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PROBATE JUDGE—TERM OF OFFICE BEGAN FEBRUARY 9, 1945—ENTITLED TO BE PAID STATUTORY RATE FIXED BY SECTION 5348-10a G. C. AS AMENDED—WHEN TERM OF OFFICE BEGAN PRIOR TO FEBRUARY 9, 1945, JUDGE NOT ENTITLED TO BENEFITS OF AMENDED SECTION—COMPENSATION OF SUCH JUDGE GOVERNED BY PROVISIONS OF SECTION AS EFFECTIVE SEPTEMBER 7, 1921—ENTITLED TO BE PAID AMOUNT FIXED FOR SERVICES IN INHERITANCE TAX MATTERS DURING TERM OF OFFICE.

SYLLABUS:

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.

Columbus, Ohio, February 8, 1945.

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads:

"Section 5348-10a, as amended by the recent General Assembly, becomes effective February 9, 1945, and provides that, in lieu of the fees in inheritance tax proceedings, the Probate Judge

shall receive a salary based upon the population of the county, and payable from the State's share of inheritance tax collected.

In Paulding County, the Probate Judge was elected in November, 1942, for a four year term, commencing on February 9, 1943.

Will you please advise us whether this Probate Judge is entitled to the salary provided in the above amended section; or should he continue to charge and receive the fees provided in the section prior to its amendment; or does he lose both salary and fees?"

Preliminary to a consideration of Section 5348-10a, General Code, referred to in your letter, it is desired to refer to other laws relating to the salary or compensation of a probate judge.

Section 2989, General Code, as amended, which became effective in its present form on September 7, 1921, reads as follows:

"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, *and such additional compensation or salary as may be provided by law.*" (Emphasis added.)

Immediately prior to the above date the language just emphasized was absent from that section, but in all other respects it was exactly the same.

Section 2992, General Code, provides in part as follows:

"Each probate judge shall receive one hundred dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election;"

Then follows a graduated scale arrangement with the final provision of the section prescribing a fixed amount for each full thousand of population in excess of ninety thousand. However, a limitation exists as to the maximum amount that may be received thereunder by reason of Section 2996, General Code, as amended, and also effective on September 7, 1921, which reads, viz:

> "Such *salaries and compensation* 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 and compensation* paid to any such officer exceed six thousand dollars, except in the case of the probate judge whose *annual salary* shall not exceed nine thousand dollars." (Emphasis added.)

The statute just quoted is part of the same act pursuant to which aforementioned Section 2989 was amended. And with respect to said Section 2989 it might be noted at this point that reference is made therein to the amount that a probate judge "shall receive out of the general county fund". It might be maintained, therefore, that the $9,000 limitation places no restriction on the amount that might be paid from other than general county funds. However, for reasons hereinafter stated I do not believe this matter is consequential.

I turn now to a consideration of Section 5348-10a, General Code, as presently in force and effect, viz:

> "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 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."
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> (Emphasis added.)

All of the sections above mentioned were the subject of consideration of one of my predecessors as more fully appears from Opinions of the Attorney General for the year 1925, at page 43. The question then passed upon was whether a probate judge taking office on February 9, 1925 was entitled to receive an annual salary of $9,000 (in event the population of his county was sufficient to allow such amount) and receive in addition thereto the amount contemplated by said Section 5348-10a, General Code. In connection therewith, my aforementioned predecessor made this observation which appears at page 45 of his said opinion, viz:

"* * * In the event that the salary under the provisions of Section 2989, et seq. amounts to $9,000 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." (Emphasis added.)

(This section had been incorrectly numbered 5348-11 by the General Assembly but subsequent to the rendition of this opinion was assigned number 5348-10a by the then Attorney General.)

The aforementioned opinion appears to have turned upon the proposition that Section 5348-10a provides for the payment of "compensation" as differentiated from "salary"—a distinction that was made in interpreting the language of Section 20 of Article III of the Constitution, which 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 hs existing term, unless the office be abolished."
(Emphasis added.)

While not specifically referred to, no doubt my aforementioned predecessor relied upon this distinction between "compensation" and "salary" as noted in Thompson v. Phillips, 12 O. S. 617; State, ex rel. v. Raine, 49 O. S. 580 and Gobrecht v. Cincinnati, 51 O. S. 68. In that connection I call attention to the last paragraph of said 1925 opinion, the emphasized matter constituting the syllabus thereof, to-wit:

"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.*"
(Emphasis added.)

It is noteworthy that in reaching the aforesaid view, the then Attorney General devoted considerable discussion to the then comparatively recent holding of the Supreme Court in State, ex rel. Lueders v. Beaman, 106 O. S. 650, and from his analysis thereof had drawn certain conclusions which are summarized in the following quoted paragraph, viz:

> "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.
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> It further seems to be equally clear that two of the five members deciding the 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."

Whether those conclusions were fully warranted is now of little moment. The then Attorney General was confronted essentially with a question of statutory construction. He found, as disclosed by the syllabus of the opinion, that the statutory limitation of $9,000 by way of salary was not violated in allowing an additional amount as "compensation". But the law providing for such "compensation" had been enacted *prior* to said probate judge taking office. In the Beaman case the factual situation was different. Iit is disclosed therein that Section 5348-10a became effective *after* the probate judge took office. I share the belief, however, that in its technical sense, as determined by my aforementioned predecessor, the amount now being paid pursuant to the last mentioned section is compensation.

This brings me now to the significance of Section 5348-10a, as amended, effective February 9, 1945, and reading as follows:

> "In lieu of fees for services performed by him in inheritance tax cases, each probate judge shall receive annually six cents per capita for each full one thousand of the first ten thousand popu-

> lation of the county and 1½ cents per capita for each full one thousand over ten thousand population of the county, as shown by the last federal census next preceding his election which shall be paid to such probate judge in equal monthly installments *from the state's share of the undivided inheritance tax in the county treasury* on the warrant of the county auditor. Provided, however, that the amount paid to any probate judge for services rendered in inheritance tax cases shall not exceed three thousand dollars in any calendar year." (Emphasis added.)

Whether the section, as amended, provides for compensation or salary —and again these words are used in their technical sense—I do not conceive to be the pivotal point upon which my ultimate conclusion can necessarily be bottomed. It seems evident that the amended section provides for the payment of a salary if we are to adhere to the distinctions that have previously been made. A probate judge whose term of office begins on February 9, 1945 will thenceforth receive a fixed or determinable amount for his services in inheritance tax matters based on a graduated scale and according to population. In other words, the situation that obtains is analogous to that with regard to the salary provided for by Section 2992, General Code. When he takes office, he knows exactly how much money he will receive for his services whether a tax is assssed in any proceeding or whether there is a finding that an estate is not subject to tax.

It seems manifest that Section 5348-10a, as amended, contemplates that the amount to be paid thereunder should be regarded as a salary. It is highly significant in connection therewith that the General Assembly saw fit to fix the effective date of the section as February 9, 1945, which is the identical date on which it seems to be contemplated probate judges shall assume office. I find it unnecessary, however, to inquire why the probate judge for Paulding County was elected in November of 1942. It will be assumed he was legally elected and is lawfully holding that office. I am also assuming, for the purposes of this opinion, that under Section 5348-10a, as amended, probate judges will not receive the same amount as before amendment. In this connection, it is interesting to note that both prior to and after amendment the section places a maximum of $3,000 on the amount that may be paid. Therefore, with respect to probate judges in the larger counties of this state who have been receiving the base salary of $9,000, plus $3,000 for services in inheritance tax

matters, the amending of the law can affect them in no particular. They will receive exactly the same amount they previously received. However, by reason of the graduated scale provision in the law, a probate judge in a county where the maximum is not involved will sustain a change in his total earnings.

In the instant matter, however, the fact is that whether the section, as amended, be regarded as providing for compensation or as providing for a salary, the recent decisions of the Supreme Court seem to have disregarded the old rule that the constitutional inhibition against increasing or decreasing the remuneration of a person while in office is limited to his "salary" alone, and that a change in "compensation" may be made without violating said provision. With regard to this distinction it was said by Judge Spear in Gobrecht v. Cincinnati, 51 O. S. 68, that:

> "A general definition of salary includes compensation. General definitions, do not, however, cover all cases. *Salary is compensation,* but under the section quoted, compensation is not, in every instance, salary." (Emphasis added.)

I interpret the Beaman case as abolishing this technical distinction and that Section 20 of Article II of the Constitution prevents a change in "compensation" as that term is to be understood in its broad meaning, which includes salary. None of the previous holdings of the court evidencing this difference between salary and compensation was expressly overruled. And I might be disposed to give recognition to the earlier decisions were it not for the fact that the Beaman case was later cited with approval in a case wherein the argument made is referred to hereinafter. If there is any doubt, therefore, as to what the court intended to hold in the Beaman case, it is my belief that its position has definitely been clarified by its holding in the case of State, ex rel. v. Kelser, 133 O. S. 429. In that case the question was presented as to whether the relator was entitled to an increase in compensation during his term of office as county commissioner. It is disclosed from the facts that relator's term as county commissioner had begun on January 1, 1937, at which time Section 3001, General Code, provided that the annual compensation of each county commissioner should be determined by the aggregate of the tax duplicate for real estate and personal property. Thereafter, the General Assembly amended the aforementiond section so that the compensation of such commissioners should be determined by the

population of the county. In each instance, the law provided for maximum and minimum amounts. A writ of mandamus was sought to compel the county auditor to deliver to the relator a voucher for the additional sum claimed due him under the amended section. After referring to the provisions of Section 20 of Article II of the Constitution and with emphasis upon the words "compensation" and "salary" appearing therein, and after referring to the argument of counsel for the relator that those two words are not synonymous, the court made this observation:

> "Counsel for relator contends that the distinction between 'compensation' and 'salary' is made more manifest by considering that 'the word "salary" appears in no other section of the Ohio Constitution and there must have been some reason for including it in the last member of the compound sentence which comprises said Section 20, instead of repeating the word "compensation."' He cites several nisi prius opinions in support of his distinction between these words.
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> We direct attention to the provision of Section 7, Article IV of the Constitution, which provides that probate judges 'shall receive such *compensation*, * * * as shall be provided by law' (emphasis ours), and to the decision of this court in *State, ex rel. Leaders, Probate Judge,* v. *Beaman,* 106 Ohio St., 650, 140 N. E., 396, wherein it was held that the inhibition contained in Section 20, Article II of the Constitution, applied to increasing the compensation during the term of office of an incumbent probate judge."

It is to be observed that in both cases reference is made to Section 7 of Article IV of the Constitution. The excerpt therefrom appearing in the Kelser case places the emphasis upon the word "compensation". I feel, therefore, the court must have concluded that "compensation" was intended to embrace or include "salary". A change in compensation as used in its broad sense is, therefore, not permitted if it affects a probate judge while holding office.

I also direct attention to the comparatively recent case of State, ex rel. v. Guckenberger, 139 O. S. 273 (1942), wherein is set forth at page 279 of the decision, Section 20 of Article II of the Constitution with the emphasis placed upon the words "during his existing term of office". Immediately following the reference to that constitutional provision, the court said:

"This inhibition is almost identical with that contained in Section 14 of Article IV of the Constitution which relates to the *compensation* of common pleas judges." (Emphasis added.)

I am cognizant, of course, that in the last mentioned case the court was concerned with the right of the General Assembly to enact a law affecting the compensation of a common pleas judge and that Section 14 of Article IV has reference only to Supreme Court and Common Pleas Court judges. However, that constitutional provision, as well as Section 7 of Article IV, clearly refer to compensation—not salary.

I have, therefore, formed the conclusion as previously suggested that from the recent decisions of our Supreme Court, the technical distinction between salary and compensation no longer appears to exist and that the effect of Section 20 of Article II is to place a restriction on the right of the General Assembly with regard to changing the "compensation" of a probate judge, which word is used in its broadest sense, rather than in a restricted sense.

I am not unaware of an opinion by one of my predecessors found in Opinions of the Attorney General for the year 1917, Vol. II, page 1614, in which it was held as disclosed by the first paragraph of the syllabus, as follows:

"1. The sections of the statute modifying the compensation of township clerks, treasurers and trustees became effective on the same day that the acts of which they are a part became operative. Section 20 of Article II of the constitution does not apply because said officers draw compensation and not salaries."

Likewise, I am not unaware of an opinion rendered under date of June 12, 1939, Opinions of the Attorney General for 1939, page 947, in which it was held as stated in paragraphs 1 and 2 of the syllabus, viz:

"1. The terms 'compensation' and 'salary', as used in Article II, section 20 of the Constitution of Ohio, are not synonymous.

2. Under the provisions of Article II, Section 20 of the Constitution, the Legislature may change the compensation of any officer so as to affect those in office at the time of such change, but may not so do with respect to the salary of any officer during his existing term, unless the office be abolished."

I do not find it necessary to overrule expressly either of these opinions. The first mentioned opinion was clearly correct in the light of the laws as they then existed. Possibly the correctness of the last mentioned opinion may be debated, but in any event, it does not involve a probate judge and my conclusion herein concerning that particular office, should not be interpreted as having application to other public officers.

In your request you have inquired as to whether the amending of Section 5348-10a would have the effect of depriving the probate judge in question of all compensation in inheritance tax matters. It would be difficult to subscribe to the idea it was the legislative intent that he perform his duties for nothing. Such a construction of the law would result in manifest discrimination. It would result in judges who take office on February 9, 1945 receiving compensation for their services, whereas the probate judges of Paulding County and other judges who perchance do not take office on that date, being compelled to render the same type of service without any remuneration therefor.

In commenting upon the situation presented in the case of State, ex rel. v. Guckenberger, supra, the court had occasion to say that under the interpretation placed upon the law by the respondent, "the junior judges thereafter elected are given larger compensation than their senior and oftimes more experienced brethren whose terms began under a lower preceding census." A probate judge who takes office on February 9, 1945, who had not theretofore held that office, would be junior, of course, in point of time with regard to his ascendance to the bench. I can not imagine it was the legislative intent to enact a law that would have a harsh and unfair effect and be almost tantamount to discrimination. If the law were construed as depriving the particular judge of all compensation for services in inheritance tax matters, it would certainly operate unfairly.

I recognize, of course, that I am not at liberty to construe legislation as creating a right, when, in fact, none exists, merely because a hardship might ensue. It is clear to me that a probate judge whose present term extends beyond February 8, 1945 is not entitled to the benefits of Section 5348-10a, as amended. If he can not receive the benefits thereon because already in office, he certainly can not be denied what he presently enjoys by way of remuneration for services in inheritance tax matters. The recent decisions appear to establish that proposition.

I would feel more confident as to the correctness of my conclusion had the Supreme Court expressly overruled its earlier decisions. But the later cases leave that inference, particularly with respect to the status of a probate judge. Inference is, of course, far from certainty and necessarily means that I proceed cautiously. Therefore, with the thought in mind that the matter is not entirely free from doubt I have decided, in specific answer to your request, 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.

Respectfully,

HUGH S. JENKINS
Attorney General