

in case of the default in any of such payments, impose such sentence as is provided by law.

The person against whom such conditional sentence shall be awarded, shall be forthwith committed to the custody of an officer of the court, until such sentence be complied with; and if he shall not pay the fine within the time limited he shall be committed to the county jail, and it is hereby made the duty of the sheriff in such case, to execute the sentence according to the terms thereof."

The pertinent portion of this section, relative to your inquiry, is "The court may place such an offender on probation, with the condition that he pay a fine and costs *or either of them*, as the case may be, in installments within a limited time". This section authorizes a justice of peace in misdemeanor cases to place a defendant on probation with the condition that he pay the costs of prosecution.

In specific answer to your inquiry, I am of the opinion that a justice of peace has no authority to remit or suspend the payment of a fine for a violation of Sections 12604 et seq., of the General Code. However, he may suspend the imposition of sentence and place the defendant on probation under control and supervision of a probation officer with the condition that the costs of prosecution be paid by the defendant.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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1741.

APPROVAL, BONDS OF WILLOUGHBY RURAL SCHOOL DISTRICT,  
LAKE COUNTY—\$12,900.00.

COLUMBUS, OHIO, April 7, 1930.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1742.

COURTS—PROBATE AND COMMON PLEAS COMBINED—COMMON  
PLEAS JUDGE MAY ISSUE DANCE PERMITS OUTSIDE MUNICIPALITIES.

*SYLLABUS:*

*When the Probate Court and Common Pleas Court of a county have been combined, the common pleas judge may issue a permit for the holding of a public dance in a township outside a municipality under Section 13393, General Code.*

COLUMBUS, OHIO, April 7, 1930.

HON. E. S. YOUNG, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication presenting the following inquiry:

"We are writing you for the construction of Section 13393, which reads in part as follows:

'No person shall give a public dance, \* \* \* in a \* \* \* township without having previously obtained a permit \* \* \* from the probate judge if such public dance, \* \* \* is given outside a city or village, or permit another so to do. \* \* \*'

Our court does not have a probate judge since our Probate Court and Common Pleas Court are combined and we only have a Common Pleas Judge.

What we want to know is, can the Common Pleas Judge issue a license for a public dance, in a township outside of a village or city, bearing in mind that we do not have a Probate Judge of this county."

Section 13393, General Code, quoted, in part, in your communication, reads as follows:

"No person shall give a public dance, roller skating or like entertainment in a city, village or township without having previously obtained a permit from the mayor of such city or village if such public dance, roller skating or like entertainment is given within the limits of a municipal corporation, or from the Probate Judge if such public dance, roller skating or like entertainment is given outside a city or village, or permit another so to do. All permits issued under the authority of this section shall be subject to revocation at all times. The provisions of this section shall not apply to charter cities where the licensing authority is vested in some other officer than the mayor."

The provision for the issuing of permits for holding dances outside municipalities was incorporated in the above section when it was last amended in 1925 (111 O. L. 82). While there is no exception made in said section by which the Common Pleas Court Judges may issue permits in those counties where the Probate Court and Common Pleas Court are combined, nevertheless, when certain constitutional provisions and other statutes are considered, there is no doubt but that such an exception was comprehended.

Provision was made in the Ohio onstitution in 1912 by an amendment to Article IV, Section 7, for the combining of the Probate and Common Pleas Courts in counties having less than sixty thousand population. The Legislature, pursuant to this authority, enacted Sections 1604-1 to 1604-6, General Code, in 1913 (103 O. L. 960), "to provide for the combining of the Probate Court and the Court of Common Pleas in counties having a population of less than sixty thousand".

Section 1604-4, General Code, reads 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."

In an opinion of the Attorney General, to be found in Opinions of the Attorney General for 1917, volume 2, page 1967, the above code section was commented upon. The opinion was directed to the then Auditor of State, and concerned questions arising out of the consolidation and combining of the Probate Court with the Common Pleas Court in Adams County. After quoting Section 1604-4, supra, the then Attorney General said:

"It will be noted that there is no specific provision that the Probate Court in such counties is abolished; neither is it expressly stated that the Common Pleas Court after such consolidation shall succeed to and be endowed with all the powers, duties and jurisdiction of the old Probate Court; yet I believe it is a fair inference, from the language used in Section 1604-4, G. C., that the succession and endowment spoken of above was intended by the Legislature. Now, since all of the provisions of the law regarding the Probate Court remain on the statute books without express change or repeal, I take it that all of the statutory law regarding Probate Courts and Probate Judges apply in the counties where there has been a consolidation of the two courts, save only as necessarily modified by the fact of consolidation and the establishment of the Probate Division in the Court of Common Pleas.

It is my view then that in all the sections of the General Code which make provision regarding the Probate Court, wherever the term 'Probate Judge' is found such words shall be read 'the judge of the Court of Common Pleas having a Probate Division,' and wherever the words 'Probate Court' are found in said statutes, such words shall be read 'the Court of Common Pleas having a Probate Division,' except as herein noted."

I am inclined to agree with the above opinion and am of the view that wherever the term "Probate Judge" appears in the General Code, such words should be construed in those counties combining their courts, as meaning "the judge of the Court of Common Pleas having a Probate Division". If this were not the case, there would be no machinery provided in those counties for the issuance of dance permits outside of municipalities, and Section 13393, General Code, would have no operation and effect in that respect. This result surely could not have been intended by the Legislature.

In an opinion of the Attorney General, reported in Opinions of the Attorney General for 1928, volume II, page 1423, it was held in the syllabus as follows:

"Where the Probate Court has been combined with the Common Pleas Court the Common Pleas Judge becomes the Probate Judge, within the meaning of Section 5348-10a, General Code, and is entitled to the fees as provided in said section."

In the opinion at page 1424, the Attorney General said, in part:

"In the case of *State ex rel. Stephenson vs. Smith*, as reported in The Ohio Law Abstract, Volume 5, No.48, page 788, under date of December 10, 1927, the Court of Appeals for Adams County on November 16, 1927, held that where the Probate Court has been combined with the Common

Pleas Court, the Common Pleas Judge becomes the Probate Judge and is entitled to fees as provided in Section 5348-10a, General Code.

Section 5348-10a, General Code, reads 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 fee 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.'

In the opinion the Court of Appeals said as follows:

'Section 5348-10a, G. C., provides that for their services under the chapter of the code relating to inheritance taxes Probate Judges shall be allowed certain fees "to be retained by them personally as compensation for the performance by them of the additional duties imposed on them by this chapter.'

In Adams County the Probate Court has been combined with the Common Pleas. The relator is the Common Pleas Judge of that county and now seeks by writ of mandamus to compel the county auditor to allow him fees under the statute referred to. His petition has been demurred to.

The only question is whether the relator is a Probate Judge within the contemplation of the section. In the chapter of which the section is part, frequent use is made of the words Probate Judge and unless in these instances there is meant to include the Common Pleas Judges with probate powers there would be no sufficient machinery for the collection of inheritance taxes in those counties where the two courts are combined. In the particular section there is required to be taxed in the costs in inheritance tax proceedings the fee fixed for Probate Judges and no other disposition is fixed for the fee but that it shall be retained by that officer. If the Common Pleas Judge is not a Probate Judge within the intendment of the statute there would be either no costs assessed in such proceeding in counties where the courts are combined, or if assessed there would be no way to dispose of the fee when collected. We conclude that the words Probate Judge in one part of the chapter refer to the same officer as in other parts of the chapter and that wherever used they apply to the Common Pleas functioning as a Probate Judge.'"

Based on the foregoing and by way of specific answer to your question, I am of the opinion that when the Probate Court and the Common Pleas Court of a county have been combined, the Common Pleas Judge may issue a permit for the holding of a public dance in a township outside of a municipality under Section 13393, General Code.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*