

1355.

PROBATE COURT—POWER TO ISSUE EXECUTIONS ON ITS JUDGMENTS.

The probate court has general power to issue executions on its judgments, subject to special and exclusive methods of enforcing its judgments that may be provided by statute.

COLUMBUS, OHIO, June 22, 1920.

HON. HOMER Z. BOSTWICK, *Judge Probate Court, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

“House Bill No. 294, passed February 4, 1920, and approved February 18, 1920, provides many radical changes in the matter of collection of fees and costs in court cases.

Section 1601 and 1602 stipulate the various items of costs that may be taxed and collected by probate judges.

The latter section recites:

“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,” etc.

It will be apparent to all persons that the collection of costs will be greatly facilitated and the delay and loss in collection greatly minimized, if probate judges may use the process of execution to enforce payment.

In this connection it is desirable to have a ruling from your department upon the limitations and scope of the power of execution as authorized by statute applicable to probate courts.

1. What general power to issue execution has the probate court?
2. If found that probate courts have general powers to enforce their judgments by execution in adversary actions, what is their status with reference to non-adversary actions?
3. Has a probate court power to enforce payment of costs in lunacy and other ex parte causes by execution, in the operation of the new fees and costs law?”

It is noted that your first question relates to the general power of the probate court in the matter of the issuance of executions.

Sections 7 and 8 of Article 4 of the Constitution creates the probate court and confer certain jurisdiction upon it. The latter section, after enumerating certain matters over which such court shall have jurisdiction, provides further:

“and such other jurisdiction, in any county or counties, as may be provided by law.”

Thus it may be noted that a part of the jurisdiction of the probate court comes from the constitution itself, while as to other matters its jurisdiction is derived from the General Assembly under the last clause of section 8, above quoted.

In the case of *Bank vs. Telegraph Co.*, 79 O. S., 99, it is said:

“The probate court is a court of record and its jurisdiction in matters testamentary and in the appointment of administrators * * * has been broadly given by the Constitution of this state, Article 14, sections 7 and 8.

The jurisdiction is plenary and it may well be doubted whether the legislature, if it chose to do so, could in any respect limit it."

In the case of *Hoffman vs. Fleming* 66 O. S., 156, it is said:

"These statutory provisions do not, and can not, limit or enlarge the jurisdiction of the probate court in the matters mentioned."

This grant of jurisdiction carries with it all of the common law incidents of the power to hear and determine matters and to enforce its judgments.

Is the issuance of an execution incident to and a part of the power to hear and determine matters and pronounce judgment? The authorities require an affirmative answer to this question.

In 17 Cyc. it is said:

"A court competent to pronounce judgment is competent to issue execution."

Again, at page 921, an execution is defined to be:

"The end of the law, final process and end of the law, the end and fruit of the law, the act of carrying into effect the judgment or decree of a court."

In the case of *Lessees of Darby vs. Carson*, 9 Ohio, 149-151, it is said:

"An execution is properly defined 'the obtaining of actual possession of any thing acquired by judgment of law; and necessarily goes on all final judgments.' Co. Lit. 154, 289. There may, it is true, be special cases, requiring special executions; *but in ordinary cases*, the right to have the usual execution follows every final judgment of course."

Sections 1598 and 1599 of chapter 6, entitled "Probate Court" are also pertinent. The latter section is as follows:

"Orders for the payment of money may be enforced by execution or otherwise, as judgments in the court of common pleas. Such executions shall be directed to the sheriff, or, in his absence or disability, to the coroner."

Some light on the meaning of the phrase "orders for the payment of money," with which this section begins, may be obtained by reference to the section immediately preceding it. Section 1598 provides for the enforcement of orders "other than for the payment of money" and for punishment for their violation by proceedings in contempt. These sections together show that their intention was to provide for compelling obedience to all the orders of the court, and their intention, taken together, was to include all kinds of orders which the court was empowered to make.

Answering your question generally, then, it may be said that the probate court has general power to enforce its orders by execution. This rule, of course, would be subject to exceptions if in the law conferring the jurisdiction on any special and exclusive methods of enforcing its judgments or orders is provided.

Your second question inquires if such general powers would apply to and include the power to issue executions in non-adversary actions. It is believed that consideration of the powers of the court in such matters does not disclose any such distinction between adversary and non-adversary actions.

It is believed that the discussion of and answer to your first and second questions necessarily require an affirmative answer to your third question, and that its separate

consideration and discussion is unnecessary, as it is believed that the sections referred to in your letter as the "new fees and cost law" does not change the situation in this regard.

It should be pointed out, however, that such consideration and answers to your first and second questions relate only to such judgments or orders as to costs in such cases as the probate court may lawfully make, and the question of his power to make such judgment or order against the person legally responsible for the care and support of the person proceeded against in such cases, where he has no estate, not being specifically involved in your question, is not considered.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1356.

CIGARETTE LICENSE LAW—WHERE BUSINESS COMMENCED AFTER
FOURTH MONDAY OF MAY—ASSESSMENT PROPORTIONATE—
LIMITATIONS AS TO MINIMUM ASSESSMENT—NO AUTHORITY TO
ISSUE LICENSE TO TRANSIENT DEALER—WHEN ASSESSMENT IS
ONE-FIFTH OF TOTAL YEARLY ASSESSMENT FEE.

1. *A cigarette retail dealer may be issued a license only upon the payment of the total yearly assessment fee, or when business is begun after the fourth Monday of May the assessment shall be proportionate in amount to the remainder of the assessment year, except it shall not be less than one-fifth of the total yearly assessment fee.*

2. *There is no authority to issue a license to a transient dealer upon the payment of one-fifth of the total yearly assessment. However, in cases where business is begun after the expiration of four-fifths of the assessment year, one-fifth of the total yearly assessment fee is the proper charge.*

COLUMBUS, OHIO, June 22, 1920.

HON. BARCLAY W. MOORE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR—Acknowledgment is made of your communication wherein you submit the following questions relative to the operation of the cigarette tax law, as last amended and effective May 20, 1920:

"(1) What collections, if any, should be made between the date when the new law becomes effective, May 19th, and the date fixed in section 5895, the fourth Monday of May, which this year is the 24th day?

(2) Can a license be issued for a transient dealer, for instance an operator of a booth at a county fair, for a week upon the payment of one-fifth of the annual assessment fee? Or must a license be issued for the remainder of the year and a refund made upon the cancellation and surrender of the license?

(3) Can a license be sold by the quarter or half year provided it does not extend beyond the fourth Monday of May?"

You are advised that the auditor of state has administratively ruled that the three day period from May 20th, the date upon which the amended law became operative, and May 24th, the beginning of the assessment year, should be ignored in the collection of taxes. Undoubtedly, this ruling has been brought to the attention of the auditor of your county before this date. In view of the complications that would arise from a bookkeeping standpoint in making the collections at the new rate for