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FILES AND CASES — SAFE KEEPING AND PRESERVATION, BOOKS AND PAPERS OF PROBATE COURT — DUTY OF COUNTY COMMISSIONERS TO PROVIDE — PROBATE JUDGE WITHOUT POWER TO PURCHASE OUT OF APPROPRIATION FOR ADMINISTRATIVE EXPENSE — SECTIONS 2419, 10501-4, 10501-5 G.C.

SYLLABUS:

Under the provisions of Sections 2419 and 10501-4, General Code, it is the duty of the county commissioners to provide suitable files and cases for the safe keeping and preservation of the books and papers of the probate court, and the probate judge is without power to purchase the same out of the appropriation made for the administrative expense of his office, pursuant to General Code Section 10501-5.

Columbus, Ohio, September 18, 1942.

Hon. Erwin L. Clemens, Prosecuting Attorney,
Defiance, Ohio.

Dear Sir:

I have your request for an opinion, which reads as follows:

“Does the authority and discretion rest with the probate judge or the county commissioners to purchase files and suitable cases for the safe keeping and preservation of the books and papers of the probate court?”

The pertinent provisions of the General Code which are involved in your inquiry are:

Section 2419:

“A court house, jail, public comfort station, offices for county officers and an infirmary shall be provided by the commissioners when in their judgment they or any of them are needed. Such buildings and offices shall be of such style, dimensions and expense as the commissioners determine. They shall also provide all the equipment, stationery and postage, as the county commissioners may deem necessary for the proper and convenient conduct of such offices, and such facilities as will result in expeditious and economical administration of the said county offices. They shall provide all room(s), fire and burglar proof vaults and safes and other means of security in the office of the county treasurer, necessary for the protection of public moneys and property therein.”

Section 10501-4:

"A probate court is established in each county which shall be held at the county seat. Such court shall be held in an office furnished by the county commissioners, in which the books, records and papers pertaining to the court shall be deposited and safely kept by the judge thereof. The commissioners *shall provide suitable cases for the safekeeping and preservation of the books and papers of the court*, and furnish such blank books, blanks and stationery as the probate judge requires in the discharge of official duties." (Emphasis mine.)

Section 10501-5:

"Each probate judge shall have the care and custody of the files, papers, books and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, stenographers, bailiff, and any other employees as may be necessary, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each such appointee may administer oaths in all cases when necessary, in the discharge of his duties.

Such appointee shall receive such compensation and expenses as the probate judge shall fix and determine, and shall serve during the pleasure of the judge. The compensation of such appointees shall be paid in semi-monthly installments by the county treasurer from the county treasury, upon the warrant of the county auditor, certified to by the judge of the court. It is hereby made the duty of the county commissioners *to appropriate such sum of money each year as will meet all the administrative expense of the court which the probate judge deems necessary for the operation of the court*, including the salaries of the appointees of the court as the probate judge shall fix and determine; provided, however, the total compensation paid to the appointees of the court in any calendar year shall not exceed the total fees earned by the court during the preceding calendar year, unless approved by the board of county commissioners.

The judge may require any of his appointees to give bond in the sum of not less than \$1,000 conditioned for the honest and faithful performance of his or her duties. The sureties on said bonds shall be approved in the manner provided for the approval and filing of the bond of the probate judge.

The probate judge shall be personally liable for the default, malfeasance or nonfeasance of such appointee, but if a bond is required of such appointee as herein provided, the liability of the probate judge shall be limited to the amount by which the loss resulting from such default, malfeasance or nonfeasance exceeds the amount of the bond." (Emphasis mine.)

From information submitted by you, it seems to be claimed that Section 10501-5, as amended (119 O.L. p. 394), in providing for an appropriation by the county commissioners of "such sum of money each year as will meet all the *administrative expenses* of the court" gives the court the right to purchase files and cases for his office, and therefore supersedes the provisions of Sections 2419 and 10501-4 which clearly confer that power and duty on the commissioners. In other words, the amendment of Section 10501-5 amounts to a repeal of those sections, so far as they relate to the probate court.

For the purpose of ascertaining the nature and effect of this amendment, it may be well to set out the language of Section 10501-5 as it stood prior to the recent amendment.

"Each probate judge shall have the care and custody of the files, papers, books and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment."

It may be noted in the first place that this section is a part of the chapter of the General Code entitled "Probate Court, its jurisdiction and procedure". The title given this section by the secretary of state as it stood prior to amendment was "Custody of files; clerks; deputy." In its amended form the same title was retained. It is further worthy of note that the title of the act whereby this section was amended (Amended Senate Bill 116) is:

"To amend sections 10501-5 * * * relating to *practice and procedure* in the probate court; to enact supplemental sections * * * and to repeal sections * * * ." (Emphasis mine.)

The actual changes made by the amendment consist in elaborating somewhat the provision relative to the appointment of clerks and deputies and the fixing of their compensation by the court, and a provision making it the duty of the commissioners to "appropriate such sum of money each year as will meet all the *administrative expense* of the court

which the probate judge deems necessary for the operation of the court, including the salaries of the appointees of the court as the probate judge shall fix and determine.”

There is a further provision limiting the liability of the probate judge for loss resulting from default, malfeasance or nonfeasance of his appointees to the amount of loss in excess of the bonds which the court has required them to give.

The whole question seems to turn on the meaning and extent of the words “administrative expense”, used in the connection in which they appear.

Unless, therefore, the amendment in providing for an appropriation to cover “administrative expense” is so strong and definite in its meaning as to give the probate court, and it alone, the right to purchase file cases, to the exclusion of the power and duty conferred upon the commissioners by the clear provisions of Sections 2419 and 10501-4, the conclusion would be irresistible that the power and duty still rests, as it has for a long time, in the county commissioners. In other words, in order to reach the conclusion that this new section overrides the explicit provisions of the law as it stood theretofore, we would be forced to hold that this provision of the new section amounts to a partial repeal of Sections 10501-4 and 2419.

No principle of statutory construction is more clearly or decisively settled than that repeals by implication are not favored, and that they will not be indulged in if there is any reasonable construction of the statutes in question whereby they may be reconciled. The courts have gone so far as to say that the law abhors repeals by implication.

In the case of *Cleveland v. Purcell*, 31 O. App. 495, a portion of the syllabus reads:

“The law abhors repeal of a statute by implication, and new legislation will have such effect only where incongruous and irreconcilable with the old statute.”

See also statement in 37 O.Jur. p. 401, with citation of numerous cases.

As showing the attitude of our Supreme Court, I quote the following significant language from the opinion by Judge Spear in the case of *Eggleston v. Harrison*, 61 O.S. 397, where he says at page 404:

“The pertinent rule of construction with respect to repeals, well established and, we suppose, of universal application, is that repeals by implication are not favored. The presumption is that laws are passed with deliberation and with knowledge of all existing ones on the subject. Therefore acts upon the same subject are to be construed as a whole with reference to an entire system of which all are parts. The presumption being against indirect repeal, the courts will endeavor to harmonize the several parts, and where the statute has made no exception the courts will make none, nor where exceptions are made will they be carried further, in the absence of direct language, than the spirit of the law requires. An enlarged meaning, beyond the import of the words, will not be given to one act in order to repeal another by implication. *State v. Dudley*, 1 Ohio St., 457; *Cass v. Dillon*, 2 Ohio St., 607; *Bowen v. Lease*, 5 Hill, 221. It is not sufficient that the subsequent statute covers some of the cases provided for by the former; there must be positive repugnancy; and even then the old is repealed only to the extent of the repugnancy. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony, and without absurdity, both will be upheld, and the later one will not be regarded as repealing the former by construction or intendment. *Sutherland on Stat.Con.*, 152; *23 Am.&Eng. Ency. of Law*, 489; *People v. Gustin*, 57 Mich.407; *Plum v. Lugar*, 49 N.J.L., 557.”

There is no evidence on the face of the amendment in question, from the language used, of any legislative intent to make an exception of the probate court by taking away from the county commissioners the duty which they have with reference to all of the other county offices in the purchase of the necessary supplies and equipment. The Legislature saw fit to leave intact not only Section 2419, which relates to all county offices, but also to leave untouched Section 10501-4, which provides explicitly with reference to the probate court that “the commissioners shall provide suitable cases for the safekeeping and preservation of the books and papers of the court”, etc. Just what was meant by “administrative expenses”, used in the section under consideration, would not be easy to determine. If, however, we turn to the definitions of the word “administrative”, we find that it is generally considered as being synonymous with “executive”. This is the general statement given by *Bouvier’s Law Dictionary* and also in 1 *Corpus Juris*, p. 1240. Turning to the dictionary definitions, I note that *Webster* defines the word “administration” as follows:

“Act of administering; government of public affairs; the services rendered or duties assumed in conducting affairs; conduct of any office or employment; direction; management.”

As applied to law or political science:

“Administration has been defined as the exercise of political powers within the limits of the constitution.”

In Vol. II, p. 437, of Words and Phrases, I note the following:

“Acts of an officer which are to be deemed as acts of administration, and are commonly called ‘administrative acts’ and classified among those governmental powers properly assigned to the executive departments, are those acts which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body of such as are devolved upon it by the organic law of its existence.”

The limits of the term “administrative expenses” are at best vague and uncertain, and it would be a violation of the rules of statutory construction to hold that such language should have the effect of repealing clear and unmistakable provisions of the other statutes, particularly if it is not only possible but easy to reconcile them with the language of such other statutes.

I am clearly of the opinion that there is no evidence of such legislative intent and that the amendment of Section 10501-5 has no such effect.

Specifically answering your question, I am of the opinion that the authority and discretion to purchase files and suitable cases for the safe keeping and preservation of the books and papers of the probate court rest upon the county commissioners and not upon the probate judge.

Respectfully,

THOMAS J. HERBERT
Attorney General.