

OFFICERS: -Notary Public - An employee of the Marine Hospital of Kirkwood, Mo., may be a notary public; (2) the powers of a notary public terminate at the expiration date of his commission; (3) a person may only be commissioned for the county in which he resides and he shall have power to transact his official business in such county and all adjoining counties thereto.

November 10, 1941

Hon. Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

We are in receipt of your letter of November 4, 1941, which reads as follows:

"Enclosed herewith is a copy of letter of November 3, 1941 from G. M. Forbes, 525 Couch Ave., Kirkwood, Missouri. I hand said copy to you with the request that you provide me with your opinion on the questions raised by Mr. Forbes in said letter."

The copy of the letter to which you refer in your request reads as follows:

"I have held a Commission as a Notary Public in the City of St. Louis for the past 4 years. My commission will expire on the 13th day of December, 1941 and I anticipate renewing same.

"However, on the application for the commission, I note the phrase 'I am not holding an office of profit under the United States.' I am at present employed by the Marine Hospital in

Kirkwood and am wondering if this position will interfere with my holding a Notary Commission for the coming four years, as I am an employee of the United States Government under Civil Service regulations. I have the consent of the Commanding officer to renew my commission, if I desire to do so.

"I would also like to inquire about the status of my residence and commission at this time. I now hold a commission for the City of St. Louis. Since my appointment as a Notary I have moved to St. Louis County and would like my Commission to be granted for the County instead of the City of St. Louis (it is my understanding I could also notarize signatures of residents of the City of St. Louis also.) Will it be necessary for me to file an application for the appointment in the County or will it be called a renewal of my application and be made to apply to St. Louis County."

Article XIV, Section 4, of the Missouri Constitution provides:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Section 13360 R. S. Mo., 1939, provides how notaries are appointed, their term of office and qualifications. Said Section reads as follows:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

Douer on John's American Notary, (4 ed.) page 1, paragraph 1, defines a "notary" in the following manner:

"A notary or notary public is an officer appointed by the executive or other appointing power under the laws of different states, having power generally to attest writings for the purpose of establishing their authenticity, to administer oaths, and to perform similar duties."

Page 3, paragraph 3, of the same work, has this to say of notaries in the United States:

"In the United States, notaries are state officers, usually appointed by the governor. * * * * *"

What is an office of profit is well settled by reason and authority. Mechem on Public Officers, Section 13, Page 10, states:

"An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit. The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit."

In view of the above, we are of the opinion that a notary public holds an office of profit under this state. The question that must now be determined is, whether a stenographer in the employ of the Home Owners' Loan Corporation holds an office of profit under the United States. 22 Ruling Case Law, Section 12, Page 380, distinguishes between a public office and a public employment, as follows:

"It is sometimes said that an office is a public charge or employment, but it frequently becomes necessary to distinguish between a public office and a public employment. The term 'employment' is the more comprehensive, and while an office is an employment, it does not follow that an employment is an office. Thus, when an employment is a continuing one, which is defined by rules prescribed by law, and not by contract, such an employment is an office, and the person who performs it is an officer. * * * * *

" * * * But on the whole an officer is distinguished from the employee in the greater importance, dignity, and

independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the more enduring tenure, and in the fact that the duties of the position are prescribed by law. Furthermore, a mere employee does not have the duties or responsibilities of a public officer.

* * * *

"It may be stated as a general rule that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of these elements. * * * "

Section 18, page 384, of the same volume, makes the following distinction between an officer of the Federal Government and a mere employee:

"Under the constitution of the United States in order to constitute a person an officer of the Federal Government as distinguished from a mere employee, he must hold his place either by virtue of an appointment of the President, or of one of the court, or of a head of a department authorized by law to make such appointment. Thus, a clerk appointed by the Secretary of the Treasury,

who is a head of such a department, is a public officer, and the same is true of an engineer in the naval service appointed by the Secretary of the Navy. But the commissioner of pensions is not the head of a department such as is authorized to appoint officers, and therefore a surgeon appointed by him has been held not to be a public officer. And where there is no statute authorizing the Secretary of the Navy to appoint a paymaster's clerk, nor any act requiring his approval of such an appointment, and the regulations of the navy do not require any such appointment or approval, a paymaster's clerk is not an officer of the United States. Again, the merchant appraisers appointed as umpires in cases of dispute on the value of imported goods subject to customs duties cannot be considered as public officers, especially in view of the fact that the original appointment of one of them is made by the importer alone. * * * * *

In the case of Robertson v. Ellis County, 84 S. W. 1097, 38 Tex. Civ. App. 146, the court said:

"A 'public office' is the right, authority, and duty created and conferred by law by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public (quoting and adopting definition in Mechem on Public Officers, as approved in Kimbrough v. Barnett, 55 S. W. 120, 93 Tex. 301). 'As said by Chief Justice Marshall, 'although an office is an employment, it does not follow that every employment is an office,' Mr. Mechem, in his work on Public Officers, says: 'The most important characteristic

which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions or government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer."* *"

In *Fekete v. City of East St. Louis*, 145 N. E. 693, the court stated:

"* * * An officer of the United States is one who holds office by virtue of appointment by the President or by heads of departments authorized to make appointments, U. S. v. Mouat, 124 U. S. 303; 8 S. Ct. 505; 31 L. Ed. 463, citing U. S. v. Germaine 99 U. S. 508, 25 L. Ed. 482; 3 Cyc. 818. * * * * *"

The Supreme Court of Missouri in the case of *Hastings v. Jasper County*, 314 Mo. 1. c. 149, defines a public officer as follows:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' (Mechem, *Public Officers*, 1;

State ex rel. Walker v. Bus, 135 Mo.
325.) * * * * *

From the foregoing authorities it is the opinion of this department that an employee of the Marine Hospital in Kirkwood, Missouri, is not an officeholder for profit of the United States, but is merely an employee and therefore is not disqualified by reason of the provisions of Article XIV, Section 4 of the Constitution of Missouri from holding the office of notary public in this State. Now turning to the second question set forth in the opinion request namely: Will it be necessary for Mr. G. M. Forbes to file a new application for the appointment of notary public instead of a renewal of his present appointment; and, thirdly: Shall he be appointed for St. Louis County, his now present residence, instead of St. Louis City, as is provided in his present commission?

Now turning to your second question, the Court in the case of State Ex Inf. v. Williams, 222 Mo. 268, said, at l. c. 277:

"* * * Where the law creates an office and prescribes the length of the term, with no date fixed for the beginning or ending of such term, and designates the power which is vested to fill such office by appointment, it necessarily follows that the appointive power has the right to fix not only the commencement of the term, but as well the end thereof. * * * * *"

It will be noted from the reason of Section 13360, supra, that the said Section provides: "Each such notary shall hold office for four years." Therefore, it is our opinion that a notary public's commission must terminate immediately upon the expiration date fixed in said commission by the Governor, which, in any event will not be for a period longer than four years from the commencement thereof. Whereupon, if such application is satisfactory the Governor

shall appoint and commission him for a period of four years from the date of the issuance of the commission, and it will of course be necessary for Mr. Forbes to make the necessary oath and furnish satisfactory bond as is provided by Section 13364 R. S. Missouri, 1939, which Section we do not copy herein for the sake of brevity.

Now turning to the third question we call attention to the case of Silver v. K. C. St. L. & C. Ry., Co., 21 Mo. App. 5, l. c. 9, wherein the Court said:

" * * * Under our statute a notary public can only transact his official business in the county for which he was appointed and in which he resides. Section 2123, Revised Statutes, authorizes depositions to be taken without this state by a notary public 'within the government where the witness may be found.' We are informed by defendant's counsel that in Illinois a notary public may execute the duties of his office in any part of the state, so long as his residence is in the county of his appointment. There was no evidence, however, of this at the trial. The statute of Illinois was not introduced. There is no presumption to be entertained as to what her statutes are. In those states formerly subject to the common law of England the presumption here would be that the common law is in force there. But as Illinois was a part of the Louisiana purchase and was never subject to the common law of England, such presumption would not obtain in matters where the common law was applicable. There being no proof of the Illinois statute, and there being no presumption as to what her law is, we hold our own statute as to the powers of the notary applicable. Crone v. Dawson (19 Mo. App. 214), and White v.

Chaney (20 Mo. App. 389). Our statute saying the deposition may be taken by any notary 'within the government where the witness may be found,' I think, means any notary within the government, who is qualified and entitled to act, at the place where the witness may be found. In this state, as before said, he would only be qualified to act in the county of his appointment."

Under this statute a notary public can only transact his official business in the county for which he was appointed and in which he resides. It will be noted from observing this case that this opinion was rendered February 15, 1886 and since that time Section 13360, supra, has been amended, through the repeal of the old Section and an re-enactment of the present Section (See Laws 1919, Page 607). The material difference between Section 10360, supra, and Section 2123 set forth in the Silver opinion, supra, is that the present Section provides: "A notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties." In other words, the law has been broadened to give a notary public the power to notarize instruments in adjoining counties to the one for which such notary is appointed by the Governor, and under the authority of the Silver case, such notary must reside in the county for which he is appointed and commissioned by the Governor.

Therefore, Mr. Forbes should make application for a notary commission for St. Louis County, that being the county in which he resides, and will have authority, when commissioned and duly qualified to transact his official business in such county and all adjoining counties thereto.

CONCLUSION.

We are of the opinion that an employee of the Marine Hospital in Kirkwood, Missouri, may be commissioned as a notary public and that such employment is not an office

Hon. Forrest C. Donnell

(11) November 10, 1941

of profit as prohibited by Article XIV, Section 4,
of the Missouri Constitution.

Secondly, we are of the opinion that on the expiration of a notary public's commission that all the powers and duties of the notary public cease and it is incumbent upon a person desiring to be a notary public to file a new application and receive a new commission and again make the oath and furnish the bond as is provided in Section 13364 R. S. Missouri, 1939.

Thirdly, we are of the opinion that a person applying for a notary public's commission may only be commissioned for the county in which he resides and after receiving such commission and having fully qualified may transact his official business in such county and all adjoining counties thereto or in this particular case the City of St. Louis, likewise.

Respectfully submitted

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APPROVED:

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