Conservation Commissioner to one J. Lee Snoots of Columbus, Ohio. This lease is one for a term of fifteen years and provides for an annual rental of eighteen dollars and, by its further terms, leases and demises to the lessee above named the right to occupy and use for cottage site and docklanding purposes the inner slope and waterfront and the outer slope of the reservoir embankment back to the state ditch, that is included in Embankment Lot No. 23 (south half), south of Lakeside at Buckeye Lake, as laid out by the Ohio Canal Commission in 1905, and being part of the southeast quarter of section 21, town 17, range 18, Fairfield County, Ohio.

It appears that the lease here in question covers a part of the reservoir land included in a lease originally granted to W. C. Wharton and A. W. Orebaugh under date of August 13, 1919, and which by assignment and transfer became the property of the lessee above named.

Upon examination of this lease, I find that the same has been properly executed by the Conservation Commissioner and by J. Lee Snoots, the lessee therein named. I further find, upon examination of the provisions of this lease and of the conditions and restrictions therein contained, that they are in conformity with section 471 and other sections of the General Code relating to leases of this kind. However, I note in the lease one provision thereof stated in the form of a condition or restriction limiting the use of this property, which apparently does not express the intention of the parties to the lease. By this provision no buildings on the parcel of reservoir lands here in question shall be located nearer than six feet from the back and side lines of the lot, and twenty feet from the front line lot, "but this does not apply where there is a building already located on the property herein leased." Carrying out the manifest intention of the parties to this lease, the above quoted qualification of the restriction above referred to should be corrected so as to read: "but this does not apply as to a building already located on the property herein leased."

With the correction above suggested, this lease is hereby approved as to legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3612.

DEPUTY SHERIFF—AS NOTARY PUBLIC MAY NOTARIZE SHERIFF'S DEED.

SYLLABUS:

A deputy sheriff, who is a notary public, may certify to an acknowledgment of a deed executed by a sheriff in his official capacity.

COLUMBUS, OHIO, December 11, 1934.

HON. VERNON L. MARCHAL, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your recent request for my opinion reads:

"I would appreciate your rendering this office an opinion on the following question:

Is it proper for a Deputy Sheriff, who is a Notary Public, to notarize deeds which are executed by the Sheriff in his official capacity?"

The question presented by you requires consideration of two propositions. The first is whether there are statutory provisions which will make a notary public ineligible to certify to an acknowledgment of a Sheriff's deed by virtue of the fact that such notary public is serving as a Deputy Sheriff. The second is, whether the duties of a Deputy Sheriff are such as to prevent him from acting as a notary public in certifying to an acknowledgment of a Sheriff's deed.

With reference to the first proposition, it must be observed that the authority to take acknowledgment of particular instruments is dependent upon statutory authority in all cases. Particularly important is the fact that no other than an officer designated by statute can take a particular acknowledgment. *State ex rel. Attorney General* vs. *Lee,* 21 O. S. 662.

In the early case of *Roads* vs. *Symmes,* 1 Ohio, 281, 13 Am. Dec. 621, it was held that an acknowledgment is indispensable to a Sheriff's deed. With the enactment of Section 8510, General Code, the General Assembly provided that a deed must be acknowledged before any one of certain stated officials. One of these officials is a Notary Public. A Sheriff is not one of them.

That one who is a Notary Public is the holder of an office, is determined by statutory provisions which refer to his status as such (G. C. Sections 120, 122, 123, 124, 131, and 12929), as well as by express judicial decision. *Bettman* vs. *Warwick,* 13 O. F. D. (U. S. Cir. Ct. App.) 668.

The legislature has, through statutes, stated that under certain circumstances a person is ineligible to serve as a Notary Public. Section 121, General Code, is one of such statutes. It reads:

"No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

The only other such statute is Section 11532, General Code, referring to modes of taking testimony and exceptions to depositions. It reads as follows:

"The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

The powers of Notaries Public are enumerated in Section 126, General Code, and it will be observed that with the exception of the limitations to which I have just referred, a Notary Public has power within the county or counties for which he is appointed, to administer oaths required or authorized by law and among other things certify to acknowledgments of deeds.

In the case of *City Commissioners of Gallipolis* vs. *State, ex rel.,* 36 Ohio App. 258, the court stated that since 1834, a Notary Public has been authorized to administer the oath to an affidavit, and that power has been plenary except so far as it has been limited by statutes subsequently passed. The court called

attention to the fact that two such limitations have been imposed by the legislature. One in 1850, which is now in varied form, Section 121, General Code, the provisions of which are cited herein. The other is the limitation found in the Code of Civil Procedure, passed in 1853, now Section 11532, General Code, quoted supra.

On page 264 of the Gallipolis case supra, the court said:

> "The inhibition against the notary or other official administering the oath found in Section 11532 is that he must not be a relative or attorney of either party. There are, of course, multitudes of instances in which affidavits are required by law which are not taken to be used as testimony in judicial proceedings. The statute on perjury recognizes this. Section 12842, General Code. In all such cases the power of the notary to administer the oath proceeds from Section 126, General Code, and not from Sections 11524 and 11529, General Code, which latter confers the special power and limits its exercise so far as affidavits employed in litigation are concerned. Upon the notary's power to administer oaths to all affidavits not to be used in litigation there is no disqualification save that in Section 126. In an affidavit to a chattel mortgage, mechanic's lien, referendum petition, or like documents, a notary may administer the oath notwithstanding he may be related to or the attorney of the affiant."

In view of these statutory provisions it is apparent that: a sheriff's deed must be acknowledged; that a notary public is specifically authorized to certify to acknowledgments of deeds; and that there is no statutory inhibition against the certification of acknowledgments to sheriffs' deeds by a notary public who also holds the position of Deputy Sheriff.

We come now to consider whether the duties of a Deputy Sheriff are such as to prevent him from acting as a notary public in certifying to an acknowledgment of a sheriff's deed. The word deputy is defined as "one who acts officially for another," "the substitute of an officer," one authorized by an officer to execute an office, or right which the officer possesses, for and in place of the latter." *State ex rel. Binyon* vs. *Houck,* 11 O. S. C. (N. S.) 414. Ohio Jurisprudence, Vol. 32, p. 877. Deputy sheriffs are appointed under Section 2830, General Code. On numerous occasions this office has been called upon to determine whether the performance of duties in connection with some other employment by a deputy sheriff creates such a conflict as to make it impossible for him to fully perform his duties as deputy sheriff. The problem was discussed at length in an opinion found in Opinions of the Attorney General Vol II, 1913, page 1439. The then Attorney General said:

> "Section 2831, G. C. provides that the sheriff shall be responsible for neglect of duty or misconduct in office for each of his deputies and the general powers and duties of the sheriff are set forth in section 2833, too long to quote here. In some instances these deputy sheriffs are employed as annual employes, with their salary paid to them monthly, while in other instances they are paid for the services they perform throughout the year. *Where the deputy sheriff is on an annual salary, it would appear that his entire time belongs to the sheriff's office and he would be in no position to accept or perform other employ-*

ment. This condition might not obtain in those cases where a deputy sheriff was not a full-time employe, but, on the other hand, the deputy sheriff, when so employed and drawing the emoluments of such appointment, it is at all times under the direction of the sheriff, whose appointee or agent he happens to be.

Where a deputy sheriff is paid for such services as he performs during the year, and his time is only partially taken up with his work as deputy sheriff, such an officer is eligible to appointment as probation officer, where the duties of both will not require all the time of the appointee, and there will be no conflict between the two positions. This does not apply to deputy sheriffs under the regular salary whose entire time is covered by his compensation." (Italics the writer's).

Based upon the reasoning in the 1913 opinion supra, it was held by an Attorney General in 1922, (Opinions of the Attorney General for 1922, Vol. II, page 947) as disclosed by the first branch of the syllabus:

"The positions of deputy sheriff and county attendance officer may not be held by one and the same person at the same time."

In my opinion No. 2853, rendered June 23, 1934, I concurred with the reasoning in the 1913 and 1922 opinions supra and held that:

"A regularly appointed and acting deputy sheriff, who is employed on an annual salary basis, may not be legally appointed as special constable by a justice of the peace to serve attachment or other papers in a civil case, while serving as deputy sheriff."

It will be observed, by reviewing the opinions cited above, that the conflict of duties occur only in those instances where the deputy sheriff is on an annual salary and his entire time belongs to the sheriff's office, thereby precluding the acceptance of other employment. Furthermore, in the opinions referred to above the employment held to be in conflict with the duties of the deputy sheriff involved a conflict of time, interest and responsibility. Acceptance of additional employment, in those instances, caused the deputy sheriff to be absent from the sheriff's office during either certain or uncertain periods of time. The nature of a deputy sheriff's duties are such that he is subject to call at any time. If he is employed on a full-time basis as deputy sheriff it is easily perceived that additional employment might prevent him from fully performing his duties in the sheriff's office. Responsibility to more than one employer would create confusion when both employers directed that a certain duty be performed at a certain specified time. The necessity that a deputy sheriff, employed full-time, be free to respond on any and all occasions, when directed by the sheriff so to do, is the predominant factor apparent in previous opinions of Attorneys General of this state upon this question.

It is not difficult to distinguish the act of notarizing a sheriff's deed, by a deputy sheriff, from other types of employment. Such act does not constitute a conflict of time, interest or responsibility. The act of notarizing the sheriff's deed does not remove the deputy from the sheriff's office. Responsibility to respond to the call of two employers does not exist. The act of notarizing

the deed is such that it would not necessarily require precedence, in point of time, over certain assigned duties in the sheriff's office.

In view of the fact that there are no statutory provisions prohibiting a notary public, who is also a deputy sheriff, from notarizing a sheriff's deed, and because the act of notarizing such deed by a deputy sheriff does not prevent the deputy sheriff from fully performing his duties as such, I am therefore of the opinion, in specific answer to your inquiry that a deputy sheriff, who is a notary public, may notarize deeds which are executed by the sheriff in his official capacity.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3613.

MINOR—LEGAL SETTLEMENT DISCUSSED.

SYLLABUS:

Legal settlement of a minor discussed.

COLUMBUS, OHIO, December 11, 1934.

HON. PAUL A. FLYNN, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

> "Judge V. A. Bennehoff, of our Seneca County Juvenile Court, has submitted to me a question concerning the legal settlement of a child, namely, M. B. I believe all the essential facts are set forth in the enclosed letter in which he submitted the question to me.
>
> I would appreciate your early opinion upon this matter."

Attached to your request is the following letter from the Judge of the Juvenile Court of Seneca County:

> "There has been some controversy between Wyandott and Seneca Counties over the question of the residence of one M. B., and both Judge Kear and myself would like to have you get a ruling from the Attorney General's office so that we may know which county has the care and custody and which pay for the expenses of this child.
>
> The facts are as follows: M. B., born August 1, 1921, was living with her father and mother in Wyandott County, Base Line Road, on the F. Y. farm. In 1927 when M. was six years old, her uncle and aunt, L. and H. E. residing in Carey, Ohio, took M. into their home with the privileges of adoption. They kept her until December, 1933, when they separated. M. was then brought to Seneca County to live with her grandmother, Mrs. T. B. She stayed with her grandmother until July 26, 1934, when they could no longer keep her and took her to another uncle, R. B. on the Seneca County side.