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MUNICIPAL COURT—BARBERTON—MAY NOT SET FEE SCHEDULE IN TRUSTEESHIP TO EXCEED TWO PER CENT OF PAYMENTS MADE TO DEBTOR—SECTION 11728-1 G. C.

*SYLLABUS:*

*The municipal court of Barberton may not set a schedule of fees in trusteeships created under Section 11728-1, General Code, which exceeds two per cent of the payments made by the debtor.*

COLUMBUS, OHIO, February 4, 1939.

*Bureau of Inspection and Supervision of Public Offices, State House Annex, Columbus, Ohio.*

GENTLEMEN: Your request for an opinion dated January 21, 1939, reads:

“We are inclosing herewith letter received from George R. Platt, Judge, Municipal Court of Barberton, Ohio, which is self-explanatory, and in connection therewith we respectfully request your opinion on the following question:

May the Municipal Court of Barberton set a schedule of fees in trusteeship matters which shall not exceed four per cent (4) of the payments made by the debtor?”

Your request is explained by the letter appended thereto which states that Section 1579-1164, General Code, the Barberton Municipal Court Act, provides that costs in such court may be the same as those taxed in justice of the peace courts and that Section 11728-1, General Code, which is the Municipal Court Trusteeship Act, provides in part that a trustee appointed by a justice may charge two per cent in addition to the two per cent costs taxed by the justice.

Section 1579-1164, General Code, reads as follows:

“Except as otherwise provided for in this act, in civil actions and proceedings wherein the court of a justice of the peace now has jurisdiction the fees and costs shall be the same and taxed in the same manner as is now, or may hereafter be provided for actions and proceedings heard and determined in a court of the justice of the peace. In other actions and proceedings the fees and costs shall be the same, and taxed in the same manner, as is now, or may hereafter be, provided for actions and proceedings heard and determined in the court of common pleas. In criminal proceedings all fees and costs shall be the same as now fixed in police courts of cities, provided, however, that the municipal court, in lieu of the aforesaid methods of taxing costs, by rule of court may establish a schedule of fees and costs to be taxed in all actions and proceedings, in no case to exceed fees and costs provided for like actions and proceedings by general law.”

Section 11728-1, General Code, after providing that a person may apply to a justice of the peace or a judge of a municipal court for a trustee to be appointed and after further providing certain rules goes on as follows:

“If application for a trustee be made to a judge in a municipal court such judge shall designate the clerk of such municipal court to act as trustee and said clerk shall serve *without additional compensation* and his official bond shall be construed as conditioned upon the fulfillment of the trust, and no additional bond shall be required. If application for a trustee be made to a justice of the peace, such justice may receive as full compensation for his services as justice of the peace therein, two per cent of the total amount of the debtor’s payment on claims as herein provided, and may appoint any suitable person to act as trustee. Such trustee shall give bond as the justice shall fix, conditioned upon the fulfillment of the trust, to be paid for by the debtor applicant, and said trustee shall receive as full compensation for his services as such trustee, two per cent of the total amount of the debtor’s payment on claims as herein provided, all said compensation to be paid before distribution to creditors as above provided.” (Italics the writer’s.)

It can be readily seen that Section 1579-1164, *supra*, as applying to costs is a general statute providing for all manner of costs in the Barberton Municipal Court, while Section 11728-1, *supra*, as applying to costs is a special statute applying specifically to costs in the case of trusteeships only. In 37 O. J. at page 315, the following statement is found:

“The term ‘special statute’ is occasionally used to designate a specific statute—that is, a statute passed for a particular, as distinguished from a general, purpose or covering a particular subject-matter.”

In the case of *State, ex rel. vs. Common Pleas Court*, 132 O. S. 93, the following statement is found in the syllabus :

“Where a later specific statute is enacted on the same subject covered by an existing general statute without express or implied intention to repeal the existing statute, such specific statute must be held to have been intended by the Legislature to be engrafted upon the general statute as an exception thereto.”

You will note that the date Section 1579-1164, supra, became effective was July 28, 1929, while Section 11728-1, supra, became effective June 30, 1933. A further indication of intent may be taken from the fact that earlier acts setting up municipal courts included within their structure a section authorizing the appointment of a trustee as is now provided by Section 11728-1 and that these municipal court acts themselves provided that the clerk should serve as such trustee without compensation. For example see Ohio General Code Sections 1579-872 and 1579-402.

In addition, it should be noted that in Section 11728-1 it is provided that where an application for a trustee is made to a justice, “such justice may receive as full compensation for his services as justice of the peace two per cent of the total amount of the debtor’s payments on claims as herein provided”, and said section further goes on and shows that the justice may appoint any person as trustee who shall receive the two per cent.

The language of the statute would indicate to me that the justice who, in this particular instance takes the place of the municipal court, receives two per cent and the trustee appointed by the justice, who would not ordinarily be an employe of the justice, would remain unpaid if the additional allowance of two per cent were not made to him, while in the case of the appointment of a clerk of the municipal court as trustee, such clerk would already receive compensation for his general duties and there is no need to provide for additional compensation for him.

I must, therefore, answer your inquiry specifically as follows: The municipal court may not set a schedule of fees in trusteeships created under Section 11728-1, General Code, which exceeds two per cent of the payments made by the debtor.

Respectfully,

THOMAS J. HERBERT,

*Attorney General.*