5974

ABSENCE—PERSON APPOINTED TO PERFORM DUTIES OF ELECTIVE COUNTY OFFICER—OFFICER ABSENT DUE TO SERVICE IN ARMED FORCES — SUCH PERSON NOT A COUNTY OFFICER—NOT REQUIRED TO OBTAIN COMMISSION FROM GOVERNOR AS SPECIFIED BY SECTION 138 G. C.

SYLLABUS:

A person who is appointed to perform the duties of an elective county officer who is absent from his office due to his service in the armed forces, is not a county officer within the meaning of section 138, General Code, and consequently is not required to obtain a commission from the Governor as provided for in said section.

Columbus, Ohio, April 8, 1943.

Hon. Edward J. Hummel, Secretary of State,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your recent communication, which reads as follows:

> "Many of the elective officials of the counties of Ohio are on military leave, and officials have been named to act in their absence.
>
> Will you, therefore, kindly advise if it is necessary for such acting county officials to obtain a commission and pay the fee of Five Dollars ($5.00) therefor to this office as is required of regularly elected and appointed county officials."

Section 138 of the General Code, which requires certain public officers to obtain commissions, reads:

> "A judge of a court of record, state officer, county officer, militia officer and justice of the peace, shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election or appointment, and receives from the governor a commission to fill such office."

It will be noted that the above section provides that each of the officers designated therein shall be ineligible to perform the duties of his office until he receives a commission from the Governor to fill such office. In view of this, it is necessary to determine whether a person acting in the stead of an elective county officer during the latter's absence is himself a county officer.

In regard thereto, it should be pointed out that, with the exception of sheriff, coroner and prosecuting attorney, there are no provisions of law under which the appointment of acting county officers may be made. This fact, however, does not in my opinion have any bearing upon the question at hand.

Obviously, there can be, for example, only one county sheriff in each county. Therefore, if the duly elected or appointed sheriff is still holding such office, it is difficult to understand how a person appointed to perform the duties of the office during his absence can be said to be the sheriff, which of course is true with respect to all other county officers.

It is fundamental that there must be an actual vacancy in an office before it may be filled. That entry by a public officer into the military service does not in and of itself create a vacancy in his office was held by me on numerous occasions. In my opinion No. 5412, rendered on August 28, 1942, it was stated:

> "Where a county prosecuting attorney or a county engineer enlists in some branch of the military service or is drafted into the service of the United States Government during the present war, each would carry the responsibility for his position during his absence in such service and would be entitled to receive the salary pertaining thereto."

To the same effect is the syllabus of an opinion rendered by me on November 2, 1940, (Opinions of the Attorney General, 1940, page 982) which reads:

> "The office of county auditor does not become vacant by reason of the temporary absence of the incumbent while on active duty as an officer in the reserve corps of the United States Army."

See also Opinions of the Attorney General, 1941, page 813, wherein it was held:

> "A coroner in a county of less than one hundred thousand population does not vacate his office because of absence with the military forces of the United States."

In cases where the statute makes provision for the appointment of a person to perform the duties of an elective officer during the latter's absence, the person so appointed would, in the performance of his duties, be acting officially for such elective officer. In such case, even though his appointment was not made by the legal incumbent of the elective office, he would be acting as a deputy of the latter. That a deputy is merely an agent of the principal and in no sense a public officer has been held on numerous occasions. See State v. Meyers, 56 O. S., 340; State, ex rel. Wilson, v. Gibson, 1 N. P. (N. S.) 565, affirmed without opinion in 70 O. S. 424; State, ex rel. Morgan, v. District Board of Assessors, 15 N. P. (N. S.) 535, affirmed by Court of Appeals, and petition in error dismissed without opinion in 92 O. S. 507. On this point it is stated in 32 O. Jur., pages 877 and 878:

> "* * * 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 and officer; and this may be the case even though the duties of the assistant are prescribed by statute."

Obviously, if there is no authority in law for an appointment of a substitute to act in the absence of an elective officer, any purported appointment made in such case would in no way constitute the presumed appointee a public officer.

In view of the above, it would appear, and it is accordingly my opinion, that a person who is appointed to perform the duties of an elective county officer who is absent from his office due to his service in the armed forces, is not a county officer within the meaning of section 138, General Code, and consequently is not required to obtain a commission from the Governor as provided for in said section.

In connection herewith, your attention is directed to an opinion rendered by the then Attorney General in 1937 (Opinions of the Attorney General, 1937, page 146), wherein it was held:

> "Where a certificate of election or appointment, regular and legal upon its face, is presented to the Governor of the State of Ohio, reciting the fact that the person named therein has been duly elected or appointed to an office under the laws of the State, it is the mandatory duty of the Governor to issue to him a commission as provided by law. Whether or not he has been legally appointed is a judicial question, to be determined by a court of competent jurisdiction."

Respectfully,

THOMAS J. HERBERT,
Attorney General.