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1. SALARIES — TOTAL COMBINED, ALLOWANCES AND COMPENSATION—PROBATE JUDGE—JUVENILE JUDGE —INCLUDES COMPENSATION RECEIVED BY OFFICER FOR SERVICES IN INHERITANCE TAX CASES — SECTIONS 1639-7a, 5348-10a G. C.

2. PAYMENT TO OFFICER OF FUNDS, SECTION 1639-7a G. C. —EXCEED LIMITATION—ILLEGAL EXPENDITURE OF PUBLIC FUNDS—EXCEPTION, WHERE PAYMENT HAS BEEN MADE IN COMPLIANCE WITH FINAL ORDER OR JUDGMENT OF COURT OF COMPETENT JURISDICTION.

3. ALTERNATE WRIT OF MANDAMUS—NOT A FINAL ORDER OR JUDGMENT.

SYLLABUS:

1. The total of the combined salaries, allowances and compensation of a probate judge and juvenile judge, as limited by the provisions of Section 1639-7a, General Code, includes the compensation received by such officer for services in inheritance tax cases under the provisions of Section 5348-10a, General Code.

2. Payment to such officer of funds under the provisions of Section 1639-7a, General Code, which exceed the limitation therein provided, constitutes an illegal expenditure of public funds, except in cases where such payment has been made in compliance with the final order or judgment of a court of competent jurisdiction.

3. An alternative writ of mandamus is not a final order or judgment.

Columbus, Ohio, October 19, 1951

Hon. Webb D. Tomb, Prosecuting Attorney
Seneca County, Tiffin, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Seneca County, in common with many others, has had difficulty in construing the provisions of Sections 2989, 2992, 2996, 1639-7a and 5348-10a, General Code, so as to determine the proper amount of salary and/or compensation which should be paid to the person holding the offices of Probate Judge and Juvenile Judge.

"After considerable research and discussion, this problem was attempted to be solved by means of a mandamus action filed in the Court of Appeals by the Probate and Juvenile Judge against the Auditor of Seneca County. Copies of the petition and journal entries in this action are enclosed herewith. Also enclosed is a copy of the letter of July 2, 1951 from the Probate and Juvenile Judge to the County Auditor, explanatory of the procedure followed to date in the payment of the Judge's salary.

"Subsequent to the termination of the mandamus action, the County Auditor was advised by an examiner of the Bureau of Inspection and Supervision of Public Offices that a finding would be made against him for any amounts paid to the Probate and Juvenile Judge in excess of the compensation received by the Common Pleas Judge of Seneca County, this calculation to include the compensation of the Probate Judge in inheritance tax cases, as provided in Section 5348-10a of the General Code. Naturally, the Auditor does not relish such a finding.

"I fully appreciate that the various questions involved cannot be answered satisfactorily without a complete revision of the several code sections by the legislature. Some phases of the problem are discussed in 1945 O. A. G. number 117, in Derhammer v. County Commissioners, 38 O. O. 439, and in various other opinions and decisions.

"Your opinion is requested particularly upon the following questions:

"1. Does the total of the combined salaries, allowances and compensation upon which the limit is placed by Section 1639-7a of the General Code include the compensation received in inheritance tax cases as provided in Section 5348-10a of the General Code?

> "2. In view of the writ issued by the Court of Appeals in the mandamus action above referred to, may the Auditor properly refuse to pay to the Probate and Juvenile Judge the full amount of the Juvenile Judge's compensation of $1500.00, payable $125.00 per month?"

As pointed out in your request for my opinion, there are several different statutes involved in answering your first question and a review of their history and interpretation is in order.

Three sections concerning the pay of probate judges were enacted in 1906 as part of the same act set out in 98 Ohio Laws 89. Section 11 of the act which became Section 2989, General Code, provided as follows:

> "After deducting from each of the several fee funds herein provided the compensation of all deputies, assistants, clerks, bookkeepers, and other employes, as fixed and authorized herein, each of the county officers herein named shall receive out of the balances in said several fee funds an annual salary, payable monthly upon warrant of the county auditor, as follows:"

Section 14 of the act, which became Section 2992, General Code, provided in part as follows:

> "Each probate judge shall receive one hundred dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election. * * *"

Section 18 of the act, which became Section 296, General Code, provided as follows:

> "And said salaries shall be in lieu of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of the officials herein named may now collect and receive, provided, however, that in no case shall such annual salary payable to any of the officers aforesaid exceed the sum of $6,000.00."

Section 2989, General Code, dealing with fee funds was subsequently amended to provide for payment from the general fund of the county but, so far as our present problem is concerned, the law remained unchanged until 1921. In that year, by an act set out in 109 Ohio Laws 614, Sections 2989 and 2996, General Code, were amended. Section 2989, General Code, provided as follows:

"Each county officer hereinafter named shall receive out of the general county fund the annual salary hereinafter provided, payable monthly upon the warrant of the county auditor, *and such additional compensation or salary as may be provided by law.*" (Emphasis added.)

Section 2996, General Code, provided as follows:

"Such salaries and compensation shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary and compensation paid to any such officer exceed six thousand dollars, *except in the case of the probate judge whose annual salary shall not exceed nine thousand dollars.*" (Emphasis added.)

By an act passed and approved the same day and set out in 109 Ohio Laws 531, Section 5348-11, General Code, was enacted, providing 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 fees 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."

This enactment was later renumbered as Section 5348-10a, General Code.

The effect of these amendments on the salary of a probate judge who had taken office prior to their effective date was involved in the case of State, ex rel. Lueders v. Beaman, 106 Ohio St., 650. In that case such an incumbent judge sought to obtain a writ of mandamus to compel the payments of the additional fees provided by Section 5348-10a, General Code. It was held that the writ should not issue. Three judges held that the provisions of Article II, Section 20 of the Constitution, forbidding the change of an officer's salary during his existing term, would be violated by the issuance of the writ. Two judges held that no new duties had been added to the office by the enactment in question and that, therefore, no additional compensation was authorized.

After the terms of those probate judges who were in office in 1921 had expired, the statutory question of the effect of the enactments was presented to the then Attorney General. In Opinion No. 2181, Opinions of the Attorney General for 1925, page 43, the question presented was:

> "May a probate judge taking office February 9, 1925, receive an annual salary, allowed under the provisions of sections 2989, 2992 and 2996, of $9,000 (in the event that the population of his county would allow such computation), and in addition thereto receive the fees up to the amount of $3,000.00 as provided under section 5348-11 of the inheritance tax law?"

This question was answered in the affirmative. The basis of the opinion was that there is a difference between "compensation" and "salary," and that, therefore, the limitation provided in Section 2996, supra, referred only to the "salary" received by a probate judge from the county under the population formula. The effect of this opinion was that the probate judges in populous counties were allowed to draw up to nine thousand dollars from the county and up to three thousand dollars in inheritance tax cases, for a total of twelve thousand dollars.

In 1943, by an act set out in 120 Ohio Laws 330, Section 5348-10a was amended to provide for a flat salary in inheritance tax cases instead of the fees theretofore allowed. In its amended form the statute provided as follows:

> "In lieu of fees for services performed by him in inheritance tax cases, each probate judge shall receive annually six cents per capita for each full one thousand of the first ten thousand population of the county and 1½ cents per capita for each full one thousand over ten thousand population of the county, as shown by the last federal census next preceding his election which shall be paid to such probate judge in equal monthly installments from the state's share of the undivided inheritance tax in the county treasury on the warrant of the county auditor. Provided, however, that the amount paid to any probate judge for services rendered in inheritance tax cases shall not exceed three thousand dollars in any calendar year."

In Opinion No. 117, Opinions of the Attorney General for 1945, page 71, the question presented to the then Attorney General was whether this change in method of payment properly could be applied to a probate judge who had taken office prior to the effective date of the statute. The answer to that question, as indicated by the syllabus, was given as follows:

"A probate judge whose term of office begins on February 9, 1945, is entitled to be paid the statutory rate fixed by Section 5348-10a, General Code, as amended, and effective on that date, but a probate judge whose term of office began prior to February 9, 1945 is not entitled to the benefits of said section as amended. The compensation of the latter is governed by the provisions of said section as effective on September 7, 1921 and he is entitled to be paid the amount fixed thereby for services in inheritance tax matters during his term of office."

The distinction between "salary" and "compensation" which had been so carefully drawn in the 1925 opinion became important in the 1945 opinion because of the language of the Constitution that "no change therein shall affect the *salary* of any officer during his existing term." Following the reasoning of the 1925 opinion to its logical conclusion, it could be said that since the pay provided by Section 5348-10a, General Code, is "compensation," it can be changed at any time without violating the constitutional provision. The then Attorney General, however, declined to follow such a line of reasoning. He pointed out that the current trend of the Supreme Court cases is against the technical distinction between salary and compensation; that the net effect of the amended statute was to change the pay of probate judges and that to give it effect during current terms of office would violate the constitutional provision.

In 1947 the 97th General Assembly passed an act which gives rise to the immediate question presented by your request. By an act set out in 122 Ohio Laws 390, Section 1639-7a, General Code, was enacted. In its original form that section provided as follows:

"In all counties where the state is not paying a salary direct to the judge exercising the powers and jurisdiction conferred in this chapter the state shall pay into the county treasury of the county, wherein such judge was elected, the sum of fifteen hundred dollars annually. The juvenile judge in such counties shall receive as his annual compensation fifteen hundred dollars. Provided that the combined salaries, allowances and compensation, of the probate judge and juvenile judge of said county shall not exceed the total salary provided by law for a common pleas judge in said county. Any unused portion of said fund shall remain in the county treasury to be used in the maintenance and operation of the juvenile court."

Following the passage of this act, the question arose as to whether incumbent probate judges, serving also as juvenile judges, were entitled

to its benefits. An action was begun in the Common Pleas Court of Medina County, and, in the case of Derhammer v. Medina County Board of Commissioners, 53 Ohio Law Abs., 110, 38 O. O. 439, it was held that such incumbent judges were entitled to the increased compensation. The basis of this holding, as indicated by the headnotes of the case, was as follows:

> "1. A constitutional or statutory provision prohibiting a change of compensation during term of office does not apply where prior to such time no salary or compensation has been fixed for the office, and compensation can be fixed after the officer has entered on his duties.
>
> "2. The Juvenile Court is a separate and distinct court, even though within the Probate Court.
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> "3. Where a juvenile judge entered upon the duties of his office before the legislature fixed the compensation therefor, he is entitled to compensation as is thereafter fixed by the legislature without violating any constitution inhibition."

So far as concerns the exact question which you have raised, all parties to the Derhammer case conceded that the compensation in inheritance tax cases, provided by Section 5348-10a, General Code, was to be considered in computing the total compensation of the probate and juvenile judge. It was stipulated that the salary of the incumbent common pleas judge was $3,991.00 and that that of the incumbent probate judge was $3,585.00 before considering Section 1639-7a, General Code. This figure of $3,585.00 can be arrived at only by adding the salary provided by Section 2992, supra, based upon the population of the county, and that provided by Section 5348-10a, and considering both as part of the "combined salaries, allowances and compensation" of the office.

It is my opinion that the parties to the Derhammer case were correct in their approach to this problem. Nowhere in this law, as I have traced it above, have I found any intimation of a legislative intent to consider the allowance in inheritance tax cases as not being part of the total compensation of the probate judge. It is true that some language in the 1925 opinion, referred to above, and in Opinion No. 2565, Opinions of the Attorney General for 1921, page 1027, taken out of context, appears to support such a conclusion. Those opinions, however, were written long before the passage of Section 1639-7a, General Code; were attempts to reconcile the then provisions of Sections 2996 and 5348-10a, General Code;

and were not written with the present problem in mind. In so holding, I am also following the well-reasoned opinion of my predecessor set out in the 1945 opinion referred to above.

I am strengthened in this conclusion by language set out in an act of the 97th General Assembly, 122 Ohio Laws, 444, 445, amending Section 5348-10a, General Code. That act became effective September 20, 1947, just two days after the effective date of Section 1639-7a, supra. So far as pertinent here, it provided as follows:

> "* * * Provided, further, that from and after the expiration of the term of office of any probate judge holding office on the effective date of this act in counties having a population of two hundred thousand and over according to the last preceding federal census, the amount paid shall not exceed four thousand dollars in any calendar year, paid any probate judge, *and in no case shall the total compensation exceed twelve thousand dollars per annum.*" (Emphasis added.)

Here is a clear indication of a legislative intent to include Section 5348-10a compensation within the total compensation of a probate judge. It cannot be seriously contended that it was the legislative intention to omit this compensation in computing total salary if the probate judge is also serving as a juvenile judge.

In answer to your first question, it is, therefore, my opinion that the total of the combined salaries, allowances and compensation of a probate judge and juvenile judge, as limited by the provisions of Section 1639-7a, General Code, includes the compensation received by such officer for services in inheritance tax cases under the provisions of Section 5348-10a, General Code.

In connection with your second question, you have submitted certain enclosures. They indicate that the probate judge of your county filed a petition in mandamus in the Seneca County Court of Appeals against the county auditor on December 13, 1949. It is alleged in this petition:

> (a) That the relator was elected in 1944 for a four year term beginning on February 9, 1945 and was re-elected for a six year term beginning on February 9, 1949 the constitutional term of office having been changed by the amendment of Article IV, Section 7, Ohio Constitution, November 4, 1947;
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> (b) That there was due him for salary as juvenile judge, under the provisions of Section 1639-7a, General Code, the

amount of $3,125.00 for his services as such judge from October 1, 1947 to November 1, 1949, but that respondent had paid relator only $2,091.95 of that amount;

(c) That there was presently due the relator the difference in these amounts ($1,033.95.)

The prayer was for a writ commanding relator to pay such amount. The sum sought by the relator in this action was based upon a computation of his combined salaries, allowances and compensation as probate and juvenile judge, which did not take into consideration the compensation provided by Section 5348-10a, General Code.

On December 30, 1949 an alternative writ was allowed by the court commanding respondent to pay the amount prayed for or to show cause on or before January 9, 1950 why he had not done so.

Prior to return day, respondent paid relator the amount claimed and no further action was taken in the case except to journalize the following entry in January, 1950:

"This cause coming on to be heard on the return of the alternative writ of mandamus heretofore issued herein and no answer having been made by the defendant, the Court find the facts to be as set forth in the petition and it appearing that said defendant has complied with the order contained in said writ, it is considered by the Court that all proceedings herein be discontinued; and the defendant showing no good reason to the contrary, it is ordered that said defendant pay the costs of this proceeding taxed at $...... for which execution is awarded."

The effect of this mandamus action will depend on the nature of the alternative writ allowed therein. Such writ is described in 55 Corpus Juris Secundum, 550, Section 312, as follows:

"An alternative writ of mandamus is in the nature of an order to show cause and commands respondent to do the act required or to show cause why it should not be done by him. After its issuance respondent may comply with its terms or contest its issuance up to the time of a hearing on the peremptory writ. An alternative writ also operates as process. The function of the writ is to give respondent the benefit of a return and an opportunity for the ascertainment of the facts before a judgment is pronounced and to give petitioner or relator an opportunity to establish his right to a peremptory writ. It does not affect a substantial right because it settles nothing against respondent or in favor of the relator except questions as to the

jurisdiction of the court; and, moreover, its scope and character may not be modified by stipulation, at least as far as the rights of third persons may be affected. The alternative writ may be dispensed with by statutes providing a different procedure.

"*The effect* of an alternative or preliminary writ is to preserve the existing status until the court can hear the parties and determine the issues between them. Where the writ, as served, requires a municipality to pay bond coupons from available funds, it operates as an impounding of such funds in respondent's hands, subject to the further disposition thereof by the court."

In 35 American Jurisprudence 92, Section 348, it is said:

"So the writ is generally regarded as the first pleading in the case, answering the same purpose as the declaration, complaint, or petition in an ordinary civil action and being governed by somewhat the same rules of pleading."

In Ohio the limited function of an alternative writ, a function wholly in harmony with the statements above, may be seen in the provisions of Sections 12288 and 12292, General Code. These sections are as follows:

Section 1228, General Code:

"When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance may allow a peremptory mandamus. In all other cases an alternative writ must first be issued, on the allowances of the court, or a judge thereof."

Section 12292, General Code:

"On the return day of an alternative writ or such further day as the court allows, the defendant may answer as in a civil action; or, if the writ be allowed by a single judge, he may demur."

It is clear, in the instant case, that the respondent, by choosing not to make a return on the alternative writ, merely assented to the conclusions of law set out in the petition in mandamus; and that payment of the amount claimed was made by respondent voluntarily and not under any order of the court. Nor, indeed, was any final order or judgment given in the case. There was, as hereinbefore noted, a "final entry" journalized in this case in January, 1950, but the only thing *ordered* by the court in such entry was that the costs should be taxed to the defendant

(respondent.) There was, it is true, a recital in the entry that the court, in the absence of an answer, found the "facts to be as set forth in the petition." This finding, however, can hardly be supposed to cover the conclusions pleaded in the petition and since mandamus actions, being predicated on the existence of a clear legal duty on the part of the respondent, must necessarily involve conclusions of law pleaded in the petition, the finding of fact in such a case can hardly be said to be dispositive of the issues therein.

I do not, therefore, regard the matter there under controversy to have been resolved by judicial action so as to be conclusive even as between the parties.

Accordingly, in specific answer to your second question, it is my opinion that under the facts which you have presented, the county auditor may and should refuse to pay to the probate and juvenile judge the full amount of $1500.00 annually under the provisions of Section 1639-7a, General Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General