"In an action in quo warranto the respondent may justify his retention of the office of county superintendent of schools by proving that his dismissal and discharge therefrom by the county board of education, before the expiration of his term by appointment, was made arbitrarily and without any proof tending to support any of the charges made against him."

In the course of the opinion in the Christmann case, supra, the court said with reference to Section 7701, General Code,

"While neither county boards of education nor county superintendents of schools existed at the time of the enactment of that section, the section is in general terms and in the present tense, and we are of the opinion that it includes, by the words 'each board,' not only the boards of education then or theretofore provided for by statute, but also boards of education thereafter created; that by the words 'appointee or teacher' it includes not only appointees to positions which had then or theretofore been created and teachers for whose employment provision had then or theretofore been made, but also appointees to and teachers for positions thereafter created; that the office of county superintendent of schools having been created and provision having been made for the filling of such office by appointment by the board, and the requirement having been made that such county superintendent should teach, such officer, for the purpose of the authority in that section conferred upon the board of education, falls within either designation of 'appointee' or 'teacher.' * * * "

"The extent of the power of the county board of education to dismiss the county superintendent of schools is found in Section 7701, General Code, and there is found there no power to dismiss at the discretion of the board or arbitrarily."

In specific answer to your inquiry, I am of the opinion that if the person appointed county superintendent of schools at the meeting of March 19, 1927, accepted said appointment, by appropriate action, before July 15, 1927, his term of office continues for three years from August 1, 1927. The only means by which he may be removed before the expiration of his term of appointment is by proceedings in accordance with Section 7701, General Code. If, however, no acceptance had been made of the appointment made by the board on March 19, 1927, the board's action on July 15, 1927, although strictly not in proper form, would amount to the appointment of a superintendent for one year.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1969.

MINOR—MAY LEGALLY BE APPOINTED DEPUTY COUNTY RECORDER.

SYLLABUS:

A minor may legally be appointed to the position of deputy in the office of county recorder and perform the duties of the same.

COLUMBUS, OHIO, April 14, 1928.

HON. FRANK L. MYERS, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, in which you ask my opinion upon a question therein stated, as follows:

"May I ask for your opinion governing Sec. 2754 of the General Code whether under this section a county recorder can appoint a minor to act in the capacity as deputy county recorder."

Section 2981, General Code, provides that the elective county officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and that they shall file with the county auditor certificates of such action. Section 2754, General Code, provides as follows:

"The county recorder may appoint a deputy or deputies approved by the Court of Common Pleas to aid him in the performance of his duties. Such appointment or removal shall be in writing and filed with the county treasurer. The recorder and his sureties shall be responsible for his deputy, or deputies' neglect of duty or misconduct in office. Before entering upon the discharge of his duty, the deputy or deputies shall take an oath of office."

Providing generally with respect to the duties of deputies and their relation to their principal, Section 9 of the General Code provides:

"A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk."

With respect to the question here presented, it is said in 31 Corpus Juris, at page 1004, that at common law infants are eligible to offices which are ministerial in their character and call for the exercise of skill and diligence only; but that they are not eligible to offices which are judicial or concern the administration of justice; nor are they eligible to offices imposing duties to the proper discharge of which judgment, discretion and experience are necessary. However, Section 4 of Article XV of the Constitution of Ohio provides that no person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector. By Section 1 of Article V of the state Constitution it is provided that every citizen of the United States of the age of twenty-one years, who has the residential qualifications therein prescribed, shall be an elector and be entitled to vote at all elections.

The question here presented in the solution of that presented in your communication is whether the position of deputy county recorder is an office within the meaning of Section 4 of Article XV of the Constitution of Ohio and whether a person appointed to and holding such position is an officer. In the case of *State ex rel* vs. *Jennings,* 57 O. S. 415, it was held that to constitute a public office it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent by virtue of his election or appointment to the office thus created and defined and not as a mere employe subject to the direction and control of someone else.

In the case of *State* vs. *Mason,* 61 O. S. 62, it was said that one who performs no duties, except such as by law are charged upon his superior, does not hold an office but merely an employment.

In the case of *State ex rel* vs. *District Board of Assessors,* 15 O. N. P. (n. s.) 535, later affirmed by the Court of Appeals of Cuyahoga County, it was held that a deputy assessor of property for purposes of taxation, appointed under the Warnes law (103 O. L. 786), was not an officer and that the position which such deputy assessor held was not an office within the meaning of the state Constitution; and that a woman was, therefore, eligible to appointment to that position. In its opinion in this case the court said:

"Authority and power relating to the public interests conferred by statute, and which may be vested in an individual by election or appointment, create an office. A public office is the right, authority and duty, created and conferred by law, by which an individual is invested with some of the sovereign functions of the government to be exercised by him for the benefit of the public. It implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. In its effects it will bind the rights of others and be subject to revision and correction only according to the standing laws of the state. The performance by a deputy or an assistant of many or indeed all of the duties of his superior does not of itself constitute such assistant an officer; and this may be the case even though the duties of the assistant are prescribed by statute."

In the case of *Warwick* vs. *The State,* 25 O. S. 21, it was held:

"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 its opinion in this case the court said:

"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. At common law the officer and his deputy filled but a single office. *Anderson's lessee* vs. *Brown,* 9 Ohio, 151. The acts of the deputy are in law the acts of the principal, and he is responsible for them. The deputy is appointed by the principal, can be appointed by no one else, and is removable at his pleasure.

> The appointment of deputy clerk of the Probate Court need not be approved by any other person or court; he is entitled to no salary or compensation, except what may be allowed him by his principal; and he can lawfully do no act against the will of his principal. Such an office does not seem to come within the definition laid down by the judge delivering the opinion of this court in the case of *The State* vs. *Kennon,* 7 Ohio St. 543—namely, 'an employment on behalf of the government, in a station or public trust, not merely transient, occasional or incidental.' Without undertaking to decide upon the correctness or incorrectness of this definition, as applicable to the present case, we all unite in the opinion that the office in question here is not within the purview of the constitutional prohibition named."

In the case of *State ex rel* vs. *Houck,* 11 O. C. C. (n. s.) 414, it was held that a deputy coroner appointed under the provisions of Section 1209a, Revised Statutes, was not an officer and that quo warranto would not lie to determine his right to hold the position. In the opinion of the court in this case it was said:

> "If the deputy coroner, herein provided for, is an officer, after such appointment, quo warranto is the proper proceeding to test his right to hold the office. It will be noticed that no duties are, in terms, imposed upon the deputy coroner, and that the authority given him is to perform the duties which under the general statutes are imposed upon the coroner. He has no independent duties whatever. Nor has he any independent authority, except that when the coroner is absent he may perform the coroner's duties. This seems to us clearly to indicate that his position is properly designated in the statute as that of a 'deputy.'
>
> The word 'deputy' is defined in Anderson's Law Dictionary as 'one who acts officially for another'; 'the substitute of an officer, usually a ministerial officer.' The definition in Bouvier's Law Dictionary is 'one authorized by an officer to execute an office or right which the officer possesses, for and in place of the latter.'
>
> The fact that the statute uses the word 'deputy' is not necessarily controlling, but, as already said, the things which a deputy coroner may do, under the statute, being only to be done as a substitute for the coroner, that is to say, being only the things which it would be the coroner's duty to do if he was present, clearly make him a deputy only and that being so, he seems clearly to be included in the general provisions of law relating to deputies."

In an opinion of this department under date of May 22, 1913, Annual Report of the Attorney General for 1913, Vol. I, p. 281, it was held that, inasmuch as a deputy is not to be considered a public officer in the absence of special provisions or the existence of special powers, a woman was not prohibited by the Constitution or statutes of this state from being appointed to serve in the position of deputy in the office of the county recorder, or in other county offices.

In the opinion of the Supreme Court in the case of *Hulse* vs. *State,* 35 O. S. 421, in discussing the question of the authority of a deputy clerk of the Court of Common Pleas and a deputy county auditor to act in the selection of the names of persons for a struck jury, under a statute imposing such duty upon the clerk of the Common Pleas Court and the county auditor, the court says:

> "According to the principle decided in *Warwick* vs. *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. They are chosen for other qualities than ability to make selection of suitable persons, in the various parts of the county, to act as jurors.

We are satisfied that the statute, in providing that the selection of such names shall be made by the clerk, auditor, and recorder, except in case of their absence or disability, designates the *persons* who are required to perform an act, and does not have reference to the performance of an act by *officers,* merely as such; and that, in case of the absence or disability of either the clerk, auditor or recorder, a judge must select a person to act in his place. Consequently, the language of the acts empowering deputies to perform the duties pertaining to the offices of their principals, broad as it is, does not extend to the performance of the duty under consideration here; and it is perfectly clear that the performance of such a duty could not be delegated by one of those persons to another person, in the absence of statutory provision permitting that to be done."

Notwithstanding the comprehensive language of Section 9 of the General Code, above quoted, with respect to the authority and duties of deputies, it is apparent that some duties may be imposed by statute upon a public officer that cannot legally be performed by his deputy. The position of deputy in the office of the county recorder does not, in my opinion, impose upon the incumbent any duties of a contractual, judicial or other nature such as under the common law a minor is not eligible to perform.

It quite clearly appears that the position of a deputy in the office of a county recorder is not an office within the provisions of Section 4 of Article XV of the state Constitution, above noted. Inasmuch as there is no statutory provision forbidding the appointment of a minor to the position of deputy in the office of the county recorder, and, as above noted, there is nothing in the duties of the office making such minor ineligible under the common law, no reason is apparent why a minor cannot be legally appointed to such position and perform the duties of the same. Your question is, therefore, answered in the affirmative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1970.

DISAPPROVAL, AGREEMENT BETWEEN THE STATE OF OHIO AND THE PENNSYLVANIA RAILROAD COMPANY, FOR THE CONSTRUCTION OF A SWITCH TRACK, AT APPLE CREEK, OHIO.

COLUMBUS, OHIO, April 14, 1928.

HON. JOHN E. HARPER, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date, submitting for my approval proposed agreement by and between The Pennsylvania Railroad Company, operating the Pennsylvania, Ohio & Detroit Railroad, and the Department of Public Welfare of the State of Ohio.