

By the above grants there is conveyed to the State of Ohio, certain lands described therein, for the sole purpose of using said lands for public fishing grounds, and to that end to improve the waters or water courses passing through and over said lands.

Upon examination of the above instruments, I find that the same have been executed and acknowledged by the respective grantors in the manner provided by law and am accordingly approving the same as to legality and form, as is evidenced by my approval endorsed thereon, all of which are herewith returned.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

500.

SUMMONS — FOREIGN COUNTY — DEPOSIT OF COSTS
LABELING.

SYLLABUS:

A writ of summons issued by a probate judge for services in a foreign county in a proceeding to sell real estate must be supported by a deposit of sufficient funds to pay the statutory fee and have endorsed thereon, "funds deposited to pay for the execution of this writ," in conformity with the requirements of Section 2882, General Code.

COLUMBUS, OHIO, April 21, 1937.

HON. FORREST D. PFALZGRAF, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR: I have your communication of recent date, requesting my opinion on the following matter:

"The Probate Judge of Monroe County, Ohio, directs me to secure your opinion upon the following facts: The Probate Court, of this County, on the 27th day of February, 1937, mailed to the Sheriff of Belmont County 'Summons' to be served pertaining to sell read estate in the Probate Court of Monroe County, Ohio, and the Sheriff of Belmont County refused said notice upon the grounds that the fees had not been deposited. Upon the return of said 'Summons' the Probate Court of Monroe County, Ohio, returned the 'Summons' to the Sheriff of Belmont County, together with a letter directing the

Sheriff's attention to Section 10501-26, General Code, of Ohio, said letter is herewith enclosed. I am also enclosing a copy of a letter written by John Whitney, State Examiner, to Ross C. Michener, Prosecuting Attorney of Belmont County, which was in response to the controversy arising between the Probate Judge of this County and the Sheriff of Belmont County.

Now I want to know whether or not the Sheriffs of the various counties of Ohio are compelled to serve 'Summons' without the fee being deposited where an administrator or executor has qualified and has filed a petition to sell real estate.

Please give this your immediate attention as a number of cases are pending in the Probate Court in this County waiting for the service of 'Summons'."

It is perfectly clear that in civil actions in the Court of Common Pleas, the clerk is not allowed to issue a writ to another county unless the fee therefor has been properly deposited with the clerk. Section 2882, General Code, provides:

"The clerk *shall not* issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it, and the clerk shall indorse thereon the words, 'Funds deposited to pay for the execution of this writ.' On the return thereof, the clerk shall pay to such officer the fees for executing such writ, and no officer shall be required to serve such writ unless it is so endorsed." (Italics, the writer's.)

The fact that a sheriff is not required to execute a summons in a civil action is further borne out by the provisions of Section 12105, General Code, which reads as follows:

" * * But he shall not be liable to an action or amercement for a failure to execute such process directed to him from a county other than that in which he was elected, unless his fees are deposited with the clerk who issued the process, and an indorsement is made and subscribed by such clerk thereon at the time of its issue, in these words: 'Funds are deposited to pay the sheriff on this process'."

Furthermore, Sections 2882 and 12105, General Code, are in perfect harmony and despite a slight variation in the language of the endorsements as set out in these two sections, they are in *pari materia* and must

stand together. See *Buggy Company vs. Cowin, et al.*, 10 Ohio Appellate, page 16.

From a reasonable consideration of the statutes discussed above no doubt can exist that, in the ordinary civil action, a writ of summons issued for service in a foreign county must be supported by a deposit of fees, and the proper endorsement made by the clerk of the county of its issuance. It now becomes necessary only to determine if a proceeding to sell real estate in the Probate Court is a *civil action* within the purview of Section 2882, General Code. The authority for holding that the procedure in civil actions in the Common Pleas Court governs all proceedings in the Probate Court is found in Section 10501-22, General Code, as follows:

“In the exercise of jurisdiction the probate judge shall have the powers, perform the duties, and be governed by the rules and regulations provided by law for the courts of common pleas and the judges thereof in vacation, so far as they are consistent with laws in force. *The provisions of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court when there is no provision on the subject in this act.* (Italics, the writer’s.)

Since the foregoing statute seems to definitely establish the principle of law that proceedings in the Probate Court are governed by the same provisions of law that obtain in civil actions in the Court of Common Pleas unless otherwise specifically provided for by the Probate Code, we are brought to the specific question as to how a summons is to be served by the Probate Court and I feel that this point is covered perfectly by Section 10501-24, General Code, which provides in part, as follows:

“Except as to persons under disability, all service of summons in the probate court shall be in the same manner as in the court of common pleas.”

The only provisions of the statutes governing the service of summons by the Court of Common Pleas pertinent to the present inquiry are the ones which, as indicated hereinbefore, require a deposit of funds to cover fees and the proper endorsement on the writ before a summons can issue to another county and there is no provision on this subject in the Probate Code.

The contention of the Probate Judge of Monroe County, Ohio, that Section 10501-26, General Code, takes the services of summons in a foreign county out of the requirement of Section 2882, General Code, is

not sustainable because a reasonable interpretation of this section compels the conclusion that sheriffs, coroners and constables are required to render certain services to the Probate Judge in the same manner as required by the judge of other courts.

Sections 10501-26, General Code, provides:

“When required by the probate judge, sheriffs, coroners and constables shall attend his court, serve and return process directed and delivered to them by such judge, and, if such officer neglects or refuses to serve and return such process issued by a probate judge or to pay over moneys by him collected to such judge or other person when so directed by the probate judge, he shall be subject to fine and amercement as provided in the next section.”

The provisions of Section 10501-27, General Code, pertinent to the present question are as follows:

“In cases made in the preceding section, the probate judge shall issue a summons, directed to the sheriff or other officer therein named, commanding him to summon the officer guilty of such misconduct, to appear within two days after the service of summons, and to show cause why he should not be amerced, specifying the cause for such amercement. In case of neglect or refusal to serve or return process issued by such judge, and directed and delivered to the officer, if no sufficient excuse is shown, such officers shall be fined by the judge not exceeding one hundred dollars, to be paid into the county treasury. * * *”

The causes for which a sheriff is subject to amercement as enumerated in Section 12103, General Code, do not include a failure or refusal to serve a summons issued from another county upon which the fee had not been deposited and the proper endorsement made. This very point was decided many years ago in the case of *Duncan vs. Drakeley*, 10 Ohio, 45, the syllabus of which reads as follows:

“A sheriff cannot be amerced for not executing a ca. sa. from another county, unless the indorsement ‘funds deposited,’ etc., is made upon the writ, nor can a tender of his fees be substituted in the place of such indorsement.”

Furthermore, the matter of amercement of a sheriff under the facts of the present inquiry is definitely disposed of in the language of Section 12105, General Code, which reads in part, as follows:

“ * * * But he shall not be liable to an action or amercement for a failure to execute such process directed to him from a county other than that in which he was elected, unless his fees are deposited with the clerk who issued the process, and an indorsement is made and subscribed by such clerk thereon at the time of its issue, in these words: ‘Funds are deposited to pay the sheriff on this process.’ ”

For the reason that the Probate Court, in the present case, is governed by the provisions of law regulating the service of summons by the Common Pleas Court, and for the further reason that a sheriff is not subject to emercement for failure to execute a process directed to him from another county unless the endorsement, “funds are deposited to pay the sheriff on this process,” is made thereon, I am led to the conclusion that the Sheriff of Belmont County is not bound to serve a summons issue by the Probate Judge of Monroe county unless funds have been deposited with the clerk of the Probate Court of Monroe county and the proper endorsement is made on the writ pursuant to the mandatory provisions of Section 2882, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

501.

APPROVAL—BONDS OF SYLVANIA VILLAGE SCHOOL DISTRICT, LUCAS COUNTY, OHIO, \$30,000.00.

COLUMBUS, OHIO, April 22, 1937.

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

GENTLEMEN :

RE: Bonds of Sylvania Village School Dist., Lucas County, Ohio, \$30,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above school district dated May 1, 1921. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of October 9, 1930, being Opinion No. 2434.