

2499.

LUNACY PROCEEDINGS—WITNESS FEES AS SPECIFIED IN SECTION 1981 G. C. INCLUDE BOTH DESIGNATED AMOUNT OF ONE DOLLAR AND MILEAGE—UNDER SECTION 1602 G. C. (109 O. L. 42) PROBATE JUDGE NOT ENTITLED TO ADDITIONAL COMPENSATION.

1. *Witness fees as allowed in the common pleas court as specified in section 1981 G. C. include both the designated amount of \$1.00 and mileage.*

2. *Under the provisions of section 1602 G. C. as amended by House Bill 58, the probate judge is not entitled to additional compensation.*

COLUMBUS, OHIO, October 24, 1921.

HON. H. M. SUMMERS, *Probate Judge, Ottawa, Ohio.*

DEAR SIR:—Your letter of recent date received in which you request the opinion of this department as follows :

“I desire the following information :

1. Section 1981, Laws of Ohio, 109-1921, repealing original sections 3016, etc., provides that each of the two physicians directed by the court to make the examination shall receive \$5.00 and \$1.00 witness fee as allowed in the court of common pleas. Does this mean in addition to the \$1.00 witness fee that they are to receive mileage?

2. Does section 1602, as amended by House Bill No. 58, entitle the probate court additional compensation to his salary as provided in section 2992 of the General Code of Ohio, Revised Edition?”

The part of the section of the General Code to be considered in answer to your first question is as follows :

Sec. 1981 G. C. “* * * The costs and expenses to be paid under the provisions of this chapter, shall be as follows: * * * To each of two physicians designated by the court to make the examination, five dollars and witness fees as allowed in the court of common pleas, to be paid upon the certificate of the probate judge; * * *”

This above quoted section in so far as physicians' fees are concerned reads as follows in 102 Ohio Laws, 287 :

“* * * To each of two physicians designated by the court to make the examination and certificate, five dollars, and witness fees as allowed in the court of common pleas; * * *”

This section was amended several times and in 108 Ohio Laws, Part 2, page 1220, was amended to read as follows :

“* * * To each of the two physicians designated by the court to make examination and certificate, five dollars in full for all services rendered; * * *”

And the section was again amended in 109 O. L., 175, to read as first above quoted.

From an examination of the above review it is noted that the section under consideration is the same now as it was in 1911 except that in 1911 "examination and certificate" were mentioned while in the present form the section reads "examination."

Section 3011 G. C. is as follows:

"In all cases or proceedings not specified in this chapter, each person subpoenaed as a witness shall be allowed one dollar for each day's attendance and the mileage allowed in courts of record. When not subpoenaed each person called upon to testify in a case or proceeding shall receive twenty-five cents. Said fee shall be taxed in the bill of costs, and if incurred in a state or ordinance case or in a proceeding before a public officer, board or commission, the same shall unless otherwise provided by law, be paid out of the proper public treasury upon the certificate of the court, or officer, board or commission, conducting the proceeding."

From an opinion of this department rendered on section 1981 G. C. as the section read in 102 O. L., 287 (Annual Report of Attorney-General for 1912, Vol. I, p. 325), the following is quoted:

"Section 1981 of the General Code says, that the costs and expenses shall be 'to each of the two physicians designated by the court to make examination and certificate, five dollars and witness fees as allowed in the court of common pleas; to witnesses the same fees as are allowed in the court of common pleas.'

The fees allowed in the court of common pleas to witnesses are \$1.00 per day, and five cents per mile each way, from their residences to the court house.

So, physicians, in commitment of adults, receive \$5.00 each and \$1.00 per day and mileage as aforesaid. Ordinary witnesses receive \$1.00 per day and mileage."

In an opinion of this department on section 1981 G. C. as amended in 108 O. L., Part 2, p. 1203 (Opinions of the Attorney General for 1920, Vol. I, p. 733), it is said:

"Physicians called as witnesses in such case, when the person is not adjudged insane, are entitled to witness fees of \$1.00 for each day's attendance and the mileage provided for in section 3011 G. C."

These above references are made to show that witness fees as allowed by the court of common pleas were taken in former opinions to cover both the designated amount of witness fees and mileage. Section 3011 G. C. above quoted seems clear and unambiguous. The fees allowed consisted of two items, one being \$1.00 and the other mileage. No case has been found in point in Ohio, but the Iowa statutes provide for the payment to witnesses of a designated amount and mileage.

In the case of *Cremer vs. Wapello County*, 139 Iowa, 580, the court said:

"Code Article 511 fixes the mileage of sheriffs for serving civil process and Code Supplement 1902, Article 510a authorizes retention by the sheriff of all such mileage collected, but declares that all 'fees' earned and uncollected at the end of each year shall belong to the

county. Held, that mileage charges were 'fees' within the latter section, and, when uncollected at the end of the year, in which the services were rendered, belong to the county."

Oregon also provides the payment of a sum certain and mileage and in *Burrows vs. Balfour*, 39 Oregon, 488, the court said:

"By section 792 of Hills Ann. Laws, the word 'fees' is defined to include both the mileage and per diem to which a witness is entitled, and hence, as used in section 795, providing that a witness residing more than twenty miles from the place of trial shall be entitled to double fees and mileage is included in the term."

From the above considerations you are advised, in answer to your first question, that the examining physician under section 1981 G. C. is entitled to one dollar and mileage in addition to the five dollars provided therein.

In answer to your second question, attention is called to section 2977 G. C., which is as follows:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 1602 G. C. formerly read in part as follows:

"The fees enumerated in this section shall be taxed by the probate judge in the bill of costs and collected from the estate of the person against whom the proceeding is instituted if there be such estate; if there be no such estate, then from the person legally responsible for his care and support, and shall be in full for all services rendered in the respective proceedings."

This section as amended in 109 O. L. 42 (H. B. No. 58) reads in part as follows:

"The fees enumerated in this section shall be paid to the probate judge out of the county treasury upon the warrant of the county auditor which shall issue upon the certificate of the probate judge and shall be in full for all services rendered in the respective proceedings."

The change as indicated above in section 1602 is the only change made and it is apparent that the source from which the fees mentioned in the section are paid has been changed and that that is the only change. In view of section 2977, above quoted, it is the policy of the law that no fees are to be retained by the probate judge unless it is clearly specified that same shall be so retained by such officer for his own use and in addition to his salary. For example, section 5348-11 G. C. (109 O. L. 531) provides 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 section speaks clearly and in so many words says the fees "are to be retained by them personally as compensation for the performance by them of the additional duties imposed upon them by this chapter."

Nowhere in section 1602 as amended is such language found. Therefore the fees are collected for the sole use of the treasury of the county as provided in section 2977 G. C.

Attention is called to *State ex rel. Enos, Pros. Atty. vs. Stone, et al.*, 92 O. S. 63, on page 65, wherein the court after quoting from section 2977 G. C., says:

"This section, as well as the sections following, clearly indicates the settled purpose and fixed policy of the state to pay county officials a fixed lump sum, no matter what additional duties may be imposed on them from time to time, unless there be a clear purpose to add further compensation for such further duties."

You are therefore advised, in answer to your second question, that the probate judge is not entitled to any compensation under the provisions of section 1602 as amended in 109 O. L., 42.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2500.

TAXES AND TAXATION—WHERE RESIDENT OF OHIO HAS ESTABLISHED REVOCABLE TRUST—RESIDENT OF NEW YORK SOLE TRUSTEE—RESIDENT OF OHIO SOLE BENEFICIARY—CORPUS OF TRUST, STOCKS AND BONDS—NOT SUBJECT TO BE LISTED FOR TAXATION IN OHIO.

Where a resident of the state of Ohio has established a revocable trust, of which a resident of New York is the sole trustee and the Ohio resident the sole beneficiary, the corpus of the trust, consisting of stocks and bonds, is not subject to be listed for taxation in Ohio.

COLUMBUS, OHIO, October 24, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department as follows:

"Will you please advise the commission whether a resident of the state of Ohio, who has established a revocable trust of which a resident of New York is the sole trustee, and the Ohio resident the sole