In the above referred to official opinion, same being 1950 Ind. O. A. G., Official Opinion No. 16, it was held that a member of a previous retirement fund who transfers her membership into the 1945, 1947 or 1949, Teachers' Retirement Fund is not chargeable with interest on his or her arrearages for time not credited to the teacher and that interest charges on such arrearages are governed by the provisions of the statute setting up the fund, in which he or she last claims membership.

The above ruling would be equally applicable to the class of arrearage referred to in your letter as to each of the classes enumerated, provided, of course, the waiver of interest is only for that period of time not credited to the teacher.

I understand from the wording of the last paragraph of your request for an opinion that you are mainly concerned with the question whether or not interest on the types of arrearages referred to in your letter is waived under periods of elapsed time during which no increased credit is given the teacher on his annuity record account. An illustration of this might be where a teacher may have been on leave-of-absence from active teaching service and then actively comes back into the retirement fund under circumstances where she would not be entitled to service credit for the years on leave-of-absence. Under such circumstances, where no service credit is claimed, the statute waives the interest charged during such periods on each of the classes of arrearages set out in your written request for an opinion.

OFFICIAL OPINION NO. 4

January 11, 1952.

Mr. Otto K. Jensen,
State Board of Accounts,
Room 304 State House,
Indianapolis, Indiana.

Dear Sir:

Your request for an official opinion reads as follows:

> "A deputy clerk of a circuit court swore an affiant to a criminal affidavit and affixed the signature of the

elected clerk of the jurat without appending thereto 'By _____ Deputy Clerk of the _____ Circuit Court.'

"The defense attorney filed a motion to quash for the reason that the clerk did not administer the oath and the signature was not that of the clerk. The motion was sustained.

"The clerk has requested an official opinion upon the following:

"(1) Is a deputy clerk, who has taken the oath of office and furnished bond as such, authorized to administer oaths in the name of the clerk and affix his signature thereto?

"(2) Is a deputy clerk of the circuit court authorized to administer an oath as such deputy?

"(3) Is a deputy clerk of the circuit court authorized to affix the signature of the clerk to any instrument required to be issued by such clerk or should the instrument carry the signature of the clerk by such clerk or should the instrument carry the signature of the clerk by _____ deputy clerk of the _____ circuit court?"

The law in general dealing with the authority of a deputy official to act within in his own name, or in the name of his principal, as stated in 43 Am. Jur. Public Officers, § 464, in part reads as follows:

"The general rule prevails in many jurisdictions that the deputy must sign or act in the name of his principal, since where the authority exercised by the deputy is a derivative and subsidiary one, it is the authority conferred on the principal and not an authority inherent in the deputy, and accordingly, that the authority must be exercised in the name of him in whom it exists, and not in the name of him who has no recognized authority. Where this doctrine prevails, whatever official act is done by a deputy must be done in the name of his principal, and not in the name of the deputy. If he undertakes to act in his own name and

> on his own authority, he no longer acts as deputy, but in an independent capacity, and his acts can then no longer be recognized as official. * * * In those jurisdictions where the deputy is recognized as an independent public officer and is endowed by statute with authority to do any act which his principal may do, he may usually act in his own name without mention of his principal. *Deputy clerks of county courts may accordingly be authorized to take and certify the acknowledgment of deeds in the names of their principal or of themselves as deputies, or in the names of both.*" (Our emphasis.)

Note also the statement from 67 Corpus Juris Secundum, Officers, §§ 151 and 152, which reads as follows:

> "Without statutory authority, deputies or subordinate officials have no power with respect to the duties of an office involving the exercise of judgment and discretion; nor may they, as a rule, without such authority, perform judicial or quasi-judicial duties conferred on their principals, and a deputy may not himself make or appoint a deputy. However, as a general rule under the statutes, a legally appointed deputy possesses the same powers as the officer whom he represents and may usually do every act which his principal may do, so that all ministerial duties pertaining to the office which the principal could perform may be performed by a deputy. When the law authorizes an officer to appoint a deputy without any express limitation on his power, the duties of the office may be performed by either, and a deputy may exercise any of the duties pertaining to the office, as the necessity or convenience of the public may demand their use, and this power may not be curtailed by the principal, unless the law expressly authorizes him to do so."

It is necessary then to determine the status of a deputy clerk of a circuit court in the State of Indiana, and what the powers are of such deputy.

As to officers authorized to appoint deputies we find the following in ch. 164, Acts of 1925; Burns' Statutes, § 49-501, which reads in part as follows:

> "The secretary of state, the auditor of state, the treasurer of state, the clerk of the Supreme Court, the sheriff of the Supreme Court, and every clerk of the circuit court, county auditor, county treasurer, county recorder, county sheriff, county coroner, county surveyor, prosecuting attorney and township assessor may appoint deputies, when necessary or when required, if provision shall have been made for paying such deputies for their services from the funds of the state or of the county or from fees received for their services. Any such officer may require any deputy so appointed to give a bond, in such amount as may be prescribed by law or as may be fixed by such officer, conditioned for the proper and faithful discharge of all of his official duties as such deputy, and for the safe accounting of all funds received by him or entrusted to his care, control or management."

See also Burns' Statutes, § 49-1002.

Burns' Statutes, §§ 49-502 and 49-503 read as follows:

> "Such deputies shall take the oath required of their principals, and may perform all the official duties of such principals, being subject to the same regulations and penalties."

> "Such principals shall be responsible for all the official acts of their deputies."

Burns' Statutes, § 49-2708, reads as follows:

> "Such clerk shall have power to administer all oaths."

We note the following rule of statutory construction as enacted by the Legislature and stated in Burns' Statutes, § 1-201, as follows:

> "The construction of all statutes of this state shall be by the following rules, unless such construction be

plainly repugnant to the intent of the legislature or of the context of the same statute: * * *

"Tenth. When a statute requires an act to be done which, by law, an agent or deputy as well may do as the principal, such requisition shall be satisfied by the performance of such act by the authorized agent or deputy."

We should determine whether or not a deputy clerk of a circuit court is a public official and authorized to act as such. We have already determined that a deputy insurance commissioner is a public official. (See Opinions of the Attorney General of 1947, No. 40.)

The Supreme Court of Indiana has held that a deputy County Auditor is an officer and authorized to perform all the acts of his principal. Wells v. State *ex rel.* (1911), 175 Ind. 380, 385, 94 N. E. 321; Ann. Cas. 1913C, 86, states the following:

"Our statute provides that county auditors may appoint deputies, who shall take the oath required of the principal, and perform all the official duties of the principal, and be subject to the same regulations and penalties, and the principal shall be responsible for all official acts of the deputies. Sections 9158-9160, 9465 Burns 1908, §§ 5568-5570, 5899 R. S. 1881.

"Auditors and their deputies may administer oaths necessary in the performance of their duties, also the oath of office of any officer receiving his certificate of appointment or election from the auditor, and oaths relating to the duties of such officers, but may not practice as attorneys before the board of commissioners. Sections 9466, 9467 Burns 1908, §§ 5900, 5901 R. S. 1881.

"A deputy auditor under the statute is more than a clerk or an employee; he is vested with the power, by express statute, to perform all duties of the auditor, and public policy requires that this should be so. He is essentially a public officer and discharges functions of government, under express statutory direction. State,

ex rel., v. Bus (1896), 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616."

The appellate court of Indiana has said that a deputy county treasurer is a public officer. Southern Surety Co. v. Kinney (1920), 74 Ind. App. 205, 212, 213, 127 N. E. 575, states the following:

> "* * * The statute provides for the appointment of deputies by county treasurers. They are required to take the oaths of their principals, and are authorized to perform all their duties, subject to the same regulations and penalties. Such treasurers are responsible for all the official acts of their deputies, and liable on their official bonds therefor. Sections 9158-9160, Burns' 1914, §§ 5568-5570, R. S. 1881. It has been held in many jurisdictions that persons who are appointed deputies under a statute are public officers. Wells v. State *ex rel.* (1911), 175 Ind. 380, 94 N. E. 321, Ann. Cas. 1913 C. 86, and cases there cited. In the case just cited, it was held that a deputy county auditor was essentially a public officer, and the same reasons there advanced lead us to conclude that a deputy county treasurer is likewise a public officer."

See also State v. Nattkemper (1926), 86 Ind. App. 85, 88, 90, 156 N. E. 168.

We note the following quotations from Wilkerson v. Dennison *et al.* (1904), 113 Tenn. 237, 80 S. W. 765, 766 as follows:

> "Mr. Mechem, in his work upon Public Officers, section 585, has very clearly stated the law upon the subject in these words:
>
> " 'The question in whose name a deputy officer should act is one of much importance and of considerable apparent uncertainty. The conflict in the cases is, however, believed to be more apparent than real, and to be readily settled by reference to principles already considered.
>
> " 'In several of the States the authority to act in an official capacity is given to the principal alone, or, if

the appointment of deputies is recognized or authorized by law, they are regarded as the mere private agents or servants of the principal, and not as independent public officers deriving independent authority from the law. Where such is the case, the authority exercised by the deputy is manifestly a derivative and subsidiary one—it is the authority conferred upon the principal, and not an authority inherent in the deputy. It follows then, logically and legally, that the authority should be exercised in the name of him in whom it exists, and not in his name, who of himself has no recognized authority at all. The execution should, therefore, be in the name of the principal alone or in the name of the principal by the deputy.

" 'In other States, as has been seen, the deputy is recognized as an independent public officer, and is endowed by law with authority to do any act which his principal might do. In these cases, where the authority exists in the deputy himself by operation of law, and is not derived solely through the principal, it is well executed in the name of him in whom it exists, the deputy himself.

" 'Under either state of facts the authority of a special deputy, who, as has been seen, is regarded as the mere private agent or servant of the principal, would, unless otherwise provided by statute, be properly exercised in the name of the principal.'

"We are of the opinion that deputy clerks of the county courts of this State are authorized to take and certify the acknowledgment of deeds in both the names of their principals and themselves as deputies. * * *"

In Davis v. State (1923), 193 Ind. 650, 654, 141 N. E. 458, the Supreme Court held that a deputy clerk of a city may administer an oath in the name of his principal. The court said:

"We hold that the city clerk of the city of Indianapolis, had legal authority to administer oaths incident to his duties as clerk of the city court and that

his duly appointed deputy had the same authority, and he had authority to act in the name of his principal."

This ruling furnishes authority for answering your first question in the affirmative. However, the court's decision does not necessarily hold that a deputy clerk may not lawfully administer an oath in his own name as such deputy. There are opinions of courts in other jurisdictions holding that such deputy may act in his own name as well as in his principal's name. Some such opinions hold that although such deputy may lawfully act in his own name, the better practice is for the deputy to act in the name of his principal. In my opinion this is the better practice. Attention is called to the comment of the courts of other jurisdictions as follows:

One of the leading cases is Summer v. Mitchell (1892), 29 Fla. 179, 10 So. 562, 564, 570, 571, which states the following:

" 'State of Georgia, Thomas county. Be it remembered that on this 22nd day of July, A. D. 1863, personally came before me, the undersigned deputy-clerk of the circuit court in and for the county and state aforesaid, Hubbard L. Hart and Mary Elizabeth Hart, who respectively acknowledged, each for himself and herself, and the said Mary Elizabeth Hart, being absent from her husband, the said Hubbard L. Hart, acknowledged voluntarily, without fear or compulsion of or from her said husband, that they signed, sealed, and delivered the foregoing instrument for the purposes therein mentioned. In witness whereof, I herewith set my hand and seal of office the day and year above mentioned. T. C. Bracewell, Deputy-Clerk S. & J. C.' "

"As it is to be presumed from these words of the certificate that a seal was impressed upon the original, the only distinction between the case at bar and those cited from Illinois and Missouri is that here the certificate is signed by the deputy simply in his own name, without using that of the clerk. There is conflict of authority as to how such certificates of acknowledgment should be executed when they are made by deputies. In Tennessee it was held (Beaumont v. Yeatman, 8 Humph. 542) that such certificates should be in the

name of the deputy; and likewise in a late case in Georgia, where an acknowledgment was taken out of the state (MacKenzie v. Jackson, 82 Ga. 80, 8 S. E. Rep. 77), and in California a certificate was held valid which stated that 'before me, the undersigned, county clerk of Sonoma county, personally appeared * * *' and was signed, 'John A. Brewster, Deputy County Clerk of Sonoma County,' the principal's name not appearing. (Touchard v. Crow, 20 Cal. 150.) See, also, Rose v. Newman, 26 Tex. 131; Cook v. Knott, 28 Tex. 85. In Talbott's Devisees v. Hooser, 12 Bush, 408, where the acknowledgment was in fact taken by the deputy-clerk, but the name of the clerk alone was signed by such deputy to the certificate, the acknowledgment was decided by the Supreme Court of Kentucky to be valid, and this, too, although the deputy was a minor; the statute not prescribing the qualifications of a deputy. The doctrine of this case is that all official acts should be done in the name of the clerk, and not in that of the deputy. The view expressed in Devlin on Deeds (section 474) is that the signature of the deputy alone does not invalidate the acknowledgment, but that *the better practice is for the deputy to sign the name of the principal, by himself as deputy.* That this is the better rule in all cases where a deputy acts, we will not deny; but in view of the conflict of authority, and the liberal views governing, in cases of these acknowledgments, we cannot hold this certificate invalid on account of the manner in which the deputy has signed, but must regard it as sufficient in this aspect; and this being so, and the presumption being that the official seal of the clerk of the superior court of Thomas county, Ga., was affixed to the original certificate of acknowledgment, and rightfully so (Touchard v. Crow; Small v. Field, *supra*), the certificate must be sustained though executed by a deputy and in another state. * * *"

See Yale State Bank v. Fletcher (1913), 173 Mich. 585, 139 N. W. 1028, 1029, 1030.

From the foregoing it is my opinion that a deputy clerk of a circuit court in the state of Indiana is a public official author-

ized to administer an oath in the name of his principal. That, such deputy may lawfully act in his own name as such deputy; however, in my opinion it is the better practice for the deputy to act in the name of his principal. Therefore, it is my opinion your questions No. 1 and 2 should be answered in the affirmative. As to your question No. 3, in my opinion, either method used would not be invalid.

OFFICIAL OPINION NO. 5

January 15, 1952.

Honorable Arthur G. Loftin,
Administrative Director,
Indiana Council for Mental Health,
1315 West 10th Street,
Indianapolis 7, Indiana.

Dear Mr. Loftin:

I have your request for an official opinion which reads as follows:

> "This department has had numerous requests for opinions on Section 22-1218 of the Burns' Annotated Statutes of 1933, 1950 Replacement.
>
> "This section states, 'Upon receipt of such statement certifying that such person is restored to mental health, the court shall thereupon enter an order finding such person sane.' Our questions stem from this particular certification.
>
> "First, is the certification of 'restored to mental health' greater than the certification 'sufficiently recovered to be released' in the eyes of the law?
>
> "Second, is the court's finding of mental illness or insanity a judicial finding?
>
> "Third, if the answer to question number two is in the affirmative, how then can a ministerial act such as the entrance of the certification from the superintendent on the orderbook of the court return the patient to