

OFFICERS: NOTARY PUBLIC - UNITED STATES POSTMASTERS CANNOT AT THE SAME TIME BE A NOTARY PUBLIC IN MISSOURI.

4-20  
April 16, 1934.



His Excellency  
Governor Guy B. Park  
Executive Office  
Jefferson City, Missouri

Dear Governor:

This department is in receipt of your enclosures and letter dated March 30, 1934, wherein you state as follows:

"I am attaching hereto a letter from Mr. J. W. Swaw, requesting that he be appointed a Notary Public for Maries County, Missouri.

"I am also attaching a copy of our blank Notary Public form of application and you will note that it states in part 'I am not holding an office of profit under the United States'.

"Will you kindly advise me if, in your opinion, a Notary Public Commission should be issued to Mr. Swaw."

Your enclosure signed "J. W. Swaw" and dated March 29, 1934, reads as follows:

"Am asking if you will issue me an appointment as a Notary Public for this Maries County.

"I have served three terms (12 yrs.) as a Notary here and as there is no Notary within 8

miles of here I find a demand for a Notary at this place.

"I have been Postmaster here since 1920 - (4th Class) and also am Justice of the Peace here - this position held for past 13 yrs.

"The Postal Laws will not permit me to hold any elective office, but a 4th Class P.M. may hold appointive positions such as a J.P. or N.P. or other appointive position.

"Will appreciate an early reply."

Your enclosure signed by five citizens and dated March 29th, 1934, reads as follows:

"Realizing the need of a Notary Public at this place we the undersigned citizens ask that you appoint J. W. Swaw, a Notary Public for Maries County. Mr. Swaw has served as Notary at this place for 12 yrs up to 3 yrs ago and he is well qualified for the work."

Your enclosure of Notary Public Form of Application, reads in part as follows:

"Sir: I respectfully request that I be appointed and commissioned a Notary Public from the County of

---

" I am over the age of \_\_\_\_\_ years, a citizen of this State for more than one year, and of the United States, I am not holding an office of profit under the United States, and my occupation at this time is that of \_\_\_\_\_

---

" In support of my application, I submit herewith a certificate of my qualifications and moral character, and of my ability to give the necessary bond."

Article XIV., Section 4, of the Missouri Constitution provides that United States officers cannot hold a State office, and reads as follows:

"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 11738, R. S. No. 1929, provides for the term of office for notaries, qualifications, and how appointed, in the following language:

"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."

Bauer on "John's American Notary", (4th 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."

notaries in the United States and declares in part as follows:

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

In the case of Fekete v. City of East St. Louis, 145 N. E. 693, the Court said:

**\*\*\*\*\*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.\*\*\*\*\*"**

In the case of State v. Barnham, 137 So. Reporter 862, 1.c. 864, the Court states as follows:

**"A postmaster is an officer under the United States, and his office is one of profit. U.S.C.A. Title 5, Sec. 361; Title 39, Sections 31, 34, 53. \*\*\*\*\*"**

What is a lucrative office seems to be very well settled upon reason and authority. Kechem on "Public Officers," Section 13, page 10, says:

**"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."**

Section 39, Title 1, of the Postal Laws and Regulations, (1932) deals with restrictions on holding other offices in the

following language:

"No person in the classified civil service and holding a position under the Post Office Department shall accept or hold any elective office under any State, Territorial or Municipal government (including the offices of alderman, councilman, etc.) even though no compensation may attach thereto, and no such person shall accept or hold such office by appointment to fill an unexpired term. Exception is made in the case of a fourth-class postmaster who is a candidate for or holds an elective position of an educational nature such as member of a school board, school committee, etc.; and it is permissible for a fourth-class postmaster to accept or hold such office provided no political issues are involved and no campaign is made for the position."

Paragraph 3 of the same Section sets out the positions that may be held by appointment, and reads as follows:

"A person in the Postal Service may be appointed (not elected) to the office of notary public, \*\*\*\* but will not be permitted to hold such office or position if it interferes with his duties in the Postal Service."

In the case of Foltz v. Kerlin, 4 N. E. Reporter, 439 l.c. 440, the Court held that the offices of postmaster and township trustee, being lucrative offices, they could not be held by one person at the same time. The Court said:

"The state courts have authority to expel him from the office of township trustee, but not from the office held by appointment from the federal government. Our courts cannot decide upon the right of an appointee of the national government, but they can decide upon the right of one asserting a title to an office under the laws

of the state. Within the powers delegated to it, the federal government is supreme, and this necessarily carries the authority to determine upon the qualification of its officers and their right to hold office. \*\*\*\* As our courts have no authority to expel an incumbent from a federal office, they are powerless to control a man who attempts to defy our constitution by holding both a federal and a state office, unless they have authority to expel him from an office held under the laws of the state, notwithstanding the fact that he may have entered into the state office last. We entertain no doubt that our courts do possess power to oust a man from a state office who undertakes to hold it in defiance of our constitution. \*\*\*\* If a man persists in clinging to a federal office, our courts can and will compel him to loosen his hold upon an office created by the state. If he perseveres in his effort to violate our fundamental law by holding two offices, the sure penalty will be the loss of that over which the state has jurisdiction. He may, if he will, surrender the federal office and retain that created by the state, but he cannot retain both in defiance of the constitution. If he elects to hold the federal office, he must surrender the state office. The courts will coerce obedience to the constitution, and will not permit men to hold office in violation of its provisions."

#### CONCLUSION.

Our opinion is limited to the precise issue of whether a postmaster can legally hold a notary public commission within the provisions of Article XIV., Section 4. of the Missouri Constitution, supra.

In the light of the foregoing cases and sections, we reach the conclusion that a postmaster is an officer under the United States and that his office is one of profit under the United States, and further that a notary public is a state officer and that his office is one of profit under this State. This falls directly under the prohibition of Article XIV., Section 4. of the Missouri Constitution, which provides that "no person holding an office under the United States shall, during his continuance in such office, hold any office of profit under this state." We are, therefore, of the opinion that a notary public commission cannot be issued to Mr. Swaw.

It is true that it has been the policy of our Legislature to make an exception in the case of notaries public when restricting the holding of several State offices in one person; but this policy was never intended to apply to State and federal officers as set out in clear and unequivocal language in Article XIV. Section 4. of the Missouri Constitution, supra.

It is further true that under paragraph 3 of Section 39 of the Postal Laws and Regulations of 1932, supra, an exception is made in the case of persons in postal service who may be appointed (not elected) to the office of the notary public. However, as stated in the case of Foltz v. Kerlin, supra, "\*\*\*\* Our courts cannot decide upon the right of an appointee of the national government, but they can decide upon the right of one asserting a title to an office under the laws of the state.\*\*\*\*"

We are, therefore, of the further opinion that Mr. Swaw may be commissioned a notary public if he will surrender his federal office, but he cannot accept or hold both offices in defiance of the Constitution. As was stated in the case of Foltz v. Kerlin, supra, "The courts will coerce obedience to the constitution, and will not permit men to hold office in violation of its provisions."

Respectfully submitted,

APPROVED:

---

WM. ORR SAWYERS  
Assistant Attorney-General.

---

ROY MCKITTRICK  
Attorney-General.

(Returned to the Governor two of the enclosures - (1) Letter of Mr. J. W. Swaw to the Governor, dated High Gate Mo. March 29th, and the one signed by five citizens by C. E. Davis, dated 3/29/34  
mw/afj