

2210.

## COURTS—PROBATE AND COMMON PLEAS COMBINED—COMMON PLEAS ENTITLED TO FEES OF PROBATE.

*SYLLABUS:*

*Where the Probate Court has been combined with the Common Pleas Court the Common Pleas Judge becomes the Probate Judge, within the meaning of Section 5348-10a, General Code, and is entitled to the fees as provided in said section.*

COLUMBUS, OHIO, June 7, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads as follows:

“You are respectfully requested to render your written opinion to this department upon the following:

Attorney General Price in his 1921 Report, at page 696, held that where the common pleas and probate courts were combined the judge was not entitled to inheritance tax fees under the provisions of Section 5348-10a, G. C. Under date of November 16th, 1927, the Court of Appeals of Adams County in a mandamus proceeding, brought by Judge Will P. Stephenson against the Auditor of Adams County, held: that the common pleas judge in case of a combined Common Pleas and Probate Court was entitled to fees under the section above referred to.

Question: Under the circumstances what should be the attitude of this department with reference to this question? In your opinion is the proceeding in the Court of Appeals the correct one to follow instead of the opinion of the Attorney General? The case referred to is to be found in The Ohio Law Abstract of December 10, 1927.”

The opinion of the Attorney General was rendered to Hon. R. W. Cahill, Common Pleas Court, Napoleon, Ohio, and construed Article IV, Section 7 of the Constitution of Ohio and also Section 1604-1 and succeeding sections of the General Code.

Article IV, Section 7 of the Constitution authorizes the combination of the courts of Common Pleas and Probate under the name of the “Court of Common Pleas.”

Section 1604-1 and succeeding sections of the General Code regulate the procedure for effecting this combination.

Section 1604-3, General Code, provides that in the event of the casting of a majority vote in favor of the combination by the electors,

“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 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, clerk and assistants, and for their salaries.

The Supreme Court of Ohio had occasion to construe said constitutional and statutory provisions in the case of *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."

As you are supplied with the 1921 Opinion of the Attorney General to which you refer, and are familiar with the reasons for the conclusions therein stated, the same will not be quoted here.

In the case of *State ex rel. Stephenson vs. Smith*, as reported in The Ohio Law Abstract, Volume 5, No. 48, page 788, under date of December 10, 1927, the Court of Appeals for Adams County on November 16, 1927, held that where the Probate Court has been combined with the Common Pleas Court, the Common Pleas Judge becomes the Probate Judge and is entitled to fees as provided in Section 5348-10a, General Code.

Section 5348-10a, General Code, reads as follows:

"For services performed by him under the provisions of this chapter each probate judge shall be allowed a fee of five dollars in each inheritance tax proceeding in his court in which tax is assessed and collected and a fee of three dollars in each such proceeding in which no tax is found, which fee shall be allowed and paid to such judges as the other costs in such proceedings are paid but are to be retained by them personally as compensation for the performance by them of the additional duties imposed on them by this chapter. Provided always, however, that the amount paid to any probate judge under this section shall in no case exceed the sum of three thousand dollars in any one year."

In the opinion the Court of Appeals said as follows:

"Section 5348-10a G. C. provides that for their services under the chapter of the code relating to inheritance taxes probate judges shall be allowed certain fees

'to be retained by them personally as compensation for the performance by them of the additional duties imposed on them by this chapter.'

In Adams County the probate court has been combined with the Common Pleas. The relator is the common pleas judge of that county and now seeks by writ of mandamus to compel the county auditor to allow him fees under the statute referred to. His petition has been demurred to.

The only question is whether the relator is a probate judge within the contemplation of the section. In the chapter of which the section is part,

frequent use is made of the words probate judge and unless in these instances there is meant to include the common pleas judges with probate powers there would be no sufficient machinery for the collection of inheritance taxes in those counties where the two courts are combined. In the particular section there is required to be taxed in the costs in inheritance tax proceedings the fee fixed for probate judges and no other disposition is fixed for the fee but that it shall be retained by that officer. If the common pleas judge is not a probate judge within the intendment of the statute there would be either no costs assessed in such proceeding in counties where the courts are combined, or if assessed there would be no way to dispose of the fee when collected. We conclude that the words probate judge in one part of the chapter refer to the same officer as in other parts of the chapter and that wherever used they apply to the common pleas functioning as a probate judge.

No constitutional question has been argued or suggested. Quære: Does the allowance of a greater fee where tax is assessed than where one is not assessed violate the constitutional principle developed in the Tumey case?"

In view of the foregoing decision of said Court of Appeals and for the reasons therein stated, I am of the opinion that where the Probate Court has been combined with the Common Pleas Court the Common Pleas Judge becomes the Probate Judge, within the meaning of Section 5348-10a, General Code, and is entitled to the fees as provided in said section.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2211.

ELECTION—SPECIAL ELECTION DEFINED—LAWS GOVERNING SPECIAL  
ELECTION TO UNITED STATES SENATE.

SYLLABUS:

1. A special election is one provided for by law under special circumstances. It is an election held to supply a vacancy in office before the expiration of the full term for which the incumbent was elected, or an election at which some question or proposition is submitted to the vote of the qualified electors, or an election for some particular emergency.

2. Where, pursuant to the provisions of Section 4828-3, General Code, a special election is to be held at the election of state officers in November, for the purpose of filling a vacancy in the representation of this state in the senate of the United States, the candidates to be voted for at such special election must be nominated on the second Tuesday in August of the same year, and the primaries at which such candidates are nominated, are to be governed by the same laws and regulations and conducted in the same manner as is provided for the nomination of candidates at regular elections.

3. A special election held pursuant to the provisions of Section 4828-3, General Code, for the purpose of filling a vacancy in the representation of this state in the United States Senate, is to be governed in all respects by the laws of this state controlling regular elections for United States Senator, including Sections 5016 and 5017, General Code, which provide *inter alia* that the names of all candidates, whose nominations for any office specified in the ballot have been duly made, shall be placed on the same ballot, arranged in tickets or lists under the respective party or political or other designation certified.