

ruff's Agricultural College Addition, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book No. 4, pages 234 and 235, Recorder's Office, Franklin County, Ohio, the title to which was considered by me in Opinion Number 813 directed to you under date of August 29, 1929.

The supplemental abstract of title submitted shows that the suggestions made in my former opinion relating to the manner in which title to this property might be legally obtained by the State of Ohio have been carried out and that the title to this property is now in the State of Ohio by deed from one Ray B. Levering who had previously purchased the same pursuant to an order of sale issued by the Court of Common Pleas, Franklin County, Ohio, in certain foreclosure proceedings instituted by the treasurer of Franklin County to sell said property for taxes.

The title to this property now being in the State of Ohio and the proceedings relating to the state's acquisition of this property being in all respects regular, the same are hereby approved.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1116.

APPROVAL, BONDS OF CITY OF AKRON, SUMMIT COUNTY—\$250,000.00.

COLUMBUS, OHIO, October 28, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

1117.

PROBATE COURT—DUTY TO HEAR CRIMINAL CASES WHERE IT HAS
LEGAL JURISDICTION—COMPULSION BY MANDAMUS.

SYLLABUS:

1. *The probate court under the provisions of Section 13425-15, General Code, must hear such criminal cases as it has jurisdiction to try upon the filing of an information by the prosecuting attorney.*

2. *It being the duty of the probate court, specifically enjoined by law, to hear such cases, mandamus will lie to require such court to perform its duty.*

COLUMBUS, OHIO, October 29, 1929.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent request for my opinion as follows:

“Sec. 13425-15 of the General Code, effective July 21, 1929, which seems to be identical with former Sec. 13455 and Revised Statutes No. 6467, provides that after the return of recognizances and transcript of criminal

cases within the jurisdiction of the Probate Court, the prosecuting attorney may elect as to whether he shall proceed in the Common Pleas Court or the Probate Court.

"In the case of *Smith vs. State of Ohio*, 12 C. C., 458, it is stated that the then existing section of the Code, authorizing the prosecuting attorney of certain counties to proceed in prosecutions in which the Probate Court has jurisdiction, either in the Probate Court or Court of Common Pleas at his election, does not authorize a transfer of any such prosecution from the Common Pleas, when once filed there, to the Probate Court.

"In that case, the prosecuting attorney attempted to transfer the case to the Probate Court after an indictment had been returned. The court held that he could not do so.

"Our Probate Court is citing the *Smith* case as authority for refusing to proceed with cases certified to it by the prosecuting attorney *before* indictment, and your opinion is respectfully requested as to whether said case has any application to Sec. 13425-15 of the Code, as it now reads.

"The refusal of the Judge of the Probate Court of Licking County to proceed to hear these cases which were certified in accordance with the practice obtaining here for some years, has resulted in a number of embarrassing complications.

"Question: 1. Has the Probate Court judge the right to refuse the cases certified by the prosecuting attorney and transmitted by the clerk of the Common Pleas Court to the Probate Court?

2. If he persists in such refusal and the same is unwarranted in law, what action will lie?"

Section 13425-15, General Code, to which you refer, reads:

"Such recognizances and transcripts shall be returned to either of such courts forthwith after the commitment of the accused or after the taking of a recognizance for his appearance before either of such courts; and in whichever of such courts they may be returned to, or the accused, by such recognizance, may be required to appear in, the prosecuting attorney, at his election, may proceed with the prosecution, and the accused shall appear therein and answer to his recognizance."

The above section now reads identically the same as former Section 13455, General Code, the General Code number having been changed as the result of the enactment by the 88th General Assembly of Amended Senate Bill No. 8 entitled "An Act to Revise and Codify the Code of Criminal Procedure of Ohio, etc."

You advise that the Licking County Probate Court is refusing to proceed with cases certified to it by the prosecuting attorney before indictment, basing its refusal on the authority of *Smith vs. State*, 12 C. C. 458. The first proposition in the syllabus of the *Smith* case, *supra*, reads:

"Section 6367, Revised Statutes, Authorizing the prosecuting attorney of certain counties to proceed in prosecutions in which the Probate Court has jurisdiction, either in the Probate Court or Court of Common Pleas at his election, does not authorize a transfer of any such prosecution from the Common Pleas, when once filed there, to the Probate Court."

In that case the prosecuting attorney attempted to transfer a case to the Probate Court after indictment had been returned and the court held that he could not do so.

I am unable to see how the Smith case, *supra*, would have any application to cases certified to the Probate Court prior to indictment.

Article IV, Section 8 of the Ohio Constitution dealing with jurisdiction of the Probate Court reads:

“The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses and for the sale of land by executors, administrators, and guardians, and such other jurisdiction, in any county or counties, as may be provided by law.”

In line with this provision of the basic law the Legislature enacted Section 13424, General Code, giving the probate court concurrent jurisdiction with the court of Common Pleas of all misdemeanors and all proceedings to prevent crime, and Sections 13441, General Code, et seq.

Section 13441, General Code reads:

“An indictment is not required in cases in which the Probate Court has criminal jurisdiction. The prosecuting attorney shall forthwith file an information in such court setting forth briefly, in plain and ordinary language, the charges against the accused, and he shall be tried thereon.”

In 1913, which was nineteen years after rendition of the decision in the Smith case, *supra*, the Ohio Supreme Court in the case of *Rogers vs. State*, 87 O. S. 308, dealt extensively in its opinion with the jurisdiction of the Probate Court in criminal cases. The late Judge Wanamaker said in the opinion:

“The Probate Court is limited to such jurisdiction as the Legislature has defined by statute. In criminal cases it is given jurisdiction in misdemeanors concurrent with the Court of Common Pleas.

“That limited jurisdiction applies not only to the subject-matter, but likewise to the procedure prescribed by statute.

“The general statute defining the procedure for misdemeanors prosecuted in the Probate Court, is Section 13441, General Code, which reads: ‘An indictment is not required in cases in which the probate court has criminal jurisdiction. *The prosecuting attorney shall forthwith file an information in such court* setting forth briefly in plain and ordinary language the charges against the accused and *he shall be tried thereon.*’ Subsequent sections further define the general procedure all based upon an information in such court.

“Manifestly, therefore, every statute defining a misdemeanor must follow the general procedure provided for in the general statutes pertaining to the Probate Court, unless there be special and particular provision made to the contrary.

“If a criminal prosecution be commenced in the Common Pleas Court, we would all understand it would have to proceed by the general method of indictment by a grand jury, unless it were otherwise specially provided; and, if there were to be a like prosecution begun in the Probate Court, we would understand that it would have to proceed by information of the prosecuting attorney, unless it were otherwise specially provided.”

In Opinions of the Attorney General, 1928, Volume 4, page 3034, it was held

that the Probate Court under Sections 13441, et seq., has jurisdiction to hear such criminal cases as are within its jurisdiction upon filing of an information by the prosecuting attorney, and I concur in that view.

Coming now to your second question, I believe that it being the duty of the Probate Court, specifically enjoined by law, to hear criminal cases within its jurisdiction upon the filing of an information by the prosecuting attorney, the Probate Court may be compelled by mandamus to hear such cases.

Section 12283, General Code, reads:

“Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.”

Any doubt expressed as to the application of this writ to require a court to assume jurisdiction is resolved by Section 12285, General Code, which reads:

“The writ may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.”

Courts may accordingly be compelled by mandamus to do that justice which the law enjoins upon them to administer. *In re Turner*, 5 Ohio 542.

Based upon the foregoing citations and discussion, you are specifically advised that:

1. The Probate Court under the provisions of Section 13425-15, General Code, must hear such criminal cases as it has jurisdiction to try upon the filing of an information by the prosecuting attorney.

2. It being the duty of the Probate Court, specifically enjoined by law, to hear such cases, mandamus will lie to require such court to perform its duty.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1118.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF CARL W. AND LONA ENGLE IN THE TOWN OF FORT JEFFERSON, DARKE COUNTY.

COLUMBUS, OHIO, October 29, 1929.

HON. HARRY D. SILVER, *Director of Finance, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my examination and approval an abstract of title relating to Lot No. 16 of the plat of the town of Fort Jefferson, Darke County, Ohio, now owned of record by Carl W. Engle and Lona Engle, the acquisition of which property is sought by the Greenville Historical Society under authority of House Bill No. 143, passed by the 88th General Assembly, (113 O. L. 593).

An examination of the abstract of title submitted shows a number of defects in the early history of the title to this property. Thus it appears that in 1833 this lot