

G. C. were in full force and effect prior to the enactment and approval of the federal act, and are now in force, you are further advised that such officers are entitled to pay from January 1, 1920, until the close of the fiscal year ending June 30, 1922, unless the federal act be sooner amended or repealed, subject to the exceptions that the pay of the assistant adjutant general and of the assistant quartermaster general (both of whom have the rank of lieutenant colonel) will continue only until the conclusion of peace as provided in section 5227 G. C. This is but applying and giving effect to the provisions of the Ohio statutes which for some time have prescribed the rule or method whereby the pay of commissioned officers of the Ohio National Guard shall be determined.

Respectfully,
 JOHN G. PRICE,
Attorney General.

1391.

PROBATE COURT—WITNESS FEES IN JUVENILE CASES UNDER SECTIONS 1680 AND 3011 G. C. ET SEQ. (108 O. L., 1203)—WITNESS FEES IN LUNACY, EPILEPTIC AND FEEBLE-MINDED CASES UNDER SAID LAW—THE WORDS “PROVED INSOLVENT” USED IN SECTION 1982 G. C. CONSTRUED—FEES AND EXPENSES OF OFFICERS REFERRED TO IN SECTION 5348-10 G. C. (108 O. L. 1203) CONSTRUED—PHRASES IN SECTIONS 1602 AND 1982 G. C. AS TO “PERSONS LEGALLY RESPONSIBLE FOR HIS CARE AND SUPPORT” CONSTRUED.

1. *Under sections 1680 and 3011 et seq. as amended in H. B. 294 (108 O. L. Part II, 1203) the payment of witness fees in juvenile cases of \$1.00 and five cents for each mile is authorized, the vouchers for which need not be verified by the oath of the probate judge.*

2. *Witness fees in lunacy, epileptic and feeble-minded cases are costs within the meaning of section 1981, as amended in said H. B. 294, which are taxable against the patient or those lawfully responsible for his care.*

3. *The words “proved insolvent,” used in section 1982 of said act, are construed to mean the determination of that fact by the probate court and the entrance of the finding in this regard on the court’s record of the case under consideration.*

4. *The fees and expenses of the officers referred to in section 5348-10, as amended in H. B. 744, 108 O. L. Part II, when properly fixed and certified are payable from the state’s share of the undivided inheritance taxes in cases where no tax is adjudged to be due from the estate.*

5. *The phrases “persons legally responsible for his care and support” and “those lawfully responsible for his care” as used in sections 1602 and 1982 respectively are held to refer to general liability by sections 12429, 13008, 7995 and 7997 rather than to the special responsibility referred to in section 1815-9.*

COLUMBUS, OHIO, July 1, 1920.

HON. JOHN P. PHILLIPS, JR., *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent letter relative to your request for the opinion of this department as to certain questions arising under house bill 294 (108 O. L., part 2, p. 1203), amending certain fees and costs sections. It is also noted that the source of your question is a communication to you from the probate judge and county auditor of Ross county.

Quotations from that communication may be made to state the questions upon which you desire the opinion:

1. Does this section (1680) warrant the payment of fees at the rate of \$1.00 per day and mileage at the rate of five cents per mile to and from, in the hearing of juvenile cases, from the treasury of the county? And if it does not, what section, if any, does warrant the payment of said fees? And if said section does warrant the payment of said fees, how and in what manner are specifically itemized vouchers to be made as to the witness fees, and who is to make oath as to said witness fees?

2. Are the witness fees in lunacy, epileptic and feeble-minded cases costs, and are they such costs, (if they are costs) as shall be paid from the county treasury if the patient or those lawfully responsible for his care do not pay the same?

3. Section 1982, as amended in house bill No. 294, among other things, provided that if the patient or those lawfully responsible for this care, should prove insolvent, etc. What is the legal interpretation of the word 'insolvent' in so far as this act is concerned? What kind of proof as to insolvency must or should be required?

4. Section 5348-10 of the General Code of Ohio makes certain provisions relative to the payment of certain fees out of inheritance taxes in the county treasury. Section 2983 of the General Code, as the same appears in house bill No. 294, provides that none of such officials, (county officials, I take it) shall collect any fees from the county. Are the county auditor and county treasurer authorized to pay certain fees to certain county officials in the fixing of inheritance taxes from the county treasury from the undivided inheritance taxes in said county treasury? And if they are, are they authorized to pay said fees and expenses made by the various county officials out of the undivided inheritance taxes in the county treasury in cases where, upon hearing, the court makes and determines and finds that there are no taxes due in the particular estate or case, from it?

5. We should like to be advised as to the meaning of the words 'those lawfully responsible for his care' as used in section 1982 and as shown in house bill No. 294, and of the meaning of the words 'person legally responsible for his care and support' as used in section 1602 of the General Code as shown in house bill No. 294. To be more definite, we should like to know who or what class of persons, or relationship, is legally responsible as said responsibility is fixed in the preceding mentioned sections."

An examination of sections 1639 G. C., et seq., in connection with your first inquiry does not disclose any section in that chapter which relates to the juvenile court, specifically and expressly fixing the amount of witness fees in juvenile court cases, or expressly authorizing their taxation and collection as part of the costs.

However, sections 1682 and 1683 may be considered in connection with a general view as to the purpose and intention of the juvenile court act.

Section 1682 provides:

"Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the expense of transportation of children to places to which they have been committed, except the fees of the court and the fees and expenses of the sheriff and his deputies, shall be paid from the county treasury upon specifically itemized vouchers, verified by oath and certified to by judge of the court."

Section 1683 provides in part:

"This chapter shall be liberally construed to the end that proper guardianship may be provided for the child * * * and * * * the parent, parents or guardian of such child may be compelled to perform their moral and legal duty in the interest of the child."

We must turn to sections 3011, 3012 and 3014, as amended in H. B. 294, for the rule fixing the amount of witness fees in the probate court. Section 3011 in part is:

"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."

Section 3012 in part provides:

"Each witness in civil cases shall receive the following fees: for each day's attendance at a court of record * * * to be paid on demand by the party at whose instance he is summoned and taxed in the bill of costs, one dollar and five cents for each mile."

Section 3014 fixes the fees in criminal cases in "the court of common pleas, * * * or other court of record * * *", to be the same as in civil costs.

The probate court being a court of record is included in the courts referred to in these sections. Here a distinction between some of the juvenile court cases may be noted. Thus a prosecution for contributing to the delinquency of a minor is of a criminal character and must be controlled by section 3014, whereas the charge of dependency or delinquency itself is not considered, strictly speaking, as a criminal prosecution, but is rather a proceeding in contemplation of section 3011.

It is believed, however, that the purpose of these three sections was to fix the amount of witness fees in all cases in the probate court, except where a special statute may provide a different rate in a given class of cases.

These sections, taken with section 1682, convince me that your first question must be answered in the affirmative.

In your first question, as they have been numbered, you also inquire if such fees must be itemized and verified by the judge of the court. Section 1682, as amended, provides for the payment of fees and costs in such cases

"that such sums as are necessary for the incidental expenses of the court and its officers and the expense of transportation of children * * * upon specifically itemized vouchers, verified by oath and certified to by the judge of the court."

As to the witness fees the law fixes the amount and it is believed that the latter part of the section, requiring verification and certification of the voucher by the judge, relates to the expenses referred to in the section and should not be construed to include witness fees.

Your second inquiry relates to witness fees in lunacy and other like cases. It is noted in this connection that section 1981, before its amendment in house bill 294, provided that the witness fees, in such cases, were the same as those provided for witnesses in the common pleas court and that in amended section 1981 no such provision was made.

In view of the previous discussion of your first question, it is believed to be sufficient to say that prior to its amendment, section 1981 was a special statute constituting an exception to sections 3012 and 3014, and by force of the amendment omitting that part which fixes the fees in those cases, the same as in the common pleas

court, with the amendment of section 3011 supra, such fees would necessarily come within the provisions of section 3011. On this same question you also inquire if such costs are taxed under section 1982 and to be included in the costs collected from the patient.

Consideration of the terms of section 1982 providing for the taxation and collection of costs convinces me that the language "the fees and expenses enumerated in the preceding section together with *all costs* in the probate court" must include the witness fees.

Your third inquiry involves an interpretation of the latter part of this same section, which provides for the collection of such costs from the patient and then proceeds:

"But if they should prove insolvent * * * said fees * * * shall be paid from the county treasury"

The meaning of "proved insolvent," as used here, is not entirely certain. In *State ex rel. vs. Bish*, 12 O. N. P. (n. s.) 369, it is held that in the construction of statutes, words and phrases are to be taken in their plain, ordinary and usual sense unless they are technical words and phrases, in which case they are to be construed according to their technical meaning.

The state has long followed a humane policy toward the mentally afflicted. This is reflected in section 1, article 7 of the constitution, providing that institutions for their care "shall always be fostered and supported by the state." This policy should not be ignored. The legislation in this regard is special and the state's duty and interest is of a somewhat different character than in the matter involved in section 3019, relating to allowance to mayors and justices of the peace in certain cases "where the defendant proves insolvent."

Consideration of the character of the cases covered by the chapter to which section 1982 belongs, and the nature of the inquiry made by the court in such cases, would indicate that it was not the intention that these words should be given a restricted or technical meaning. If we were to hold that the words "proved insolvent" mean that they shall be so proved by the exhaustion of all legal processes, such as the issuance of execution, passing upon exemptions, etc., it is at once apparent that considerable difficulty and expense must be encountered in the determination of that question. On the other hand, in the determination of the condition of the patient, in practice the probate judge is advised of and informed as to the patient's condition and surrounding, including his financial resources.

It is, therefore, concluded that the meaning to be given this term is that the proving of insolvency in these cases consists of the determination of that fact by the probate court and the entrance of his finding in this regard on the court's record of the case. This opinion in this regard supplements opinion No. 1387, directed to Hon. John B. Coonrod, probate judge, a copy of which is enclosed for your consideration in connection herewith.

Your fourth question relates to the payment under section 5348-10 of the fees and expenses of the officials referred to out of the undivided inheritance taxes in cases where it is determined there are no taxes due from the particular estate.

Section 2983, as amended in house bill 294, referred to in your inquiry provides for the various county officers paying into the county treasury all fees, costs and allowances of all kinds collected during the preceding month, and then provides "that none of such officers shall collect any fees from the county."

This is a general statute at least general in its application to the officers of the county and to fees generally from the county. Section 5348-10 is a part of a special act relating to and providing for the inheritance tax and must be regarded as more special in its nature.

In *Railway vs. Commissioners*, 71 O. S., 454, the rule is announced that a special statutory provision upon a particular subject supersedes and takes the place of a more general provision. Nor need we be concerned with which is the later enactment as special laws are not repealed by subsequent statutes general in their character and a special act is not repealed or otherwise affected by conflicting general provisions of a subsequent general statute on the same subject unless the legislative intent that such effect be given to the enactment is clearly manifest. See *White vs. State*, 11 O. D. N. P., 794, *Fosdick vs. Perrysburg*, 14 O. S., 472.

Examination of section 5348-10 (108 O. L., 575) shows that the matter of fees provided for in the inheritance tax act is provided for explicitly. The new duties conferred upon the officers in administering the inheritance tax law and the specific direction for the payment of fees, show what may be termed its specialness in this regard.

Section 5348-10, as amended in 108 O. L., part 1, page 575, provided for the fixing of fees in individual cases and then provided that the county auditor should "allow such fees and expenses out of said taxes *when paid* and credit the same to said fee funds" and further provided for the auditor drawing his warrant "payable from such taxes." The fact that these fees and expenses were to be allowed from inheritance taxes when paid, suggests the idea of the fees and expenses being allowable and payable only when it was adjudged that some taxes were due from an estate, from which it would follow that in case it was adjudged that no such tax was due, such fees and expenses were not allowable and payable.

However, in house bill 744, 108 O. L., part 2, page 1192, this section was amended, reading as follows:

"Such fees as are allowable by law to the probate judge for services performed under the provisions of this subdivision of this chapter, shall be fixed in each case and certified by him on the order fixing the taxes, together with the fees of the sheriff or other officers, and the expenses of the county auditor. The county auditor shall pay such fees and expenses out of the state's share of the undivided inheritance taxes in the county treasury and draw his warrants on the treasurer in favor of the fee funds or officers personally entitled thereto, payable from such taxes as the case may require."

Section 5348-11, relating to the distribution of the inheritance tax, is consistent with this section as amended. It provides for the state to receive "the remainder of such taxes after deducting the fees and costs charged against the proceeds thereof under this subdivision of this chapter."

In view of these provisions, it is concluded that the fees and expenses of the officers referred to in section 5348-10, when properly fixed and certified, are payable from the state's share of the undivided inheritance taxes in cases where no tax is adjudged to be due from the state.

Your fifth question requires interpretation of the words "person legally responsible for his care and support" as used in section 1602, and the words "those lawfully responsible for his care" as used in section 1982, as amended in H. B. 294.

It is noted that in your letter you refer to section 1815-9. This section, however, by its terms is of limited application. It is as follows:

"It is the intent of this act that a husband may be held liable for the support of a wife *while an inmate of any of said institutions*, a wife for a husband, a father or mother for a son or daughter, and a son or daughter, or both, for a father or mother."

It is believed that this section, relating to the powers and restrictions of trustees and managers of state institutions, does not apply to sections 1982 and 1602 in the re-

spect mentioned in your inquiry. These two latter sections do not attempt to create or attach any new responsibilities, but refer to existing legislation on that subject. There is no express reference to or connection with section 1815-9 in these later sections, and it is believed that the terms above quoted refer to the general legal responsibility rather than the special responsibility of certain persons for the support of others while inmates of the institutions referred to in section 1815-9.

Section 12429 deals with the responsibility of the adult child for an indigent parent, with the exception noted in section 12431. Section 13008 relates to the parental obligation of the care and support of children. Sections 7995 and 7997 define the mutual obligations of husband and wife as to support and their several obligations to their minor children. Without attempting at this time to closely define the extent of the liability under varying circumstances, it is believed that these sections and not 1815-9 indicate what persons are legally responsible.

Respectfully,
 JOHN G. PRICE,
 Attorney-General.

1392.

PROBATE COURT—PHYSICIANS ENTITLED TO FEE OF \$5 00 WHEN PERSON PROCEEDED AGAINST ADJUDGED TO BE INSANE—SEE SECTIONS 1956 AND 1981 G. C (108 O. L. 1203)—ENTITLED TO WITNESS FEES OF \$1 00 FOR DAY'S ATTENDANCE AND MILEAGE WHEN PERSON NOT ADJUDGED INSANE—SEE SECTION 3011 G. C (108 O. L. 1203) THE WORDS "IN FULL FOR ALL SERVICES RENDERED" IN SECTION 1981 G. C. CONSTRUED—PHYSICIANS NOT ENTITLED TO \$1.00 PER DAY WITNESS FEE IN ADDITION TO \$5.00 FEE.

1. Under sections 1956 and 1981, as amended in House Bill 294, the two physicians designated by the probate court to make the examination and certificate required, are entitled to a fee of \$5.00 when the person proceeded against is adjudged to be insane and are not entitled to such fee when such person is not adjudged to be insane.

2. 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.

3. The words "in full for all services rendered" refer to and include all of the services rendered by such physician in such case and the physician is not entitled to the \$1.00 per day witness fee in addition to the \$5.00 fee provided in section 1981.

COLUMBUS, OHIO, July 2, 1920

HON JOHN W. DAVIS, *Probate Judge, Youngstown, Ohio.*

DEAR SIR:—Your request for the opinion of this department, which has been previously acknowledged, may be stated as follows:

1 Under section 1981, as amended in H. B. 294, is the physician entitled to a fee of \$5.00, whether the person who is charged with lunacy is adjudged insane or not?

2. If he is not entitled to the fee of \$5.00 when the patient is not adjudged insane and no certificate is made out, is he entitled to a witness fee of \$1.00 per day?

3. Do the words "in full for all services rendered" refer only to making the certificate and is the physician entitled to the \$1.00 per day as a witness fee?