

said department, by which there is leased and demised to The Home Banking Company, of St. Marys, Ohio, for a term of fifteen years, a certain parcel of abandoned Miami and Erie canal lands in the city of St. Marys, Auglaize County, Ohio, said parcel consisting of 472 square feet of land. Said lease is for an annual rental of six per cent upon the sum of \$300.00, the appraised value of said parcel.

A careful examination of said lease shows that the same conforms to the provisions of House Bill 162, passed by the 86th General Assembly, and to the provisions of Sections 13965, et seq., of the General Code, and to other related statutory provisions pertaining to the execution of leases of this kind. Said lease is therefore approved as to form.

Under the provisions of Section 464, General Code, all leases of canal lands executed by you in your official capacity as Superintendent of Public Works are required to be approved by the Governor and Attorney General. There being no apparent reason why this lease should not be approved by this department, the same is accordingly hereby approved by me and my approval is endorsed upon said lease and upon the duplicate and triplicate copies thereof.

Respectfully,

GILBERT BETTMAN,
Attorney General.

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HUMANE SOCIETY AGENT—WHEN APPOINTMENT APPROVED BY PROBATE JUDGE, SERVES UNTIL SOCIETY TERMINATES SERVICES—VALIDITY OF NUNC PRO TUNC ENTRY OF APPROVAL.

SYLLABUS:

1. *Where one has been duly appointed by a humane society as agent, and the probate judge duly approved said appointment, such person is duly qualified as a humane agent and is authorized to draw funds from the public treasury until such time as the humane society terminates his services in such capacity.*

2. *In the event of an appointment, the notice of which is directed to the probate judge by a letter, and the approval of the probate judge is made upon such letter, such circumstances would constitute a valid appointment of such agent, notwithstanding the probate judge failed properly to record said appointment as required by law.*

3. *The probate judge after having once approved the appointment of an agent of a humane society, is without power to take further action in the matter.*

COLUMBUS, OHIO, August 20, 1929.

HON. JAY R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication which reads:

“Wish to submit the following proposition for your opinion:

Defiance County has a duly organized county humane society. On the 4th day of September, 1923, said society, at a regular meeting, appointed Ed. M. Colwell as its agent, to act as humane officer, and duly recorded said appointment in its minute book. Shortly thereafter said society notified Charles W. Palmer, the then probate judge, by letter, of said appointment and said probate judge endorsed upon said letter his approval of said appointment. Said letter was filed with the Auditor of this county as authority upon which said

auditor issued the warrants for said humane officer's salary. The said probate judge either did not make a record in his office of such approval or the record has since become lost, or has been destroyed. Likewise the letter from the humane society notifying said probate judge of the appointment upon which the probate judge noted his approval has since become lost or has been destroyed.

The said Ed. M. Colwell under said appointment continued to act as humane officer and to draw his salary out of the county treasury until about March, 1929, whereupon D. F. Openlander, the present probate judge who assumed the duties of his office on the first of January, 1924, and has continued in that office ever since, notified the county auditor not to issue any more warrants to Ed. M. Colwell for his salary, stating to the said officer that said warrants had been drawn illegally and without authority ever since he, the said D. F. Openlander, had assumed the office of probate judge for the reason that he, D. F. Openlander, had not upon coming into the office of probate judge or any time since that date approved the appointment of the said Ed. M. Colwell.

The minute book of the humane society shows the appointment of Ed. M. Colwell as humane officer but does not specify any period or length of time for which the appointment was to continue. No new appointment of the said Ed. M. Colwell or any other person has been made since September 4, 1923.

Question: What is the status of Ed. M. Colwell as such humane officer? Does his appointment as of September 4, 1923, and the approval of the then probate judge continue in force even though a new probate judge has assumed the duties of that office? Can the auditor legally issue his warrant for said humane officer's salary upon the appointment as of September 4, 1923, and the approval made at that time?"

Undoubtedly, the agent to which you refer was appointed pursuant to the provisions of Section 10070 of the General Code which relates to the appointment of agents by societies organized in counties pursuant to the provisions of Section 10067 of the General Code. Said Section 10070 provides:

"Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense."

Section 10071, which relates to the approval of the agent's appointment by the probate judge, provides:

"All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments."

Section 10072 expressly provides that upon the approval of the appointment of such agent by the probate judge of the county, the county commissioners shall pay

monthly to such agent or agents from the general revenue fund of the county such salary as they may deem just and reasonable.

Analyzing the foregoing sections, it appears to be clear that the power of appointment is solely vested in the humane society. Likewise, the power of approval of said appointment is vested in the probate judge, when the society exists outside of a municipality, and the appointment by the society is ineffective insofar as authorizing such agent to draw money from the public treasury is concerned, until such approval is made. There does not appear to be any definite time fixed for which such appointment shall be made. It appears, therefore, to be in the power of the humane society to terminate such appointment in its discretion. However, the only power that a probate judge has in connection with such an appointment is the approval thereof.

In the case of *State ex rel. The Coshocton Humane Society vs. Ashman*, 90 O. S. 200, it was held:

“Under the provisions of Chapter V, Title IX, Div. VI, of the General Code, providing for the organization and powers of humane societies, a probate judge, when called upon to approve the appointment of an agent for such society, has discretion to determine not only whether the person named is a proper person for the discharge of such duties, but also whether there is such necessity for the appointment as would justify the payment of the expense out of the public treasury.”

It therefore appears that in the first instance the probate judge has some discretion as to whether there is a necessity for such appointment. However, when such judge has once exercised his discretion and approved such an appointment, it is believed that his power in reference thereto is at an end. In other words, the power to take a given action does not imply the power to recall such action, and the fact that the personnel of the probate court of a given county has changed would in no wise alter the situation.

In view of the foregoing, it is believed that the sole question now to be determined is whether or not such agent was duly appointed by the humane society, and whether or not such appointment was duly approved by the probate court.

While the statute requires that a record be made by the probate judge of such appointments, it does not necessarily follow that in the absence of such record, no appointment was made. It is true that certain courts speak from their records in those instances wherein journals are required to be kept. However, even such records may be corrected to conform to the true facts by means of *nunc pro tunc* entries in those cases in which some action was, as a matter of fact, taken but not recorded. If it be a fact that the appointment was made and the approval duly given, this undoubtedly could be established by oral evidence in the absence of records the same as other matters of a similar nature are proven in case of lost or destroyed records.

Based upon the foregoing, it is my opinion that:

1. Where one has been duly appointed by a humane society as agent, and the probate judge duly approved said appointment, such person is duly qualified as a humane agent and is authorized to draw funds from the public treasury until such time as the humane society terminates his services in such capacity.
2. In the event of an appointment, the notice of which is directed to the probate judge by a letter, and the approval of the probate judge is made upon such letter, such circumstances would constitute a valid appointment of such agent, notwithstanding the probate judge failed properly to record said appointment as required by law.
3. The probate judge after having once approved the appointment of an agent of a humane society, is without power to take further action in the matter.

Respectfully,

GILBERT BETTMAN,
Attorney General.