinions of the court in the cases of Ex Parte Bank, 1 O. S. 432, and *Mendelson* vs. *Miller,* 11 O. N. P. (n. s.) 586, it was said:

> "Measured by the principles above stated, it is apparent that the juvenile court, so called, of Hamilton County, is not in any complete or proper sense, a separate and distinct court, either as to organization or jurisdiction, but is only a forum for the transaction of certain distributed business, concurrent jurisdiction of which is vested in the courts first specifically named in Section 1639."

The conclusion thus reached with respect to the nature and character of the juvenile court to which the probation officers here in question were appointed and in which they perform their duties, is not conclusive with respect to the question here under consideration. Although the juvenile court is not an office separate and distinct from the judge designated to exercise the jurisdiction thereof, it is in every proper sense a department within the meaning of that term as used in Section 486-13, General Code, providing that the head of a department and the appointing officer thereof shall, except as otherwise provided in the civil service act, make appointments to positions in said department, from eligible lists submitted to him by the Civil Service Commission. The appointment of probation officers in the juvenile court being

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