

OFFICERS: NOTARY PUBLIC: A stenographer in the employ of Home Owners' Loan Corporation may be a Notary Public.

March 1, 1935

3-6-35

Mr. Woodson Cockrill
Executive Clerk
Executive Office
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date, with inclosure from Redick O'Bryan, which reads as follows:

"I am attaching hereto a letter received from Hon. Redick O'Bryan, State Counsel for the Home Owners' Loan Corporation regarding the issuance of a Notary Public commission to a stenographer in the employ of the Home Owners' Loan Corporation.

On the Notary Public application it states that no person can be appointed a Notary Public if they are holding an office of profit under the United States Government. Will you kindly furnish me an opinion as to whether or not a commission should be issued to Miss Appel?

Kindly return Mr. O'Bryan's letter with the opinion."

Article XIV, Section 4, of the Missouri Constitution, provides 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. Mo. 1929 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 courts, 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 of 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.' (Wechem, Public Officers, 1; State ex rel. Walker v. Bus, 135 Mo. 325.)* * * * *"

CONCLUSION

In view of the foregoing authorities, it is the opinion of this department that a stenographer, in the employ of the Home Owners' Loan Corporation, does not hold an office of profit under 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.

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JLH:JET:LC

(Letter, Redick O'Bryan Inclosed)