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PROBATE JUDGE—COLUMBIANA COUNTY—ALSO PERFORMING FUNCTIONS OF JUDGE OF JUVENILE COURT—CAN RECEIVE NO ADDITIONAL SALARY OR COMPENSATION DURING HIS PRESENT TERM OF OFFICE—SUBSTITUTE SENATE BILL 223—AMENDED SENATE BILL 50, 97 GENERAL ASSEMBLY.

SYLLABUS:

Under the provisions of Substitute Senate Bill 223 and Amended Senate Bill 50, passed by the 97th General Assembly, the probate judge of Columbiana County, who is also performing the functions of the judge of the juvenile court, can receive no additional salary or compensation during his present term of office.

Columbus, Ohio, August 20, 1947

Hon. Frank W. Springer, Prosecuting Attorney, Columbiana County
Lisbon, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Common Pleas Judge of Columbiana County, Ohio, receives a total salary of \$6,150.00. He was re-elected last fall and commenced his new term of office January 1, 1947 for a period of six years. Substitute Senate Bill No. 223 becomes effective September 19, 1947 and provides among other things as follows:

‘that from and after the expiration of the term of office of any judge of the Common Pleas Court holding office on the effective date of this act, such annual salary shall be four thousand dollars.’

In our county, the Common Pleas Court receives \$3,000.00 per year from the State and the above bill increases the annual allowance from the State to \$4,000.00 effective, however, only after the term of office of the Common Pleas Judge expires.

The Probate Judge of Columbiana County, Ohio, now receives \$6,675.00 per annum. Amended Senate Bill No. 50 provides that the Juvenile Judge, which office is held by the Probate Judge in our county, shall receive the sum of \$1,500 annually, which shall be paid into the County Treasury from the State. Amended Senate Bill No. 50 further provides as follows:

'Provided that the combined salaries, allowances and compensation, of the probate judge and juvenile judge of said county shall not exceed the total salary provided by law for a common pleas judge in said county.'

Our county auditor desires to know if he should pay to the Probate Judge of our county so much of the \$1,500 salary provided for the Juvenile Court as will equal the difference between \$6,675.00 and \$7,150.00 after the effective date of the above mentioned acts.

While our Common Pleas Judge cannot receive the increase in salary provided by Substitute Senate Bill No. 223 until the expiration of his term of office, is the Probate Judge also prevented from receiving the salary provided by Amended Senate Bill No. 50, or may he receive the increase on the theory that the law provides for the Common Pleas Court to receive a total salary of \$7,150.00 and that the present judge is merely disqualified from receiving it until his new term of office?"

Substitute Senate Bill No. 223, as passed by the 97th General Assembly, and to become effective September 19, 1947, amends certain sections of the General Code, as follows:

"Section 2251. The annual salaries of the chief justice of the supreme court and of the judges herein named payable from the state treasury shall be as follows: * * *

Judges of the common pleas courts, each, three thousand dollars. Neither the chief justice of the supreme court nor any judge of the supreme court or of the court of appeals shall hold any other office of trust or profit under the authority of this state or the United States; provided, however, that from and after the expiration of the term of office of any judge of the court of appeals holding office on the effective date of this act, such annual salary shall be twelve thousand dollars; and provided, however, that from and after the expiration of the term of office of any judge of the common pleas court holding office on the effective date of this act, such annual salary shall be four thousand dollars.

Section 2252. In addition to the salary allowed by Section 2251, each judge of the court of common pleas shall receive an annual compensation equal to three cents per capita for the first fifty thousand of the population of the county in which he resided when elected or appointed, as ascertained by the latest federal census of the United States, and four cents per capita for the population of such county in excess of fifty thousand and not in excess of one hundred thousand, and four and one-third cents per capita for the population of such county in excess of one

hundred thousand and not in excess of one hundred and eighty thousand, and one-third cent per capita for the population of such county in excess of one hundred and eighty thousand. Such additional annual compensation shall not be more than nine thousand dollars, payable monthly from the treasury of such county upon the warrant of the county auditor.

Provided, however, that from and after the expiration of the term of office of any judge of the common pleas court holding office on the effective date of this act, the additional annual compensation shall not be more than eight thousand dollars."

Your letter states that the Common Pleas Judge of Columbiana County receives under the present law a total salary of \$6,150 per annum; that he was reelected in the fall of 1946 and commenced his new term of six years on January 1, 1947. He will therefore complete his present term on December 31, 1952.

We may therefore start with the proposition that the salary of the common pleas judge of your county is, as above stated, \$6,150, and that it will continue at that figure until his successor is elected and takes office, January 1, 1953. Of course, under the plain provision of Section 20, of Article II of the Constitution, no change in the law could affect his salary during his term, and nothing in the language of the statute quoted suggests any attempt to change the present salary basis, until that term expires.

Amended Senate Bill No. 50, passed by the 97th General Assembly, provides a salary for the judge of the juvenile court in those counties in which the duties of that court fall upon the judge of the probate court, and reference is made therein to the salary of the judge of the common pleas court in such counties as establishing a maximum beyond which the entire compensation of the probate judge, including his salary as juvenile judge, may not go.

This act amends Section 1639-7 and enacts Section 1639-7a, General Code. These sections in the new act read as follows:

"Section 1639-7. The juvenile court, or court of common pleas, division of domestic relations of any county, separately and independently created, established and functioning as such by law, shall have and exercise the powers and jurisdiction conferred in this chapter. Except in counties in which there now is, or may hereafter be created, a separate and independent juvenile court or court of domestic relations, there is hereby established

and created within the probate court, a juvenile court, presided over by the probate judge, which shall be a court of record, and which shall exercise such powers and jurisdiction. The judge of such court shall receive such compensation as may be provided by law.

Whenever the judge of the court exercising the powers and jurisdiction conferred in this chapter is absent from the county, or is unable to attend court, or the volume of cases pending in court necessitates it, and upon the request of said judge, the presiding judge of the common pleas court shall assign a common pleas judge of the county to act in his place or in conjunction with him. In the event no such common pleas judge is available for said purpose, the chief justice of the supreme court of Ohio shall assign a common pleas judge, juvenile judge or a probate judge from some other county to act in the place of such judge or in conjunction with him, who shall receive such compensation and expenses for his services as is provided by law for judges assigned to hold court in courts of common pleas.

Section 1639-7a. In all counties where the state is not paying a salary direct to the judge exercising the powers and jurisdiction conferred in this chapter the state shall pay into the county treasury of the county, wherein such judge was elected, the sum of fifteen hundred dollars annually. The juvenile judge in such counties shall receive as his annual compensation fifteen hundred dollars. Provided that the *combined salaries, allowances and compensation, of the probate judge and juvenile judge of said county shall not exceed the total salary provided by law for a common pleas judge in said county.* Any unused portion of said fund shall remain in the county treasury to be used in the maintenance and operation of the juvenile court." (Emphasis added.)

The probate judge in Columbiana County is now serving a term of four years, which will end February 9, 1949. The question which you propound is as to his right to receive an increase of salary during the remainder of his term, based upon the provisions of the two acts above referred to. It appears to me, clear, that he cannot receive any increase of salary or compensation during his present term, for two reasons, to wit:

I. Section 20, of Article II of the Constitution of Ohio reads as follows:

"The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The General Assembly had, long prior to these recent enactments, by the provision of Section 1639-7, General Code, imposed upon the probate judge the duties of the juvenile court and had fixed his salary for that combined service, on a basis which, according to your letter, yields the probate judge in your county the sum of \$6,675 per annum. By the terms of Amended Senate Bill No. 50, no change is made in the duties of the probate judge, but the General Assembly has seen fit to fix a salary of \$1500 to be paid to the judge of the juvenile court. If that sum or any portion thereof were paid to the present probate judge during his current term of office, it would be in direct violation of the constitutional provision above quoted. In the case of *State ex rel. Lueders v. Beaman*, 106 O. S., 650, the court denied the right of a probate judge to receive payment of certain fees for service in inheritance tax cases, provided by statute during his term of office. The court said in the course of its opinion:

“The question presented is whether a probate judge who was in office when the act giving an increased compensation took effect, is entitled to receive and retain such fees; or is debarred from receiving such additional compensation by reason of the provisions of our Constitution.”

The court then proceeded to quote the constitutional provision above set out, and concluded:

“Since Section 7, Article IV of the Constitution, provides that probate judges ‘shall receive such compensation, payable out of the county treasury, as shall be provided by law,’ it is argued that no limitation should control legislative action in increasing or diminishing compensation during the existing term of a probate judge. The majority of the court, Judges Hough, Wanamaker, Robinson, Jones, Matthias and Clark, are of opinion that the provisions of Section 20, Article II, apply to the office of probate judge, where the Constitution itself does not fix the term or compensation. *State, ex rel. Metcalfe v. Donahey*, Aud., 101 Ohio St., 490.”

The decision last referred to was quoted with approval by the Supreme Court in the case of *State, ex rel. DeChant v. Kelsner*, 133 O. S., 429.

The principles of the *Lueders* case were applied in an opinion which I rendered February 8, 1945, found in 1945 Opinions of the Attorney General, page 71, the syllabus of which is as follows:

“A probate judge whose term of office begins on February

9, 1945 is entitled to be paid the statutory rate fixed by Section 5348-10a, General Code, as amended, and effective on that date, but a probate judge whose term of office began prior to February 9, 1945 is not entitled to the benefits of said section as amended. The compensation of the latter is governed by the provisions of said section as effective on September 7, 1921 and he is entitled to be paid the amount fixed thereby for services in inheritance tax matters during his term of office."

2. From the statement in your letter it appears that the probate judge is already receiving a larger salary than that of the common pleas judge, the former as you have stated, receiving \$6,675 per annum, whereas the common pleas judge's salary is \$6,150. Under the terms of Senate Bill No. 223, the salary of the judge of the court of common pleas is definitely fixed, so far as Columbiana County is concerned, and the change in salary there indicated is wholly ineffective until January 1, 1953. This change which by its terms can have no effect in any case until the expiration of the term of the judge of the court of common pleas, could not by any process of reasoning be so construed as to fix a basis for an allowable increase in the salary of the probate judge. Between now and the time when this act is to become effective, so far as its operation is concerned, the General Assembly may conclude either to increase or decrease the salary of the common pleas judge who may hereafter be elected.

Accordingly, it is obvious that not even the probate judge who will take office on the expiration of the present term, to wit, February 9, 1949, may hope to realize any benefit from the proposed allowance of a juvenile judge's salary, because unless other legislation is had, the *maximum* salary which he can receive will still be the present salary of the common pleas judge, which as I have already pointed out, is less than that allowed by the present law to the probate judge.

Accordingly, in specific answer to your question it is my opinion that under the provisions of Substitute Senate Bill 223 and amended Senate Bill 50, passed by the 97th General Assembly, the probate judge of Columbiana County who is also performing the functions of the judge of the juvenile court, can receive no additional salary or compensation during his present term of office.

Respectfully,

HUGH S. JENKINS,
Attorney General.