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INHERITANCE TAX LAW—JUDGE OF COMBINED COMMON PLEAS AND PROBATE COURTS NOT ENTITLED TO RECEIVE FOR OWN USE SPECIAL FEES IN INHERITANCE TAX CASES PROVIDED FOR BY SECTION 5348-11 G. C.

A judge of the combined common pleas and probate courts is not entitled to receive for his own use the special fees in inheritance tax cases provided for by section 5348-11 of the General Code.

COLUMBUS, OHIO, August 12; 1921.

HON. R. W. CAHILL, *Common Pleas Judge, Napoleon, Ohio.*

DEAR SIR:—In your letter of July 11th you inquire whether or not a judge of the combined common pleas and probate courts, in a county in which such combination has been effected, is entitled to receive the inheritance tax fees prescribed for the probate judge by the provisions of the inheritance tax law.

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 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 as follows:

"When the probate court and the court of common pleas have been combined there shall be established in the court of common pleas a probate division and all matters whereof the probate court has jurisdiction by law shall be filed in and separately docketed in said probate division, and the resident judge of the court of common pleas, shall appoint the necessary deputies, clerks and assistants to have charge and perform the work incident to the probate division. The salaries of such deputies, clerks and assistants to be regulated by section 2980-1 of the General Code. Error may be prosecuted or appeals taken from said probate division to the court of appeals in all cases where the same lie to the court of common pleas in counties where such courts have not been combined."

None of these sections deals with the subject of fees.

Section 14 of article IV of the constitution provides that:

"The judges of the * * * court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites,
* * *"

This section does not apply to the probate court. One question is whether,

of its own force, it applies to a judge of the combined courts of common pleas and probate existing under favor of the provisions previously referred to herein. It will be observed that section 7 of article IV, does not in terms provide that the effect of the procedure therein authorized is to merge into the constitutional common pleas court the existing constitutional probate court. The word used is "combined" and the result is described in the above language; that is to say, there comes into existence a court which "shall be known as the court of common pleas." Section 1604-4 of the General Code is not quite consistent with this, in that it assumes that the effect of the vote is one that might more aptly be described as a "merger" rather than as a combination or a consolidation, both of which terms are used in section 1604-3, as above quoted. The difference between the two, which is very material here, is this: In case of merger one entity is swallowed up in another, which continues as it was before; in case of combination or consolidation the resultant entity is a new being, both of the constituent entities being swallowed up in it. This distinction is a familiar one in the law of private corporations, and is made elsewhere in our statutes, as, for example, in those relating to public utilities. Section 614-60 of the General Code regulates the procedure for the acquisition by one utility of the stock or property of another. This is properly called "merger," although the statute does not use that term. Section 614-61 of the General Code uses the following language:

"With the consent and approval of the commission * * * any two or more telephone companies * * * may consolidate *with each other.*"

The secretary of state in making the marginal notations on this section has entitled it "merger." This is erroneous, however, because it will be observed that the statute assumes that the companies are on an equality with respect to the consolidation, and that which emerges from the consolidation is neither one company nor the other, but a new creature. On this point observe the statutory procedure for consolidation of corporations—sections 9025 et seq. of the General Code. The principal statute, for example, provides that railroad companies, under certain circumstances, "may consolidate themselves into a single company," and it is quite expressly provided that that single company shall be a new company distinct from either of its predecessors.

See *Lee vs. Sturges*, 46 O. S. 153.

•The law of private corporations has been referred to for the purpose of illustrating a vital distinction. Is the effect of all the procedure which has been taken in Henry county to merge the probate court into the common pleas; or is it to consolidate the two courts into a new court, which in name is to be known as the "court of common pleas" but which in legal idea is not a court of common pleas known to the other sections of the constitution, but a combined court? That this is material it is believed arises from the provision respecting compensation quoted above. If the judge holding the combined court is to be regarded as the constitutional judge of the court of common pleas, then he is precluded by section 14 above quoted from receiving any fees whatever. If, however, the court is the common pleas court in name only, and in law is to be regarded as a unique tribunal distinct from either the common pleas court or the probate court, as such, then the judge of that court is not governed by section 14 and his compensation may be fixed in any

manner which the general assembly may see fit to fix it. True, he would not be the single probate judge referred to in the first part of section 7 of Article IV, but he would be governed apparently by section 20 of Article II of the constitution, which authorizes the general assembly, in cases not provided for in the constitution, to fix the compensation of all officers.

The question is the more clearly raised because the provisions of House Bill No. 286, passed by the last session of the general assembly, expressly authorize a probate judge to retain for his own use certain fees in inheritance tax proceedings instead of paying them into the treasury to the credit of the fee fund of his office. This section, however, raises still another question, namely, whether as a matter of statutory construction it was intended to apply to any one excepting a probate judge. We thus have two questions—one of them constitutional and the other statutory; one arising under the sections cited in the earlier part of this opinion and the other arising as a mere question of statutory interpretation respecting the meaning of section 5348-11 of the General Code, as enacted by House Bill 286.

Still another question arises under Amended Senate Bill 239, which re-enacts certain sections of the county officers' salary law so as to limit the compensation of the probate judge to nine thousand dollars in the aggregate. Whether this limitation includes inheritance tax fees, which are according to section 5348-11 in no case to exceed three thousand dollars in any one year, or not is itself a question which does not seem to be involved in your inquiry, and it is not believed that Amended Senate Bill No. 239 need be considered in connection with the questions which you raise.

Without discussing the constitutional questions which have been raised and outlined above, it may be assumed, without deciding, that the constitution contemplates a consolidation or combination of two courts, rather than a merger of one court in another. Literally, then, the resulting court is neither the common pleas court nor the probate court, but a court known as the "common pleas court" and distinct from either one of the other two mentioned.

But the legislature in providing for the filling of this position and the making of compensation has never acted on this theory, and inasmuch as it must be assumed that the statutory provisions for the organization of such court are constitutional, such last named assumption would require us to reject the assumption first above referred to. For example, in regulating the procedure of combination the general assembly has seen fit to provide that the consolidation shall take effect at the expiration of the term for which the probate judge has been elected, assuming that at that time the common pleas judge then in office will become the judge of the combined court; for there is no other manner pointed out by statute in which the officer who is to hold the combined court shall be elected. Moreover, as previously pointed out, section 1604-4 speaks of a probate division in the existing common pleas court and requires its establishment when the courts have been combined.

The conclusion is therefore inescapable that the general assembly has looked upon the judge holding the combined courts as the judge of the common pleas court; or, putting it in another way, has provided that the combined courts shall be held by the judge of the common pleas court. Moreover, the general assembly has made specific provision for the payment of the salary of the officer holding the combined courts on the theory that he is the judge of the common pleas court. This provision is found in section 2251-1 of the General Code, as follows:

"When in any county, having a population of less than sixty thou-

sand, as ascertained by the federal census next preceding such election, by a vote of the electors thereof, the probate court shall be combined with the court of common pleas, the resident judge of the court of common pleas with which such probate court has been so combined shall, after such office has been so combined, receive, in addition to the salary provided for in sections 2251 and 2252, an annual salary of five hundred dollars. Such additional salary shall be paid quarterly from the treasury of such county upon the warrant of the county auditor."

Observe that the compensation herein provided for is ascribed to "the resident judge of the court of common pleas." He is the officer who holds the court, and he is to receive, in consideration of the fact that additional duties have devolved upon him, his ordinary salary of common pleas judge and in addition thereto an annual salary of five hundred dollars, payable quarterly from the county treasury.

There is here manifest, then, a specific intention on the part of the legislature that the compensation of the judge of the combined courts is to be the common pleas judge's compensation, and that judge is treated as the common pleas judge. Manifestly, then, the general assembly did not intend that any statutory provision relating to the salary of the probate judge should apply. It is just as logical to argue that the judge of the combined courts shall receive the statutory salary of the probate judge, as it is to argue that he shall receive the statutory fees personally retainable by the probate judge in inheritance tax cases.

It is the conclusion of this department, therefore, that the general assembly has treated the effect of the combination or consolidation of the common pleas and probate courts in counties having a population of less than sixty thousand as a merger of the probate court into the common pleas court; and that the provisions relative to compensation which govern the judge of such court are those of section 2251-1 of the General Code, and no other section, except those referred to therein; and that, consequently, the salary and fees, especially those in inheritance tax cases, receivable by a probate judge for his own use cannot be received by a judge of such combined courts in such county.

Respectfully,
JOHN G. PRICE,
Attorney-General.

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APPROVAL, BONDS OF VILLAGE OF MILFORD, OHIO, IN AMOUNT OF \$3,500 FOR OPERATING EXPENSES.

COLUMBUS, OHIO, August 12, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.