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1. SHERIFF, DEPUTY—POSITION NOT AN OFFICE—ARTICLE II, SECTION 5, CONSTITUTION OF OHIO.

2. TOWNSHIP TRUSTEE — DULY ELECTED — QUALIFIED ELECTOR OF COUNTY — CONVICTED OF EMBEZZLEMENT OF PUBLIC FUNDS WHO THEREAFTER MADE RESTITUTION AND WAS RESTORED TO CITIZENSHIP IS ELIGIBLE TO BE APPOINTED AND MAY SERVE AS DEPUTY SHERIFF.

SYLLABUS:

1. The position of deputy sheriff is not an office in this state, within the scope of the term "office" as used in Section 5, Article II, of the Constitution of Ohio.

2. A duly elected township trustee, who was convicted of embezzelment of public funds and who thereafter made restitution and was restored to citizenship, and who is a qualified elector of the county, is eligible to be appointed a deputy sheriff and may serve in such capacity.

Columbus, Ohio, September 24, 1942.

Hon. Lester S. Reid, Prosecuting Attorney,
Chillicothe, Ohio.

Dear Sir:

I have your letter with request for opinion, reading as follows:

"Please advise me whether under Article 2, Section 5, of the Constitution of the State of Ohio, a duly elected township trustee, who was convicted of embezzlement of public funds, who thereafter made restitution and was thereafter restored to citizenship, is eligible to be appointed a deputy sheriff and thereby serve in such capacity.

Is the position of deputy sheriff an office in this state in view of this section?"

Section 5, Article II, Constitution of Ohio, reads as follows:

"No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this state; nor shall any person holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury."

In this connection we may also note Section 4, Article V, of the Constitution, which reads:

"The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime."

Pursuant to the authority of the last quoted section of the Constitution, the Legislature enacted Section 13458-1, General Code, which provides:

"A person convicted of a felony in this state, unless his conviction is reversed or annulled, shall be incompetent to be an elector or juror, or to hold an office of honor, trust or profit. The pardon of a convict shall effect a restoration of the rights and privileges so forfeited or they may be restored as otherwise provided by law, but a pardon shall not release a convict from the costs of his conviction, unless so ordered."

It will be noted that by the provisions of this section a pardon effects a restoration of the rights forfeited by conviction. Two other provisions of the statutes also accomplish that result.

Section 13452-7, relating to the probation of a person convicted of a felony, authorizes the judge of the court, at the termination of the period of probation, to restore the defendant to his rights of citizenship of which he may have been deprived by reason of his conviction under Section 13458-1, General Code. Furthermore, Section 2161 provides that upon service of his entire term without a violation of the rules and discipline of the penal institution, a convict shall be restored to the rights and privileges forfeited by his conviction.

It should be noted, however that the framers of the Constitution, in

adopting Section 5 of Article II, singled out the crime of embezzlement of public funds as the one offense, the commission of which should have the effect of absolutely barring the guilty official from holding any office in this state. I find no other provision of the Constitution which would relieve the offending official of the penalty thus imposed, and the authority given the Legislature by Article V, Section 4, does not empower it to grant such relief.

If, therefore, the position of deputy sheriff referred to in your letter is an "office" within the meaning of the law, it would follow that if a township trustee has been convicted of embezzlement of public funds, he would be absolutely barred from receiving an appointment as such deputy sheriff. This conclusion seems to be supported by the opinion of one of my predecessors in Opinion No. 4650, Opinions Attorney General for 1932. That opinion dealt with the construction of Section 4785-26 of the General Code which provides that "no person who has been convicted of a crime * * * can serve as an election official." The Attorney General there held that in view of the explicit language of that statute, neither a pardon nor service of the term of imprisonment could have the effect of clearing the record of one who has been convicted of a crime so as to make him eligible to appointment as an election official.

I come then to a consideration of the question whether the position of deputy sheriff is an office within the scope of the constitutional provisions and the statutes above referred to. The elements that go to make an appointee to a public position an "officer" have been considered by the courts in numerous decisions. Thus it has been held:

An officer is one who exercises in an independent capacity a public function in the interest of the people by virtue of law. Parkinson v. Crawford, 13 O.N.P. (N.S.) 73.

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. State ex rel. v. Board of Assessors, 15 O.N.P. (N.S.) 535.

In the case of Newman v. Skinner, 128 O.S. 325, the syllabus reads in part as follows:

"A public officer, as distinguished from an employee, 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 judical character."

To like effect is State ex rel. v. Commissioners, 95 O.S. 157, 160; also, Palmer v. Ziegler, 76 O.S. 210.

From 32 Ohio Jur. 877, I quote the following:

"* * * Deputies holding their appointment only during the pleasure of the principal who is answerable for the proceedings and misconduct of the deputy and may, for his own protection, take a bond with sureties for the faithful performance of the services required of the deputy, but taking no oath of office, nor giving bond to any public authority, are in no sense public officers, but merely agents of the principal. 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."

Citing, among other cases, State v. Meyers, 56 O.S. 340.

In State ex rel v. Hauck, 11 C.C. (N.S.) 414, it was said:

"A deputy coroner, appointed under the provisions of Section 1209a, is not an officer, and quo warranto will not lie to determine his right to hold the position."

The court at page 415 of the opinion uses the following language:

"* * * 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."

A deputy is defined by Bouvier's Law Dictionary as "one authorized by an officer to execute an office or right which the officer possesses, for and in place of the latter."

Section 9 of the General Code provides as follows:

"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."

It does not follow, however, that the above provisions of the General Code confer any primary authority on the deputy. Whatever he does by virtue of his appointment he does in the name and on behalf of his principal.

The Supreme Court, in the case of State v. Meyers, supra, held that a deputy county treasurer was not liable to prosecution for the offense of embezzlement under a statute applying to all persons who are "charged with the collection, receipt, transfer, disbursement or safe-keeping of the public money." The court found that that was a duty devolved by law upon the treasurer, not upon the deputy. The court said at page 349 of the opinion:

> " * * * True, the statute confers authority on the deputy, during his appointment, to perform the duties of his principal; but that falls short of charging the former with the performance of the duties of the latter. The difference is the substantial one between an authority given to do an act, and enjoining the performance of the act as a duty. That duty is plainly observable, under our legislation, in the relations of a treasurer and his deputy to each other, and to the public. The former is charged by law with the duty of collecting and disbursing the public moneys, and the doing of all acts necessary thereto, as required by law; but the latter is not so charged with the performance of those duties."

In the case of Warwick v. State, 25 O.S. 21, the court, in discussing the position of a deputy clerk of the Probate Court, said at page 25 of the opinion:

> "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 v. Kennon, 7 Ohio St. 546 — namely, 'an employment on behalf of the government, in a station or public trust, not merely transient, occasional, or incidental.' "

The authority for the appointment by a sheriff of deputies is found in Section 2830 of the General Code, which reads as follows:

> "The sheriff may appoint in writing one or more deputies. If such appointment is approved by a judge of the court of common pleas of the subdivision in which the county of the sheriff is situated, such approval at the time it is made, shall be indorsed on such writing by the judge. Thereupon such writing and indorsement shall be filed by the sheriff with the clerk of his county, who shall duly enter it upon the journal of such court. The clerk's fees therefor shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county. No justice of the peace or mayor shall be appointed such deputy."

Section 2831, General Code, reads:

> "The sheriff shall be responsible for neglect of duty or misconduct in office of each of his deputies."

Attention should be called to certain further provisions of the statute that might seem to have a bearing on the legal status of a deputy sheriff. Section 2 of the General Code provides:

> "Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties. The failure to take such oath shall not affect his liability or the liability of his sureties."

Section 2981, relating to the appointment of deputies, assistants, clerks and other employes, by all county officers, provides in part as follows:

> "* * * Each of such officers *may require such of his employes as he deems proper* to give bond to the state in an amount to be fixed by such officer with sureties approved by him, conditioned for the faithful performance of their official duties. Such bond with the approval of such officer, indorsed thereon, shall be deposited with the county treasurer and kept in his office." (Emphasis mine.)

But the requirement of an "oath of office," and the provision that the appointing officer "may * * * require * * * bond" and that the bond is given to the state, does not make such deputies and other appointees officers. Indeed, the context in each of these sections indicates a rec-

ognition by the Legislature of the distinction between "officers" and "deputies." As said in 32 Ohio Jur., p. 866:

> "A bond and an oath of office are generally, though not always, required as a pledge for the faithful performance of the duties of the incumbent of a public office. The fact, however, that no oath of office is prescribed does not preclude the position from being an office. Conversely, the mere fact that one takes an oath and gives a bond does not constitute him an officer."

In Palmer v. Zeigler, 76 O.S. 210, the court in discussing the question whether the superintendent of a county infirmary is a public officer, said at page 222 of the opinion:

> "The fact that the statute requires an infirmary superintendent to take oath and give bond, does not determine his to be a public office."

A deputy sheriff has no definite tenure; his compensation, if any, is fixed by the sheriff; he is endowed by the law with no part of the sovereignty of the state, and has no independent powers or duties; and in the light of the above authorities, it seems clear that he is not an officer within the meaning of the constitutional and statutory provisions hereinabove referred to.

Specifically answering your questions, therefore, I am of the opinion:

1. The position of deputy sheriff is not an office in this state, within the scope of the term "office" as used in Section 5, Article II, of the Constitution of Ohio.

2. A duly elected township trustee, who was convicted of embezzlement of public funds and who thereafter made restitution and was restored to citizenship, and who is a qualified elector of the county, is eligible to be appointed a deputy sheriff and may serve in such capacity.

Respectfully,

THOMAS J. HERBERT
Attorney General.