

In Lease No. 984, Mrs. Elmer Hayes Sellars, Cardington township, Morrow county, 203.66 acres, the lessor's name is misspelled in the granting clause.

In Lease No. 990, John R. Merchant, Thompson township, Delaware county, 90 acres, the lessor's name is misspelled in the granting clause.

In Lease No. 991, Sarah and Phil McCarthy, Falls township, Hocking county, 657 acres, the same Phillip McCarthy appears in the granting clause whereas the lease is signed and acknowledged by Phil McCarthy. There is nothing to show that these parties are one and the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

817.

COUNTY COMMISSIONERS—DUTY CONCERNING APPOINTMENT OF SUCCESSOR TO COUNTY RECORDER—AUTHORITY OF DEPUTY COUNTY RECORDER CEASES UPON DEATH OF COUNTY RECORDER—PERSONAL REPRESENTATIVE OF DECEASED COUNTY RECORDER BECOMES CUSTODIAN OF RECORDER'S SEAL OF OFFICE, RECORDS, ETC.

SYLLABUS:

1. *Upon the death of a county recorder, it becomes the duty of the county commissioners to appoint his successor without unreasonable delay. If an appointment is not made within a reasonable time, the commissioners become subject to an action in mandamus to compel them to act.*

2. *The powers and authority of a deputy county recorder ceases upon the death of the county recorder.*

3. *The personal representative of a deceased county recorder becomes the custodian of the recorder's seal of office, all books, records, and other instruments of writing belonging to the office and such personal representative is required to deliver the same to the deceased recorder's successor when appointed. Such personal representative has no official capacity and can exercise none of the recorder's official powers and duties as distinguished from powers merely ministerial.*

4. *In the interim between the death of a county recorder and the appointment of his successor the deceased recorder's personal representative as custodian of the seal, books, records and papers belonging to the recorder's office should make such books, records and papers available for public use and should receive all instruments presented for record and note the time of the filing of the same and collect the fee therefor. Upon the appointment and qualification of the recorder's successor, the personal representative of the deceased recorder should account to such successor for all fees collected, and instruments received during the interim between the death of the recorder and the appointment and qualification of his successor.*

5. *If for any reason, there is delay in the appointment of a personal representative of the deceased recorder, or if in the opinion of the probate court it becomes necessary, the*

probate court may appoint a special administrator for the deceased county recorder for the purpose of acting as custodian of the seal, books, papers and records of such county recorder until the appointment of his successor.

COLUMBUS, OHIO, August 1, 1927.

HON. RALPH E. HOSKOT, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I am in receipt of your inquiry of July 29, 1927, which reads as follows:

“Hon. T. M. Bookwalter, the duly elected County Recorder of Montgomery county, died last night, and certain questions have arisen regarding the office of Recorder in this county as a result thereof. We would appreciate very much the opinion of your office to assist us in solving the problems arising therefrom, and concerning which our opinion has been sought.

In the interim between the death aforesaid and the appointment of a successor in that office by the County Commissioners, should papers and instruments be received for filing and record at the Recorder's office, and if such instruments and papers should be received who has authority to receive them?

Who has authority to file or record them, and who has authority to certify and attest to records and documents in that office during said interim?

If no one in the office at the present time, or no other officer has authority to do or perform these acts of the Recorder, may some one be temporarily appointed or empowered to act for the Recorder until a successor is appointed by the Board of County Commissioners?

Lastly, what is the status of the Deputy County Recorders during said interim?

We shall appreciate very much your opinion in these matters and thank you for any assistance you may give us regarding same.”

Sections 2755 and 2756 of the General Code read as follows:

Sec. 2755. “If a vacancy occurs in the office of the recorder, the commissioners shall appoint a suitable person to fill it, who shall give bond, take the oath of office, as provided by law for county recorders, and shall hold his office until his successor is elected and qualified.”

Sec. 2756. “On going out of office, each recorder shall deliver to his successor the seal of office, all books, records and other instruments of writing belonging to the office, and take his receipt therefor. In case of the death of the recorder, his personal representative shall deliver over such seal, books, records and papers.”

I know of no authority whereby a person may be temporarily appointed or empowered to act for, or in the place of a county recorder during the interim between the death of the recorder and the appointment of his successor by the county commissioners. However, inasmuch as Section 2756, *supra*, provides that in case of the death of the recorder his personal representative shall deliver over the seal of office the books, records and papers to the recorder's successor when appointed, it is clear that such personal representative must have custody of the seal, books, records and papers during the interim between the recorder's death and the appointment of a successor.

This personal representative would have no authority other than that of a custodian and the provision of the statute seems to be nothing more than a declaration

of the common law, under which a personal representative of a deceased trustee succeeds to the possession of and is custodian of the property constituting the trust; but such personal representative holds such property merely as a passive or dry trustee and is not empowered to perform any of the functions of the trustee with reference to said property other than to preserve the same. Obviously, in the instant case, the personal representative would not possess any *official* capacity and could not perform any of the recorder's *official duties* as distinguished from duties of a merely ministerial or clerical nature.

The seal, books, records and papers in the hands of the recorder and his succeeding personal representative are public property held by him as trustee for the public. The public is entitled to access to the property for legitimate purposes and for that reason the personal representative should keep the office of the recorder open so that the public may have the use of the records.

The authority of the deputy county recorder ceases with that of the recorder. See *Brady vs. French*, Treasurer, 6 O. N. P. 122.

No one would have authority to certify and attest to records and documents in the office during this interim, but someone should be there to receive and note for filing any papers offered for record.

Deeds, mortgages and other instruments which may be recorded with the county recorder take effect from the date of their filing for record and not from the actual recording so that if such instruments are filed for record in the office of the county recorder such filing would be legal. While I know of no direct authority in Ohio an early case, *Cook vs. Hall*, 6 Ill. 575, holds that a person delivering an instrument entitled to record to one who has any custody of the records and who is acting as a recorder is not required to ascertain whether he is recorder *de jure*; and it is my opinion that, if the recorder's office be open and in charge of someone under such color of authority as the personal representative, i. e. the executor or administrator, of the recorder such custodian for the purpose of receiving and noting as received for filing instruments for record would in so far as those acts are concerned, be an officer *de facto* and not a mere usurper, I am also of the opinion that such custodian would have authority to receive the proper fee for such filing and perform any other ministerial or clerical acts which might be performed by the recorder and, upon such custodian's delivery of the seal, books, records, papers, etc., in his custody as personal representative, to the deceased recorder's successor duly appointed, he would be required to account for the fees collected and would be entitled to be reimbursed from public funds for any expenses incurred by reason of having employed persons to assist in caring for the property and performing whatever ministerial and clerical acts as were necessary to keep the office open and receive for filing instruments offered for record.

It is significant to note that Section 2636, General Code, provides that in the event of the county treasurer's death the commissioners shall *forthwith* appoint a successor. Section 2870, General Code, provides that when a vacancy occurs in the office of Clerk of Courts the Commissioners shall appoint a clerk pro tem. No such provision is made with reference to a county recorder, but it seems to me that because of the urgent necessity of having a county recorder and the important duties devolving upon such an officer that if the commissioners should fail to appoint a successor upon the death of the recorder within a reasonable time they may be required to do so by an action in mandamus.

If the family of the deceased recorder fails to have a personal representative appointed within such time as the probate court feels it should be done, or if for any reason the probate court thinks it necessary, a special administrator may be appointed under Section 10619 of the General Code, for the purpose of taking charge of the seal, books, records and papers of the deceased county recorder. This section reads as follows:

“When, by reason of a suit concerning the proof of a will, or from other cause, there is delay in granting letters testamentary or of administration, the court may appoint a special administrator to collect and preserve the effects of the deceased.”

The special administrator so appointed would have authority and would in my opinion be charged with the duty of keeping the recorder's office open and receiving and filing instruments offered for record until such time as a successor to the deceased recorder was duly appointed and qualified.

Respectfully,
EDWARD C. TURNER,
Attorney General.

818.

GAME REFUGE LEASES—15 APPROVED—1 DISAPPROVED.

COLUMBUS, OHIO, August 2, 1927.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date in which you enclose the following Game Refuge Leases, in duplicate, for my approval:

No.	Name	County	Township	Acres
1004	Otto J. Wheeler.....	Franklin	Perry	2
1005	Harry Artz.....	Franklin	Washington	7.74
1006	Ethel Artz.....	Franklin	Washington	24
1007	Chas. W. Miller.....	Franklin	Washington	43
1008	W. Mitchell.....	Franklin	Washington	100
1009	Nell D. Tuller.....	Franklin	Washington	55
1010	Frank M. and Sarah Raymund.....	Franklin	Washington	55
1011	Perl B. Morton.....	Franklin	Washington	39.03
1012	John M. Adams.....	Franklin	Perry	9
1013	Francis M. Leonard.....	Franklin	Perry	1.27
1015	Harry M. Frech.....	Franklin	Perry	15
1016	Chas. S. M. Krumm.....	Franklin	Perry	15
1017	Ward B. Perley.....	Franklin	Washington	125
1018	Wm. K. Lanman.....	Franklin	Washington	134.54
1019	Carl R. Lindenburg.....	Franklin	Washington	25

I have examined said Leases, find them correct as to form, and I am therefore returning the same with my approval endorsed thereon.

I am returning herewith Lease No. 1014, The Whitsit Realty Co., Perry Township, Franklin County, 8.59 acres, unapproved for correction, for the reason that the acknowledgment thereon is defective. I suggest that same be corrected to read as follows:

“Before me, a Notary Public in and for said county, personally appeared the above named P. B. Whitsit, President of The Whitsit Realty Company, the corporation which executed the foregoing instrument, who acknowledged that he did sign and seal said instrument as president in behalf of said corporation and by authority of its board of directors; and that said instrument is the free act and deed of said The Whitsit Realty Company.”