

at the rate of 5¼%. This office has repeatedly held that unless the notice advertising the sale of bonds published pursuant to the provisions of Section 2293-28, General Code, states that bids may be presented based upon bonds bearing a different rate of interest than specified in the advertisement, the acceptance of a bid for such bonds to bear a different rate of interest is void. See Opinion No. 341, under date of April 23, 1929; Opinion No. 93, under date of February 14, 1929.

In view of the foregoing I am compelled to advise you not to purchase these bonds.

Respectfully,

GILBERT BETTMAN,
Attorney General.

718.

INSOLVENCY COURT—PROCEDURE FOR OBTAINING JURIES IN MUNICIPAL APPROPRIATION CASES OUTLINED.

SYLLABUS:

Juries in municipal appropriation cases, which cases are filed in the insolvency court of Cuyahoga County, should separately be secured in each proceeding by the judge thereof issuing an order to the clerk of the Common Pleas Court to draw from the jury wheel the names of twelve persons to serve as jurors in the particular proceeding, and the names after being drawn from the wheel by the clerk, in the presence of the sheriff, should be certified to the insolvency court, which is authorized to issue a venire facias to the sheriff of the county, commanding him to summon the persons whose names were so secured to attend as jurors in the insolvency court at the time and place stated in the order.

COLUMBUS, OHIO, August 8, 1929.

HON. RAY T. MILLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date enclosing copy of letter addressed to you by Hon. Harry L. Eastman, judge of the Insolvency Court of Cuyahoga County. Judge Eastman's letter is in part as follows:

“We shall be greatly obliged if you will kindly secure from the Attorney General an opinion on the following question: ‘Can the Common Pleas Court summon jurors for service in Insolvency Court pursuant to Section 11419, G. C., or must Insolvency Court summon their own jurors as provided in Section 11426, G. C.?’

It is the practice of this court to secure jurors for service in appropriation cases, in which a municipal corporation is plaintiff, in the following manner: This court makes an order on the clerk of the Common Pleas Court directing him to draw, in the presence of the sheriff, a certain number of names to serve as jurors in a particular case. The list of names is certified back to this court by the clerk of the Common Pleas Court. This court then issues a venire facias to the sheriff commanding the sheriff to summon the persons whose names were so secured, to appear on a day named in the venire.

This procedure requires an average of four days for each case and often results in a loss of time by the court. To illustrate: A case may be set for trial on the 29th day of April. A jury has been previously ordered. Counsel

appear on the morning of April 29th, and announce to the court that they have settled the case.

Before another jury can be summoned, according to the above procedure, the court has lost two or three trial days."

The Insolvency Court to which you refer is a court of record having original jurisdiction as provided by Sections 1620 and 1629, General Code, the pertinent parts of which read:

Sec. 1620. "There shall be established in Cuyahoga County a court of record which shall be styled 'The Court of Insolvency.' * * * "

Sec. 1629. "The court of insolvency shall have original jurisdiction in all cases, matters and things relating to and arising under the laws now in force or hereafter enacted regulating * * * the appropriation of land for public use, and for the assessment of damages occasioned by a public improvement, and shall in every respect have the same jurisdiction, possess the same powers, discharge the same duties, and incur the same penalties as are now or may hereafter be enforced or enjoined by the constitution and laws of the state, upon the judge of the probate court. All laws now in force or hereafter enacted, regulating the mode and manner or proceeding in such cases by the probate court, shall extend to the court of insolvency."

It will be noted from the provisions of the above sections that the Insolvency Court is given original jurisdiction in the appropriation of land for public use, and for the assessment of damages occasioned thereby.

In reference to the procedure, provision is made in Section 1629, supra, that the Insolvency Court shall possess all powers granted by the laws now in force or hereinafter enacted regulating the mode and manner or proceedings in such cases by the probate court.

Section 11212, General Code, provides that the provisions of law governing civil procedure 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 title. Neither the Probate Court statutes nor the Insolvency Court statutes expressly provide for the drawing of juries in actions for the appropriation of property by municipal corporations, so therefore the procedure of the Court of Common Pleas must be followed insofar as it is applicable to the Probate Court.

In the case of *Railroad Co. vs. O'Harra*, 48 O. S. 343, at page 356, the court says:

"No express provision on the subject is to be found in the procedure provided by statute for the probate court; indeed the special rules of procedure provided for this court, are quite limited, because, by Section 6411, Revised Statutes, all the provisions of law governing civil proceedings in the court of common pleas, are made applicable to the probate court, where there is no special provision on the subject applicable to that court. Again it is provided in Section 537, Revised Statutes, that the probate judge shall, in the exercise of the jurisdiction conferred on his court, have the same powers and be governed by the same regulations as are provided by law for the courts of common pleas, and, by Section 539, it is made his duty to issue all process and notices, not contrary to law, necessary and proper to carry into effect the powers granted to him."

Now, various methods are provided by statute for empaneling juries in the court of common pleas. Thus the parties may under Section 5185 have a struck jury, and under Section 5168 special juries may be empaneled by the

court. We see no reason why either of these methods for obtaining a jury might not be adopted, under the provisions above referred to, for the purpose of obtaining a jury, if necessary, in any proceeding in the probate court, where there is no special provision applicable to the case."

In reference to the appropriation of private property by a municipal corporation special powers are given to such corporation as are found in Chapter 1, Division III, Page's Annotated Code, Sec. 3677, and the securing of a jury for the purpose of the appropriation is governed by Sections 3681 and 3683, General Code, which sections are respectively as follows:

Sec. 3681. "Upon the passage of such ordinance, the solicitor shall make application to the court of common pleas or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the land sought to be taken is located, which application shall describe as correctly as possible the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof."

Sec. 3683. "If it appears that such notice has been served five days before the time of application, or has been duly published, or that such notice has been waived, the court shall set a time for the assessment of compensation by a jury, but it may be made at a special term of court, and the jury shall be drawn and the trial proceed as in other civil actions."

It will be noted that the last section quoted provides that the jury shall be drawn and the trial proceed as in other civil actions. Provision is made by statute for the drawing and impaneling of juries in civil actions. The jury is, therefore, to be drawn in the manner provided for in civil cases.

While the jury in municipal appropriation cases is to be drawn in the manner provided in civil cases, it is necessary to determine the manner in which juries are drawn in the probate court in such cases, for the mode and manner of drawing jurors in municipal appropriation cases in the insolvency court is governed by the procedure in the probate court. The probate court is a court of limited jurisdiction, having only such powers as the statutes confer upon it. The probate court has no regular term, it being open for business at all times.

In the case of *Mansfield vs. Cole*, 16 O. N. P. (N. S.) 209, the fourth and fifth branches of the head-notes are as follows:

"The court of common pleas is one of general jurisdiction, having regular terms. The probate court is a court of limited jurisdiction, having only such powers as the statutes confer upon it. The probate court has no regular terms, it being open for business at all times. Such terms as are provided for it by statute are for special purposes only. Therefore it is extremely doubtful whether the doctrine that the court of common pleas, being a court of general jurisdiction, has control over its docket and judgments during the term, applied to the probate court.

Section 11643, General Code, does not confer upon a probate court power to hold three regular terms of four months each in each year for all purposes, but only for purposes mentioned as provided for in Chapter VI of Title 4, Division 4, General Code."

It is apparent that jurors cannot be drawn by the probate court for service during a full term therefor, and they can only be drawn in the same manner as juries are drawn for special terms in the common pleas court.

Section 11427 of the General Code provides as follows:

“Upon receipt of an order therefor from the judge of a common pleas court, the clerk thereof, at the time, place, and in the mode hereinbefore provided, forthwith shall draw the names of twelve persons to serve as petit jurors, or twenty-seven persons to serve as grand and petit jurors, for a special term of such court. When, in the court of appeals, an issue of fact triable by a jury is joined in a cause, at the instance of either of the parties, the clerk of the court of appeals, forthwith in like manner, shall draw the names of twelve persons to serve as jurors in the trial of such cause, and issue his venire for the appearance of the jurors at the proper time and place.”

Rockel's "Complete Ohio Probate Practice" comments on the method of securing a jury in municipal appropriation cases, and at Section 1760, among other things, says the following:

“The statute makes applicable the law relating to the drawing of jurors generally in the court of common pleas and the method there observed should be followed relating to special venires, etc. The clerk should proceed as directed in Section 11427, G. C., and a venire should be issued to the sheriff, as in other cases, made returnable on a day which is set for trial, and an entry to this effect should be put upon the journal.”

While it is true that Section 1628 of the General Code provides that terms of the court of insolvency shall be considered as three terms of four months each, beginning on the first day of January of each year, nevertheless jurors cannot be drawn for a full term as is done by the common pleas court, because Section 1629 of the General Code provides that the mode and manner of drawing jurors in municipal appropriation proceedings in the insolvency court shall be the same as in the probate court; therefore, it appears to me that a jury in municipal appropriation cases in the insolvency court should be drawn under the provisions of Section 11427, General Code. That is, a special venire should be issued to the sheriff for each case.

Section 11419 of the General Code provides as follows:

“The common pleas court of each county shall, at the first term thereof in each year, determine the number of persons necessary to be selected in each county, annually, to serve as grand and petit jurors in the several courts of such county, in which juries may be required, and cause a memorandum thereof to be entered on the journal; such order, if not made at that term, may be made at any other time, and amended from time to time at the discretion of the court, and until it is made, the number of persons to be selected for jurors in each county shall be as theretofore determined; but if there has been no such determination, the number shall be one hundred and thirty, until otherwise ordered.”

You will observe that this section provides that the court of common pleas shall determine the number of jurors to be selected in each county annually to serve as jurors in the several courts of the county. It seems to me that by the provisions of this section, the court determines the number of jurors that the jury commission shall select to place in the jury wheel and that this section has no application to the drawing of jurors by the Court of Common Pleas.

Specifically answering your inquiry, I am of the opinion that juries in municipal appropriation cases, which cases are filed in the Insolvency Court of Cuyahoga County, should separately be secured in each proceeding by the judge thereof issuing an order to the clerk of the Common Pleas Court to draw from the jury wheel the names of

twelve persons to serve as jurors in the particular proceeding, and the names after being drawn from the wheel by the clerk in the presence of the sheriff, should be certified to the insolvency court, which is authorized to issue a venire facias to the sheriff of the county, commanding him to summon the persons whose names were so secured to attend as jurors in the insolvency court at the time and place stated in the order.

Respectfully,
GILBERT BETTMAN,
Attorney General.

719.

LIVE STOCK—KILLED BY DOG—PAYMENT OF COMPENSATION TO
OWNER ILLEGAL WHEN CLAIM NOT FILED WITH TOWNSHIP
TRUSTEES WITHIN SIXTY DAYS—FINDING FOR RECOVERY.

SYLLABUS:

1. *By reason of the express provisions of Section 5840, of the General Code, the owner of live stock which has been injured by a dog, may not receive compensation from the county unless such claim with a supporting affidavit is filed with the township trustees within sixty days.*
2. *In the event a claim which has not been filed in compliance with law, is paid, the sum so paid may be recovered from the party to whom it has been paid.*

COLUMBUS, OHIO, August 8, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent communication reads:

“You are respectfully requested to furnish this department with your written opinion upon the following statement of facts:

Section 5840, General Code, 112 O. L. 353, provides for the procedure necessary to perfect a claim for the killing or injuring of sheep by dogs. It is provided that the owner of such sheep may present to the township trustees of the township in which such loss or injury occurred within sixty days a detailed statement of such loss or injury, supported by his affidavit that it is a true account of such loss or injury. A duplicate of such statement shall be presented to the county commissioners of the county in which such loss or injury occurred. It is further provided that if such statements are not filed within sixty days after the discovery of such loss or injury no compensation shall be paid therefor.

The claimant had a loss June 12th, 1928, and the county commissioners were notified at once, the dog warden viewed the injury, and two free-holders appraised the loss. Claim was filed with the township trustees within sixty days but was not sworn to by claimant at the time of filing but was sworn to by him on the 29th day of September, the date of the meeting of the trustees at which the claim was allowed. The claim as allowed by the trustees was filed with the county commissioners on the 4th day of October, 1928. The claim was not acted upon by the county commissioners at their next regular meeting as provided by Section 5846, G. C., in fact, no claims presented to the county commissioners were allowed at the next regular session after being