

1427

COUNTY COURTS—ENACTMENT AND REPEAL OF EXISTING SECTIONS—MINISTERIAL OFFICERS OF COUNTY COURT—§§509.05, 1907.511 RC—PERFORMANCE OF PARTICULAR ACTS, REFERENCE TO PERTINENT STATUTES NECESSARY.

SYLLABUS:

1. The provision in Section 2 of House Bill No. 914, as passed on May 29, 1957 and approved by the Governor on June 17, 1957, for the repeal of "existing" Section 509.05, Revised Code, has reference to the section of that designation in force and effect on the dates of passage and approval of that act, and does not have the effect of repealing Section 509.05, Revised Code, as enacted in House Bill No. 937, as passed on May 29, 1957 and approved by the Governor on June 18, 1957, and effective on January 1, 1958.
2. Under the provisions of Sections 509.05 and 1907.511, Revised Code, the ministerial officers of a county court are the sheriff and all of the township constables of the townships within the county court district. Such constables are elected as provided in Section 509.01, Revised Code, or appointed as provided in Sections 509.03 and 509.16, Revised Code, and, except as to police constables appointed under authority of Section 509.16, Revised Code, are compensated under the fee system provided in Section 509.15, Revised Code.
3. To determine which of the ministerial officers of a county court is to perform particular acts, reference must be made to the several pertinent statutes in Chapters 1911., 1913., 1917., 1919., and 1923., Revised Code, prescribing as to particular acts, by what officer they are to be performed.

Columbus, Ohio, December 12, 1957

Hon. Marlowe Witt, Prosecuting Attorney
Henry County, Napoleon, Ohio

Dear Sir:

I have before me your request for my opinion in which you ask the following questions:

"Our County is one of those counties which have only one County Judge and no municipal court, therefore there is only one district which is the entire county, and there is no district constable.

"The newly elected County Judge has asked me my opinion as to who is the officer to whom he directs all writs and summons for service.

"Based on Revised Code 1907.511, as well as the fact that the County Judge is a county and not township officer, I have given him the opinion that the sheriff is the proper officer to use for that purpose.

"However, he questioned certain apparent inconsistencies, which appeared in Revised Code 1911.01, 1911.04, which becomes effective January 1, 1958, and 1911.05 and several others which refer to 'Constable of the County' or just to 'Constable'.

"Therefore, the following questions arise:

- (1) Is my opinion correct, in that the sheriff is the officer to whom he directs writs and summons?
- (2) If not, since the constables are township officers, who is the 'Court Constable' and how can he be appointed?"

Section 1907.511, Revised Code of Ohio, to which you refer, reads as follows:

"The county sheriff shall be the ministerial officer of the county court in all civil and criminal cases in which the county court has jurisdiction."

Section 509.05, Revised Code, also denominates township constables as ministerial officers. It reads as follows:

"In addition to the county sheriff, constables shall be ministerial officers of the county court in all cases in their respective townships, and in criminal cases, they shall be such officers within the county. They shall apprehend and bring to justice felons and disturbers of the peace, suppress riots, and keep and preserve the peace within the county. They may execute all writs and process, in criminal cases, throughout the county in which they reside, and in which they were elected or appointed. If a person charged with the commission of a crime or offense flees from justice, any constable of the county wherein such crime or offense was committed shall pursue and arrest such fugitive in any other county of the state and convey him before the county court of the county where such crime or offense was committed."

"Such constables shall serve and execute all warrants, writs, precepts, executions, and other process directed and delivered to them, and shall do all things pertaining to the office of constable."

"The authority of a constable in serving any process, either civil or criminal, and in doing his duties generally shall extend throughout the county in which he is appointed, and in executing and serving process issued by a judge of the county court, he may exercise the same authority and powers over goods and

chattels, and the persons of parties, as is granted to a sheriff or coroner, under like process issued from courts of record."

(Emphasis added)

It should be noted here that the prior Section 509.05, Revised Code, contained very similar provisions, except that it provided that the constables were ministerial officers of the courts held by *justices of the peace*. Old Section 509.05, Revised Code, was repealed by Section 2 of House Bill No. 914, to be effective January 1, 1958. House Bill No. 914 was passed May 29, 1957 and was approved June 17, 1957. The new Section 509.05, Revised Code, was enacted by House Bill No. 937, which was also passed May 29, 1957, but which was not approved until June 18, 1957. House Bill No. 937 provides that the new section is also to be effective January 1, 1958. There is no question but that when the act provided in House Bill No. 914, "that existing Sections 509.05 * * * of the Revised Code are repealed effective January 1, 1958," it was referring to old Section 509.05, Revised Code. This is seen to be true when it is noted that House Bill No. 937 was not approved until one day after House Bill 914 was approved. It is, therefore, obvious that where reference is made in House Bill No. 914 to existing Section 509.05, Revised Code, it was the old section that was being referred to because it was the only Section 509.05 that was in existence on June 17, 1957.

Coming now to what is meant by the term "ministerial officers," I find no general definition of the term. In 14 Ohio Jurisprudence, 2d, page 450, it is said:

"The legislature has provided for certain officers with power to perform ministerial duties in connection with the administration of justice by the various courts of Ohio. * * *"

To determine what is meant by ministerial officers here we must look to the statutes prescribing the acts to be performed by such officers. When Sections 1907.511 and 509.05, Revised Code of Ohio, are read together it appears that the ministerial officers of the county court are the sheriff and all of the various constables of the townships within the territorial jurisdiction of the county court. Resort must be taken to the particular statutes to determine which of these ministerial officers is to perform a particular act.

It is quite apparent that an action in a county court is commenced by delivering a summons to the constable for service. Section 1911.01, Revised Code of Ohio, reads in part as follows:

"An action before the judge of a county court is commenced by a writ of summons, or by the appearance and agreement of the parties without summons. If such writ is issued, the action is commenced upon delivery of such writ *to the constable*, who shall serve it. Such constable shall note thereon the time of receiving such writ. * * *" (Emphasis added)

Sections 1911.04 and 1911.08, Revised Code, refer to the directing of a writ of summons to constables, whereas Section 1911.10, Revised Code, refers to writ of summons directed to sheriffs. These sections are not inconsistent and when reference is made to delivery of summons to a constable it should be so delivered, but when reference is made to a delivery of a summons to the sheriff, it should be delivered to the sheriff, and not to a constable. Sections 1911.18 and 1911.19, Revised Code, which have reference to an order of arrest before judgment in civil cases require that such orders be directed to and executed by the constable and not the sheriff. The following is a listing of sections referring to ministerial acts to be performed by constables:

1911.01, 1911.04, 1911.05, 1911.08, 1911.09, 1911.18, 1911.19, 1911.26, 1911.31, 1911.37, 1911.50, 1913.18, 1917.29, 1917.32, 1919.02, 1919.05, 1919.08, 1919.09, 1919.10, 1919.11, 1923.13, and 1923.14.

Following are some of the more important duties which the legislature has provided the constable shall perform:

Section 1913.16, Revised Code, provides that the constable shall serve summons commanding jurors to attend court. Section 1917.19, Revised Code, requires that a writ of execution be delivered to a constable of the county and it should be noted that there is no provision in that section for a delivery of execution to a sheriff. Section 1919.02, Revised Code, provides that a summons in a replevin suit shall command the constable to seize the goods and again there is no provision that the sheriff shall seize the goods, but Section 1919.10, Revised Code, requires that if the value of the property so seized exceeds \$300.00 or if an appeal is taken, that the property be turned over to the sheriff by the constable. Section 1923.13, Revised Code, prescribes the form for a writ of execution and by the language therein that form is directed "to any constable of township."

It should be noted here that when reference is made in these sections to a constable, such reference is not to a constable of a court such as may

be appointed under the authority of Sections 2301.12 and 2701.07, Revised Code, but rather such reference is to township constables elected under the authority of Section 509.01, Revised Code, or appointed, as provided in Section 509.03, Revised Code, to fill vacancies in this office, and to police constables appointed as provided in Section 509.16, Revised Code. Section 509.01, Revised Code, reads in part as follows:

“Such number of constables as are directed by the board of township trustees shall be elected, biennially, in each township. * * *

Section 509.03, Revised Code, provides in part:

“When, by death, removal, resignation, or nonacceptance by the person elected constable, a vacancy occurs in such office, or when there is a failure to elect such officer, the board of township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable. If there is no constable in a township, the constable of an adjoining township in the county shall serve any process that a constable of such township may serve. * * *

Section 509.16, Revised Code, reads as follows:

“The board of township trustees may designate any qualified person as a police constable. The board may pay each police constable, from the general funds of the township, such compensation as the board by resolution prescribes for the time actually spent in keeping the peace, protecting property, and performing duties as a police constable. Such police constable shall not be paid fees in addition to the compensation allowed by the board for services rendered as a police constable. All constable fees provided for by section 509.15 of the Revised Code, where due for services rendered while the constable performing such services is being compensated as a police constable for his performance, shall be paid into the general fund of the township.”

Here will be seen the clear implication that police constables may render services which would normally involve earning a fee as provided in Section 509.16, Revised Code, although they may not, if compensated as a police constable, claim such fees.

These fees, as provided in Section 509.15, Revised Code, apparently constitute the means of compensation of township constables elected or appointed as provided in Sections 509.01 and 509.03, Revised Code.

These conclusions, that township constables rather than specially appointed county court constables, are to serve as ministerial officers of

these courts is supported by the many references to acts which may be done by constables *in their respective townships*.

Also to be considered on the subject of appointed constables is the limited authority conferred on county court judges in Section 2931.06, Revised Code, to appoint constables in townships which include islands in a lake, and in other specially situated townships.

A special power of appointment of constables by justices of the peace is provided in Section 509.04, Revised Code, and this section was neither amended nor repealed in the enactment of the two county court bills. Although the editors of one of the commercially published codes suggest an amendment of this section by implication, I am unable to point to anything in either of these acts, House Bills Nos. 914 and 937, 102nd General Assembly, which would support this view, especially when it is remembered that amendment or repeal by implication is not favored and is recognized only where made *necessary* by reason of irreconcilable conflict between old and new enactments. Although Section 509.04, Revised Code, will apparently become wholly obsolete on January 1, 1958, this does not, in my opinion, amount to such a conflict as would invoke such necessary implication of amendment.

Accordingly, it is my opinion:

1. The provision in Section 2 of House Bill No. 914, as passed on May 29, 1957, and approved by the Governor on June 17, 1957, for the repeal of "existing" Section 509.05, Revised Code, has reference to the section of that designation in force and effect on the dates of passage and approval of that act, and does not have the effect of repealing Section 509.05, Revised Code, as enacted in House Bill No. 937, as passed on May 29, 1957, and approved by the Governor on June 18, 1957, and effective on January 1, 1958.
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Respectfully,
WILLIAM SAXBE
Attorney General