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1. BOOKS—RECORDS—PROBATE COURT — SECTION 10501-15, SUBSECTIONS 1 to 13 G. C.—RECORDS AND DATA MAY BE KEPT IN ONE BOOK, IF AS REQUIRED BY SECTION 10501-16 G. C., THE RECORDS AND DATA MENTIONED IN SECTION 10501-15, SUBSECTIONS 5, 6, 7, 8, 11 G. C.—INHERITANCE TAX PROCEEDINGS SHOULD BE KEPT IN SEPARATE BOOK—SECTION 5348-7 G. C.
2. PROBATE COURT BY DULY ENTERED ORDER MAY INCLUDE IN ONE BOOK, PROPERLY INDEXED, DOCKETS MENTIONED IN SECTION 10501-15, SUBSECTIONS 2, 3, 4, 9 G. C.

SYLLABUS:

1. By virtue of Section 10501-15, General Code, the probate court is required to keep books wherein shall be incorporated the records and data mentioned in subsections one to thirteen, both inclusive, of said section. Therefore said probate court, by order duly entered, may include in one book, provided the same is as required by Section 10501-16, General Code, the records and data mentioned in subsections five, six, seven, eight and eleven of said Section 10501-15, General Code. However, inheritance tax proceedings should be kept in a separate book in view of the terms of Section 5348-7, General Code.

2. The probate court, by order duly entered, may include in one book, provided the same is properly indexed, the dockets mentioned in subsections two, three, four and nine of Section 10501-15, General Code.

Columbus, Ohio, July 29, 1948

Hon. James E. Reed, Prosecuting Attorney
Marion County, Marion, Ohio

Dear Sir :

Your request for my opinion reads :

“Will you please render me an opinion on the following questions?

“‘Can the Probate Court by order duly entered, establish a Final Estate Record to be kept in one volume wherein there is recorded all papers pertinent to the administration of a decedent’s estate as defined in General Code Section 10501-15, Paragraphs 5, 6, 7, 8, and 11 in addition to inventories, schedule of debts and inheritance tax proceedings?’

“‘Can the Probate Court by order duly entered, establish one Probate Docket which would combine the dockets provided by General Code Section 10501-15, Paragraphs 2, 3, 4 and 9?’ ”

Although somewhat lengthy it has been deemed advisable to set forth herein in its entirety Section 10501-15, General Code, which reads :

“The following books shall be kept by the *probate court* :

“1. A criminal record, in which shall be made an accurate entry of proceedings had in criminal actions instituted in the court prior to January 1, 1932.

“2. An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties therein, and containing a minute of the time of filing each paper, and brief note of each order or proceeding relating to the estate, with reference to the journal or record in which the order or proceeding is found.

“3. A guardian’s docket, showing the name of each ward, and, if an infant his age, and the name of his father, the amount of bond and names of sureties therein, and a minute of papers, orders and proceedings as in the preceding clause.

“4. A civil docket, in which shall be noted the names of parties to actions and proceedings, a minute of the time of the commencement of such actions and proceedings, and of the filing of the papers relating thereto, a brief note of the orders made therein, and the time of entering them.

"5. A journal, in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings.

"6. A record of wills, in which the wills proved in such court shall be recorded, with a certificate of the probate thereof, and wills proved elsewhere with the certificate of probate, authenticated copies of which have been admitted to record by the court.

"7. A final record, which shall contain a complete record in each cause or matter of the petitions, answers, demurrers, motions, returns, reports, verdicts, awards, orders and judgments, which shall be made and completed within ninety days after the final order or judgment has been made in such cause or matter. The probate judge shall also, within thirty days after the return thereof, record inventories, sale bills, and allowances to widows, in a book provided for that purpose.

"8. A record of accounts, which shall contain an entry of the appointment of executors, administrators and guardians, partial and final accounts thereof, and the orders and proceedings of the courts thereon, which record shall be made within sixty days after the filing and approval of such account.

"9. An execution docket, in which shall be entered a memorandum of executions issued by the probate judge, stating the names of the parties, the name of the person to whom delivered, and his return thereon. It shall also contain the date of issuing the execution, the amount ordered to be collected, stating the costs separately from the fine or damages, the payments thereon, and the satisfaction thereof when it is satisfied.

"10. A marriage record, in which shall be entered licenses, and the names of the parties to whom issued, the name of the person or persons applying therefor, with a brief statement of the facts sworn to by such person, and the returns of the person solemnizing the marriage.

"11. A record of bonds, in which shall be recorded bonds of executors, administrators, guardians, trustees and assignees which have been taken and approved by him.

"12. A naturalization record, in which shall be entered the declaration of intention of the person seeking to be naturalized, the oath of the person naturalized, and the affidavit or oath of witnesses who testify in his behalf, in which affidavit shall be stated the place of residence of such witnesses.

"13. A permanent record of all births and deaths occurring within the county, reported as provided by law. Such record shall be kept in such form and manner as may be designated by the state registrar of vital statistics." (Emphasis added.)

Section 10501-16, General Code, should also be set out. It provides:

“To each record required by the proceeding section, an index shall be attached securely bound in the volume. Each index shall be kept up with the entries therein and refer to such entries alphabetically by the names of the parties or persons in which originally entered, indexing the page of the book where the entry is made. On the order of the probate judge, blank books for such records and indexes shall be furnished by the county commissioners at the expense of the county.”

It is noted that in your first question reference is made to the probate *court* and the keeping of records in inheritance tax proceedings. The duties of the probate *judge* as to certain records growing out of proceedings of this nature just mentioned will be found in Section 5348-7, General Code, wherein it is stated:

“In connection with the estates of decedents on the succession to which any inheritance tax is found to be due, each *probate judge* shall keep a docket, the form whereof shall be prescribed by the auditor of state, which shall be a public record, and in which such *probate judge* shall enter the name of every such decedent upon whose estate an application to him has been made for an issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of said decedent, the estimated value of his real and personal property, the names, places of residence and relationship to him of his heirs at law, the names and places of residence of the legatees or devisees in any will of any such decedent, the amount of each legacy, and the estimated value of any real property devised therein and to whom devised. Such entry shall be made from the data contained in the papers filed on any such application or in any proceeding relating to the estate of the decedent. The *probate judge* shall also enter in such docket the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by the county auditor under the subdivision of this chapter, and the value of annuities, life estates, terms of years and other property of said decedent, or given by him in his will or otherwise, as fixed by the *probate court*, and the taxes assessed thereon, and the township or municipal corporation in which the same originated, and the amounts of any receipts for payment of any taxes on the estate of such decedent under this subdivision of this chapter, filed with him. The auditor of state shall also prescribe forms for the reports to be made by each *probate judge* and county auditor, which shall correspond with the entries to be made in such docket.”

(Emphasis added.)

The words "court" and "judge" have been emphasized above for the reason that, as will be observed, the section last quoted refers to the duties of the probate judge whereas Section 10501-15, General Code, mentions the books that are to be kept by the probate court. References will be made to these terms at a later point.

Can it be said that Section 10501-15, General Code, merely because it consists of thirteen subsections, must be construed as requiring the probate court to keep or maintain at least thirteen separate books in order for compliance to be had therewith? If that be the situation then it would necessarily follow both of your questions would have to be answered in the negative. Considerable light will be thrown on the matter if other, although entirely unrelated sections of the General Code, are looked to with a view to arriving at the proper construction to be placed on said Section 10501-15, General Code.

Section 2757, General Code, which deals with the records to be kept by the county recorder, provides in part:

"The recorder shall keep five separate sets of records, namely: First, a record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments; Second, a record of mortgages, in which shall be recorded all mortgages, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged, or otherwise conditionally sold, conveyed, affected or incumbered in law; Third, a record of powers of attorney; Fourth, a record of plats, in which shall be recorded all plats and maps of town lots, and of the subdivisions thereof, and of other divisions or surveys of lands, and any center line survey of a highway located within the county, the plat of which shall be furnished by the director of highways or the county engineer; Fifth, a record of leases, in which shall be recorded all leases. * * *"

Kindly observe that at the very outset of this section it is provided that "five *separate* sets of records" shall be kept. It might also be noted that documents other than deeds are to be recorded in the record of deeds. Likewise documents other than mortgages are to be incorporated in the record of mortgages.

Another instance wherein a statute provides in specific terms for the keeping of separate books is made apparent by Section 710-116, General

Code. This section, which will be found in that portion of the General Code dealing generally with the powers and duties of the superintendent of banks, provides:

“A corporation formed to combine two or more classes of business under this act shall keep separate books of deposit accounts for each class.”

Attention is next called to Section 2878, General Code, which sets out the records to be kept by the clerk of the common pleas court. This section reads:

“The clerk shall keep at least five books, to be called the appearance docket, trial docket, and printed duplicates of the trial docket for the use of the court and the officers thereof journal, record, and execution docket. He shall keep an index to the trial docket and to the printed duplicates of the trial docket and of the journal direct, and to the appearance docket record and execution docket, direct and reverse.”

In this case, while reference is not made in positive language to separate books, it may reasonably be concluded that at least five separate books must be kept.

One more instance wherein the law appears to provide for the keeping of separate books, although again not specifically so stating, is revealed by Section 3302, General Code, which deals with the duties of the township clerk. This section reads:

“In addition to the books for the record of the proceedings of the trustees, the clerk shall be provided by the township with a book for the record of township roads, a book for the record of marks and brands, and a book for the record of official oaths and bonds of township officers.”

No language will be found in Section 10501-15, General Code, which bears any similarity to that which is contained in the four sections of the General Code which have just been quoted in so far as said quoted sections require the keeping of books or records.

Further mention will now be made of Section 10501-16, General Code, which was quoted at the outset of this opinion. It is clear that this section and Section 10501-15, General Code, must be read together. Note particularly the first sentence of said Section 10501-16, General Code, which states that “to *each record* required by the preceding section, an index

shall be securely bound *in the volume.*” The word “book” does not appear therein but instead the General Assembly saw fit to employ the term “volume”. Whether “book” and “volume” may be used synonymously or whether one word has a more restricted or more comprehensive meaning than the other is perhaps not of too much importance. In any event, no good reason is readily apparent why “the volume” mentioned in Section 10501-16, General Code, could not contain more than one index with each index being in the form prescribed by law.

With the foregoing in mind further reference will now be made to your first question wherein you mention among others subsection seven and then inquire as to “inventories”. Subsection seven of Section 10501-15, General Code, provides in specific language for the recording of inventories within thirty days after the return thereof. Therefore I am somewhat at a loss to understand why it deemed it necessary to refer to inventories since provision has been made for their recording. However, the matter of recording the “schedule of debts” presents greater concern. Provision for the filing of a schedule of debts has been made by virtue of Section 10509-118 et seq. of the General Code. It must be admitted, however, that research has failed to disclose any section of the Probate Code that, in express terms, requires the recording of a schedule of debts. It is evident that there is no language in Section 10501-15, General Code, to such effect. It is not being suggested, however, that schedules of debts should not be recorded. Subsection seven of Section 10501-15, General Code, would probably contemplate such recording.

In addition to the above your first question also involves inheritance tax proceedings. As will be noted from Section 5348-7, General Code, “each probate *judge* shall keep a docket, the form whereof shall be prescribed by the auditor of state.” While this section does not, in specific language, preclude such docket from being combined with other books, i. e., those contemplated by Section 10501-15, General Code, proceedings in inheritance tax determinations involve the taxing power of the state as distinguished from proceedings that relate to the administration of estates. Therefore in this sense each proceeding partakes of a different nature. The General Assembly having conferred upon the auditor of state the duty of prescribing the form of the docket of the probate *judge*, it can be concluded there is some justification for the assumption that such docket should not be combined with records that are to be kept by the probate

court. Moreover, the words "court" and "judge" are not strictly synonymous and the judge alone does not necessarily constitute a court. In pointing out this distinction it is stated in 14 Am. Jur., Courts, Sec. 4:

"* * * Whether an act is to be performed by the one or the other is generally to be determined by the character of the act rather than by such designation. Whenever the power or duty imposed is found from a consideration of the object and purposes of the act to be one which is more properly the function of the court, it will be so construed; and whenever it is manifest that the legislature meant the judge, and not the court, that meaning will be applied to the words in order to carry out the legislative intent. 'Court' will always be construed to mean 'judge,' and 'judge' to mean 'court,' wherever either construction is necessary to carry into effect the obvious intent of the legislature."

In the light of this distinction there appears to me to be an added reason why the books to be kept pursuant to Section 10501-15, General Code, and the docket that is mentioned in Section 5348-7, General Code, should not be combined.

Your second question relates to consolidating in one docket the records that are to be kept pursuant to the subsection of Section 10501-15, General Code, that are set out in said question. It is apparent that, in view of the general discussion herein set forth, no particular comment is necessary as to said second question.

The conclusion has been formulated that, merely because Section 10501-15, General Code, contains thirteen subsections, it does not necessarily follow that at least thirteen separate books must be kept or maintained. Reliance upon the number of subsections as determinative of the number of books to be kept would seem to lead to an untenable position. It will be observed that under the language of subsection seven the first sentence thereof provides for a final record whereas the second and last sentence states that "The probate judge shall also, * * * record inventories, sales bills, and allowances to widows, *in a book provided for that purpose.*" If it can be said this subsection provides for two distinct books and the other subsections also contemplate separate books then it would logically ensue that said Section 10501-15, General Code, in reality provides for *fourteen* separate books. But if that position be taken then the argument that thirteen subsections contemplate thirteen separate books has been materially weakened if not entirely demolished.

My views as to the matter are further strengthened when there is taken into consideration the legislative history of Section 10501-15, General Code, along with the history of another section that has been mentioned herein, viz., Section 2757, General Code. A comparison of said sections is interesting. The section last noted became effective in its present form September 4, 1947 (122 O. L., S. 71). It now provides for five separate sets of records whereas immediately prior to amendment it provided for only four separate sets of records. Section 10501-15, General Code (formerly Section 1594, General Code), came into existence when an act was passed in March, 1853 defining the jurisdiction and regulating the practice of probate courts. In that portion of the act providing for the organization of the court and found in 51 O. L. 169 it was provided in Section 11 as follows:

“The following books shall be kept by the probate court, and blank books for the purpose, shall be procured by the county auditor, at the expense of the county: * * *”

Then followed *seven subsections* which provided respectively for the keeping of a criminal record, a civil docket, a journal, a record of wills, a final record, a final record of accounts and an execution docket. It might be here noted that in then subsection five, which provided for a final record, it was stated therein at the end thereof as follows:

“* * * and he shall also, * * * record all inventories, sales bills, and allowances to widows, in a book to be provided for that purpose: * * *”

The matter just set out is substantially the same as presently contained in the last sentence of subsection seven of present Section 10501-15, General Code. It is particularly important to note that present Section 10501-15, General Code, as was the situation when there came into existence the law that provided for the creation of the probate court, states at the very outset thereof “The following books shall be kept * * *.”

The legislative history of Section 2757, General Code, will now be the subject of further consideration. In February, 1831, the General Assembly passed “An Act to provide for the election of county recorders, and prescribing their duties.” (29 O. L. 344). Section 4 of that act provided in part:

“That the recorder of each county shall record in a fair and legible hand writing, in books to be by him provided for that purpose, at the expense of the county, all deeds, mortgages, and other instruments of writing, required by law to be recorded, and which shall be presented to him for that purpose: * * *”

In March, 1850 there came into existence for the first time a provision that the recorder keep “separate sets of record books” (48 O. L. 64). The act of this date required *three* such separate records. Then in March, 1864 (61 O. L. 55) the 56th General Assembly passed an act to amend Section 4 of the aforementioned act of February, 1831 which, as previously noted, will be found in 29 O. L. 344. This last amendatory act merely served the purpose of adding a sentence to former Section 4 to the effect that the auditor shall certify upon the record the value of the revenue stamp that was apparently required to be attached to certain documents by virtue of the provisions of an act of congress approved July 1, 1862. However, of much greater significance is the fact that the next General Assembly passed an act which provided (62 O. L. 170) :

“That the recorders of the several counties of this state are hereby authorized and required to *keep a separate book* for the record of leases.” (Emphasis added.)

This is the second time that there was introduced into the law a provision for the keeping by the recorder of a separate book. It should be observed that this act which was passed in April, 1865, was twelve years later than that which provided for the organization of the probate court. Consequently both prior to and after the original probate court act we find instances wherein provision has been made for separate records.

It was not until 1880 that Revised Section 1143 came into existence being one of the predecessor sections of present Section 2757, General Code. This revised section in specific terms stated in part:

“The recorder shall keep four separate sets of records, namely: * * *”

As previously mentioned herein it was not until comparatively recently, namely August 4, 1947, that the General Assembly provided for *five separate sets of records*.

The conclusion is inescapable that if the General Assembly, in the enactment of present Section 10501-15, General Code, had intended that separate books shall be kept by the probate judge, it would and could have said so. Therefore it cannot be successfully maintained that the word "separate" can, in effect, be read into this section. To me the expression "the following books" does not mean the same as "separate books." Had there been an intent to require separate books it is more logical to believe that it would have been specifically so stated especially since the General Assembly so provided in the case of the records to be kept by the recorder.

It is entirely possible that, as a practical matter, the maintenance of separate books would be desirable in that there would be uniformity throughout the 88 counties in this state. Moreover, I have reason to believe that in at least some of the larger counties separate books are maintained. However, on the other hand, it can be asserted with considerable merit that where the number of estates being administered is relatively small, little purpose can be served by having thirteen or more separate books. The statute under consideration merely requires the keeping of the records and data therein enumerated. It is certainly not a sensible view of the matter to say that the law must so be construed as to require separate books when the General Assembly has not so expressly provided and when, in the judgment of the probate judge, it would facilitate matters to have certain records and data in one bound volume instead of two or more bound volumes. Just why the information contained in two separate books could not be consolidated in a single book or volume, if the words are to be used synonymously, does not readily appear.

In the absence of any language which in specific terms requires the probate court to keep thirteen or more separate books, which, to my way of thinking Section 10501-15, General Code, does not demand, I cannot by inference construe that section as imposing upon the probate court the mandatory duty to keep thirteen or more separate books. Hence in specific answer to your two questions you are therefore advised as follows :

1. By virtue of Section 10501-15, General Code, the probate court is required to keep books wherein shall be incorporated the records and

data mentioned in subsections one to thirteen, both inclusive, of said section. Therefore said probate court, by order duly entered, may include in one book, provided the same is as required by Section 10501-16, General Code, the records and data mentioned in subsections five, six, seven, eight and eleven of said Section 10501-15, General Code. However, inheritance tax proceedings should be kept in a separate book in view of the terms of Section 5348-7, General Code.

2. The probate court, by order duly entered, may include in one book, provided the same is properly indexed, the dockets mentioned in subsections two, three, four and nine of Section 10501-15, General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.