

2178.

APPROVAL, BONDS OF MONTGOMERY VILLAGE SCHOOL DISTRICT,
HAMILTON COUNTY, \$23,666.66.

COLUMBUS, OHIO, January 27, 1925.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2179.

APPROVAL, BONDS OF BLUE ASH VILLAGE SCHOOL DISTRICT, HAMILTON
COUNTY, \$33,133.34.

COLUMBUS, OHIO, January 27, 1925.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2180.

APPROVAL, BONDS OF WILLOUGHBY VILLAGE SCHOOL DISTRICT,
LAKE COUNTY, \$4,150.00.

COLUMBUS, OHIO, January 26, 1925.

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

2181.

SALARY AND COMPENSATION OF PROBATE JUDGE—SECTIONS 2989,
2992, 2996 AND 5348-11 G. C. CONSTRUED.

SYLLABUS:

Under the provisions of sections 2989, 2992 and 2996 of the General Code, a probate judge is entitled to receive the maximum salary of \$9,000.00. In addition to such salary he may receive the compensation allowed under the provisions of section 5348-11 in the maximum amount of \$3,000.00.

COLUMBUS, OHIO, January 29, 1925.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your recent communication you request the opinion of this department as follows:

"Section 2969 G. C., as amended, 109 O. L. 614, provides that each county officer named in the following sections shall receive out of the general county fund the annual salary provided and such additional compensation or salary as may be provided by law.

"Section 2996 G. C., as amended, 109 O. L. 614, provides that in no case shall the annual salary and compensation paid to any such officer exceed \$6,000.00, except in the case of the probate judge whose annual salary shall not exceed nine thousand dollars in any one year.

"Section 5348-11 G. C., as amended, 109 O. L. 531, provides that probate judges shall receive a fee of three dollars in each inheritance tax proceedings in which no tax is found and a fee of five dollars in which tax is assessed and collected, which fees 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 of additional duties imposed upon them by this chapter, provided, however, that the amount paid to any probate judge shall in no case exceed the sum of \$3,000.00 in any one year.

"Section 2992 G. C., fixes the salary of the probate judge upon the basis of the population of the county. In the large counties if it would not be for the limitation of section 2996 G. C., the salary of the probate judge under the provisions of section 2992 G. C. would exceed \$6,000.00.

"*Question:* May a probate judge for the year following February 9th, 1925, receive an annual salary of more than six thousand dollars and in addition thereto the fees provided for in section 5348-11 G. C. to the extent of three thousand dollars?"

Your question may be restated as follows:

"May a probate judge taking office February 9, 1925, receive an annual salary, allowed under the provisions of sections 2989, 2992 and 2996, of \$9,000 (in the event that the population of his county would allow such computation), and in addition thereto receive the fees up to the amount of \$3,000.00 as provided under section 5348-11 of the inheritance tax law?"

Section 2989 of the General Code, before the amendment to which you refer, provided:

"Each county officer hereinafter named shall receive out of the general county fund the annual salary hereinafter provided, payable monthly upon the warrant of the county auditor."

The "hereinafter" provision referred to relates to section 2992 which fixes the salary of the probate judge upon a graduated scale in accordance with the population of the county, as shown by the last federal census.

It will further be noted that section 2996 before amendment provided:

"Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

In the amendment of section 2989 the same language was used that was originally used, to which the following was added:

"and such additional compensation or salary as may be provided by law."

In the amendment of section 2996 it will be seen that wherein the word "salaries" was used in the original section, the amendment added immediately following the words "and compensation;" also the following words were added to the original section:

"except in the case of the probate judge, whose annual *salary* shall not exceed \$9,000.00."

Section 5348-11 as amended in 109 O. L. provides:

"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 proceedings 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 fees 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."

It must be conceded that under the provisions of the section last quoted, the legislature designated the fees allowed to the probate judge in inheritance tax cases as "compensation," and it is clearly the intent of this section that such compensation shall be for the personal use of such judge for his services in connection with such proceedings. In the event that the salary under the provisions of section 2989, et seq. amounts to \$9,000.00 if the limitation in section 2996 controls, it will be evident that such judge may not receive any compensation under the provisions of section 5348-11. If this situation should obtain, then there is a conflict between the two provisions.

It will be observed that both acts were passed by the legislature, approved by the governor and filed in the office of the secretary of state on the same date. Therefore, they are equal in so far as the time of passage is concerned, and the rules adopted by the court in reference to the interpretation of statutes relating to the order or time of enactment cannot aid in deciding the controversy.

However, it is a rule that has been frequently enunciated by the court that every effort will be made to harmonize two existing statutes rather than to determine that they are in conflict. It may be stated that there is some argument that can be properly presented in favor of the proposition that such court is entitled to \$9,000.00 under the salary clause in a proper case and \$3,000.00 under the inheritance tax provision, in the history of this legislation. The acts being passed contemporaneously, it is evident that the legislature had in mind that probably sections 2989 et seq. would prevent the compensation in inheritance tax cases in some instances. Therefore, in order to eliminate this possible construction they placed the additional language in section 2989 as heretofore stated, "and such additional compensation as may be provided by law." I have no doubt but that the "additional compensation" to which the legislature referred in this amendment had reference to the "compensation" provided for in section 5348-11.

The same argument may be presented to the amendment of section 2996. Of course, section 2996 is susceptible of another interpretation, which is that the object in this amendment was to provide for the \$3,000.00 permitted to be charged under section 5348-11. However, this in my opinion is not the most logical conclusion, for the reason that in the amendment to section 2996, the legislature clearly distinguished compensation from salary. It would appear that the terms "compensation and salary" were used in their technical sense. The addition of the term "and compensation" following "salaries" as it appeared in the original section indicates that the compensation referred to in this section was the compensation referred to in section 5348-11

which, as heretofore stated, was passed contemporaneously with this amendment, and in the exception provided for by the amendment it is expressly provided that the probate judge's salary shall not exceed \$9,000.00. In view of the history of this legislation from all visible guides, it would appear to be the intent of the legislature in such enactment to restrict the limitations of section 2996 to the salary of a probate judge as fixed in accordance with the population of the county.

However, in connection with your inquiry it would seem to be necessary to discuss the opinion of the Supreme Court in the case of *State ex rel. Lueders vs. Beaman*, 106 O. S. 650. This is a case in which a mandamus was instituted by the probate judge of Hamilton county to compel the auditor to pay the inheritance tax fees as provided for in section 5348-11. In this case the question was whether or not the payment of such fees to judges who were in office at the time the act was passed violated the provisions of section 20 of Article II of the Ohio Constitution which provides:

"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 court held that the provisions of such section "apply to the office of probate judge." In this statement it does not discuss the distinction between compensation and salary. However, later in the opinion it is stated that five members of the court are of the opinion that the writ could not issue. It is further stated that three of the members hold that such compensation cannot be allowed, irrespective of whether additional duties were assigned to such judges at the time of the provision for increased compensation. It is further pointed out that two members of the court were of the opinion that the writ could not be granted for the reason that in the case under consideration new duties were not assigned.

In analyzing this opinion it would seem that the conclusion must be that three of the members of the court deciding the case were of the opinion that the compensation provided for in inheritance tax cases constituted salaries within the meaning of section 20 of article II.

It further seems to be equally clear that two of the five members deciding this case were of the opinion that the compensation was not included in the term "salary" in view of such constitutional provision. While all the five members of the court concurred in the general conclusion that the writ should not issue, the opinion clearly discloses that this conclusion was reached upon different grounds, and therefore it is my contention that the same affords no especial weight as a precedent to sustain the contention that the compensation provided for in section 5348-11 is "salary" within the meaning of the constitution, especially in view of the fact that there is now upon the Ohio Supreme bench but one of the members who concurred in this conclusion.

In view of the clear provision of the statute and the distinction drawn between compensation and salary, and further, in view of the long line of decisions in this state contradistinguishing compensation from salary, and the decisions to the effect that additional compensation may be granted when additional duties are imposed contemporaneously with such increase of compensation, without violating the provisions of section 20 of article II, constrains me to hold that under the provisions of sections 2989, 2992 and 2996 of the General Code, a probate judge is entitled to receive the maximum salary of \$9,000.00. In addition to such salary, he may receive the compensation allowed under the provisions of section 5348-11 in the maximum amount of \$3,000.00.

Respectfully,
C. C. CRABBE,
Attorney-General.