

Number	Name
1896	Lepha Harris
1897	Wm. H. Stone
1898	Mrs. Tessie Groves, et al.
1900	Geo. E. Parker
1901	Emma L. Parker
1902	Wm. and Mary B. Winter
1903	W. B. and Leona H. French
1904	David E. Pierce

By the above grants there are 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.*

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2873.

DEPUTY OF PROBATE COURT—APPRAISER'S FEES — NO RIGHT TO OBTAIN SUCH FEES FOR SERVICES—INCOMPATIBLE WITH DUTIES—MAY ACT AS NOTARY PUBLIC—FEES MAY BE CHARGED WHEN HE ACTS IN NON-OFFICIAL CAPACITY AFTER WORKING HOURS.

*SYLLABUS:*

1. *A deputy of the Probate Court has no right to obtain appraiser's fees as compensation for his services as appraiser, as such services are incompatible with his duties as deputy to the Court.*

2. *A deputy of the Probate Court who qualifies as a Notary independently of his office may retain the fee for his notarial work as long as he performs the notarial services in his non-official capacity after working hours.*

COLUMBUS, OHIO, August 26, 1938.

HON. G. W. MARRIOTT, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication. Your letter reads as follows:

"There is a question which has been raised in my office on which I desire to have the Attorney General's opinion if possible. In the past, deputies in the Probate Office have acted as appraisers in occasional cases and they have charged, and there has been paid in the fee of \$2.00 for such services. There has also been a few cases in which one of the deputies, who is a Notary Public, has collected fees as a Notary. Does any deputy in the Probate Office have the right to collect any fee other than his salary? Such services were not performed during the regular hours of employment.

Several of the auditors have checked the books in regard to fees and have never made any comment in regard to the same, but the present auditors, basing their opinion on Decision No. 4716, Attorney General Opinion, November 1, 1932, feel that these fees so collected belong to the County Treasury."

While your letter does not raise the question of incompatibility of offices, a careful perusal of the facts stated therein will reveal that such a question is presented.

Section 10509-42, General Code, which provides for the appointment of appraisers, contains no express prohibition which would prevent a deputy of the Probate Court from serving as an appraiser. By virtue of Section 9, General Code, a deputy or clerk when duly qualified may perform all and singular the duties of his principal. Section 10509-57, General Code, expressly confers upon the Judge of the Probate Court, his deputy or other officer authorized to administer oaths, authority to take oaths relating to inventories. Section 10509-58, General Code, further provides for the allowance of appraisers' fees by the Court, and Section 10509-59, General Code, provides for hearing on the inventories by the Court and for the entering of the Court's finding on the journal. It can thus be seen that because of the close relationship between a Probate Judge and his deputy, and the wide scope of delegated authority to act for the Judge permitted a deputy by virtue of Section 9, General Code, and customary Court practice, a Probate Court Judge is in reality appointing one who stands in his stead, and acts as his agent when he appoints his deputy to act as an appraiser. Moreover, he is

also placed in the position of approving his acts and allowing fees to his agent.

Certainly such a situation creates incompatibility in offices. It is now a well established rule that offices are incompatible when there is an inconsistency in their functions, where one is subordinate to the other, or where a contrariety and antagonism results in the attempt of one person to discharge faithfully and impartially the duties of both. Where such subordination or conflict in the duties of offices results, it is improper for one person to attempt to discharge the duties of such offices.

Judged by these facts, certainly public policy demands that a Probate Court deputy be not appointed appraiser by his Court. It is therefore my opinion that a deputy of the Probate Court has no right to obtain appraiser's fees as compensation for his services as appraiser, as such services are incompatible with his duties as deputy to the Court. It also follows from these circumstances that no finding can be made requiring such fees to be paid into the county treasury, as the money in question can not be considered a fee coming rightfully into an officer's hands while acting in his official capacity. Whatever right might exist to recover such fees paid to such deputy would be a matter to be determined by the party having paid the same.

In the case of a deputy who serves as a Notary; if his right to take acknowledgements comes by virtue of his being a deputy of the Court, then his service is an official one whether performed during or after office hours and he would be bound under Sections 2977 and 2978, General Code, to pay all such fees into the County Treasury. However, if his power to act as a Notary comes from a Notary Commission for which he has qualified as a private person and which he has received as such, the situation changes and as long as he performs his notarial duties after office hours, he is entitled to retain the fee charged for his personal services as a notary.

It cannot be disputed that an officer is not required to pay over to the county treasury, money received by him in payment for services performed for another by private agreement, where such services are no part of the duties of his office and are not incompatible with or included within his official duties.

In answer to your second question, it is my opinion that a deputy of the Probate Court who qualifies as a Notary independently of his office may retain the fee for his notarial work as long as he

performs the notarial services in his non-official capacity after working hours.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

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2874.

APPROVAL—CONTRACT BETWEEN VILLAGE OF WAUSEON AND STATE OF OHIO FOR IMPROVEMENT OF PORTIONS OF STATE HIGHWAYS NOS. 296 AND 298, APPORTIONED SHARE OF COST OF IMPROVEMENT TO BE PAID BY EACH OF PARTIES THERETO.

COLUMBUS, OHIO, August 25, 1938.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval as to form and legality a contract in duplicate by and between the Village of Wauseon and the State of Ohio providing for the improvement of portions of State Highways Nos. 296 and 298 situated in the Village of Wauseon and setting forth the apportioned share of the cost of said improvement to be paid by each of the parties thereto.

Attached thereto is the certificate of the Auditor of the Department of Highways and of the Director of Finance certifying that sufficient funds to pay for the State's share of said improvement have been set aside and not otherwise obligated.

There is also attached the certificate of the village clerk of Wauseon, Ohio certifying that the money required for the payment of the cost of said improvement, other than that part assumed by the State, is in the treasury or in the process of collection and not appropriated for any other purpose, or is being obtained by the sale of bonds, which bonds are sold and in the process of delivery.

Upon examination, it is my opinion that said contract is in proper legal form and constitutes a binding agreement by and between the parties thereto for the purposes therein stated.

I have, therefore, endorsed my approval as to form and legality thereon and am returning the same herewith.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*