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OFFICER WITHIN THIS STATE—DEPUTY OF THE CLERK OF COMMON PLEAS COURT—DEPUTY OF THE CLERK OF PROBATE COURT—NEITHER AN OFFICER— MINOR APPOINTEE CAPABLE OF ADMINISTERING OATHS—IN ALL INSTANCES WHERE DEPUTY CLERK AUTHORIZED SO TO DO—ARTICLE XV, SECTION 4, CONSTITUTION OF OHIO.

SYLLABUS:

Neither a deputy of the clerk of the common pleas court nor a deputy of the clerk of the probate court is an "officer within this state" within the meaning of Article XV, Section 4, Ohio Constitution; and such position of deputy may be held by a minor. A minor so appointed is capable of administering oaths in all instances in which a deputy clerk is authorized to do so.

Columbus, Ohio, June 23, 1954

Hon. Morris O. Gibby, Prosecuting Attorney
Harrison County, Cadiz, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The following inquiry has been made: Can a person who is over the age of eighteen but under the age of twenty-one years be a deputy clerk in the Probate Court or in the Clerk of Court's office and carry forth all functions necessary in such position, specifically the giving of oaths in all instances that a deputy clerk over the age of twenty-one years could do in either court? Your opinion in this matter would be appreciated."

In 27 American Jurisprudence, 751, Section 6, we find the following statement regarding the capacity of an infant to act as agent or deputy for another:

> "An infant may be an agent for another, and his contracts as such, if otherwise valid, will bind his principal. He may also hold public offices which are ministerial and call only for the exercise of executive skill and diligence, such as that of a deputy county clerk, but not public offices which are judicial, such as the office of a justice of the peace."

The reference to eligibility to service as a deputy county clerk is based on the decision in Harkreader v. State, 35 Texas Criminal Reports, 243, 33 S.W.117, in which it was held that a minor is eligible for such appointment "in the absence of any constitutional provision or statute prescribing the qualifications of a deputy clerk."

In Ohio the statute which authorizes the appointment of deputies by the clerk is silent in regard to the qualifications of such appointees. The only constitutional provision which may be thought applicable is Article XV, Section 4, which provides in part:

> "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; * * * "

The question thus presented is whether a deputy clerkship is an "office in this state."

In State ex rel Newman v. Skinner, 128 Ohio St., 325, the first paragraph of the syllabus is as follows:

> "1. A public officer, as distinguished from an employe, must be invested by law with a portion of the sovereignty of the state and authorized to exercise functions either of an executive, legislative or judicial character."

In the course of the opinion by Judge Matthias in this case it was said, p. 327:

> "A public officer as distinguished from an employee must possess some sovereign functions of government, to be exercised by him for the benefit of the public, either of an executive, legislative or judical character. It is well stated in the *Landis case, supra,* that 'The chief and most decisive characteristic of public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed

by statute and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.' "

It is not to be doubted that by this criterion the position of clerk, as an elective office, is a public officer, or more precisely an "officer in this state" within the meaning of the constitutional provision, supra. It is true also that the clerk's deputy, under the provisions of Section 3.06, Revised Code, may "when duly qualified, perform any duties of his principal." It is to be remembered, however, that any such duties are performed in the name of the principal and in the capacity of substitute for him rather than by virtue of any power reposed independently in the deputy. Thus it cannot be said that "their performance involves the exercise of continuing, *independent,* political and governmental functions." See Judge Matthias' quotation above from the Landis case, 95 Ohio St., 157.

It has generally been held in Ohio that deputies are in no sense public officers but are merely agents of the principal. 32 Ohio Jurisprudence, 877, Section 18. Thus in Warwick v. State of Ohio, 25 Ohio St., 21, the second paragraph of the syllabus is as follows:

"2. Section 4 of Article 15 of the state constitution, which provides that 'no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector,' does not apply to the office of deputy clerk of the Probate Court, and therefore a female is eligible to that office, and may lawfully discharge its duties."

In the opinion in this case by Judge Welch, it was said, pp. 24, 25:

"The question whether Ellen Stranahan was a legal deputy clerk depends on the construction to be given to section 4 of article 15 of the state constitution. This section declares that 'no person shall be elected or appointed to any *office* in this state unless he possess the qualifications of an elector.' Ellen Stranahan had not the qualifications of an elector, and if this was an 'office,' within the meaning of that section of the constitution, then she was not legally appointed. No one will contend that the word 'office' in this section of the constitution is to have its broadest meaning, so as to make it applicable to everything known by that designation. Surely it does not apply to officers of private corporations, or of churches, or to all the minor and subordinate officers in colleges, academies, and schools, such as professors, teachers, janitors, and the like. Nor can it be applicable to all subordinate officers in the military or legislative departments, to the private

> Secretary of the governor, or numerous other subordinate offices. The provision is disenabling, and should therefore receive a restricted rather than an enlarged interpretation. On this principle, it seems to us, the provision should be held here to apply to the principal officer alone, the probate judge, and not to his deputy."

The decision in the Warwick case was quoted with approval in Hulse v. State, 35 Ohio St., 421, in which we find the following statement, pp. 425, 426, by Judge Okey:

> " * * * Indeed, according to the principle decided in Warwick v. The State, 25 Ohio St., 21, a minor may be a deputy clerk of any court; and we know that nothing is more common than for a minor to act in that capacity. The same thing is true as to the deputies in the offices of the auditor and recorder. * * * "

It is significant that at the time of this decision there was in existence a statute, 1 S. & C. 233, providing that the deputies were authorized to "perform any and all of the duties pertaining to the office of his principal." It would seem, therefore, that the existence of the statutory provision to the same effect in Section 3.06, Revised Code, noted above, would not be sufficient to justify any conclusion in the instant case contrary to that stated by the court in the decisions above noted.

It is true that in the Hulse case, supra, the court held that a deputy clerk was not authorized by this general statutory provision to act in the place of the clerk in the matter of selecting the names of jurors in the case of a struck jury, the court holding in this respect that such duty required the exercise of personal discretion on the part of the clerk himself. In the instant case you are concerned primarily with the authority of the deputy clerk to administer an oath. This act, however, has been held to be one purely ministerial in nature and one which is necessarily done under the supervision of the court itself. See State vs. Townley, 67 Ohio St., 21, 27.

It would seem, therefore, to be firmly established by these decisions that the position of deputy clerk of the probate court is not an "office in this state" within the meaning of Section 4, Article XV, Ohio Constitution, and I perceive no basis, therefore, upon which it could be supposed that a minor is not eligible for appointment to such position nor any reason why a minor so appointed would not be capable of administering oaths in the court in which he is authorized by law to perform his duties.

By reason of the similarity of the two positions, it would seem that the same conclusion must be reached with respect to deputies appointed by the clerk of the common pleas court, particularly in view of the observation by Judge Okey in the Hulse case, noted above, regarding the common practice of minors serving as deputy clerk.

I conclude, therefore, in specific answer to your inquiry, that neither a deputy of the clerk of the common pleas court nor a deputy of the clerk of the probate court is an "officer within this state" within the meaning of Article XV, Section 4, Ohio Constitution; and such position of deputy may be held by a minor. A minor so appointed is capable of administering oaths in all instances in which a deputy clerk is authorized to do so.

Respectfully,
C. WILLIAM O'NEILL
Attorney General