

Women Holding Office. Notaries Public, Women As. Librarians, Women As. Assistant Librarians, Qualifications Of.

A Notary Public is a public officer. Under Sections 2 and 11 of Article IX of the Constitution, women are ineligible to the office of Notary Public.

The Librarian of the Historical Library is a public officer and women are not eligible to such office under the above section of the Constitution.

Assistant Librarians are not public officers within the meaning of the above provisions of the Constitution, but are merely clerks, and women are eligible to hold such positions.

Helena, Mont., March 22nd, 1907.

To His Excellency, Joseph K. Toole,
Governor of the State of Montana,
Helena, Mont.

Dear Sir:—

Your communication of the 20th inst., in which you request an official

opinion upon the following statement of facts, received:

"In course of business of this office numerous applicants for appointment as Notaries Public give only the initials of their names, and on several occasions I have been misled into the appointment of persons who are subsequently found to be women.

Acting upon the belief that such appointments were unauthorized by the Constitution, I have promptly revoked the same as soon as the facts were brought to my attention. My investigation of the question has not, however, been exhaustive, and I shall be glad to have the written opinion of your office as to the eligibility of women to hold such office under the Constitution and laws of this State.

Under the law the Trustees of the State Historical Library appoint a Librarian, and the present incumbent—appointed three several times with my express approval—is a woman. Recent investigations of the general power of appointment leads me to inquire whether that position is an office within the purview of the Constitution and laws, and, if so, is the incumbent eligible?

House Bill No. 181, passed at the last session of the Legislature, added to Chapter III, Article 1, Part III, Title V of the Political Code a section to be designated as Section 2401, which provides for the appointment by the Librarian of two assistants.

These two assistants are also women. I do not find that the law prescribes their duties, fixes their tenure or requires a bond. So that, if you should hold that the position of Librarian is an office under the Constitution and laws, and that a woman is ineligible to such appointment, does such rule of construction follow as to the two female assistants?"

In answering the above questions, we shall take the same up in the order in which they are submitted.

1. That the position of Notary Public constitutes a public office within the State there can be no question. By Section 912 of the Political Code, his term of office is fixed at a definite period. The duties of such office are prescribed by Section 913, and he is required to take an official oath and file an official bond, and thereby, comes squarely within the rules laid down by the authorities showing that such person is a public officer.

In re House Bill No. 66, 21 Pac. (Col.) 473.

State v. Davidson, 22 S. W., 639.

State v. Spaulding, 102 Ia. 639.

This brings us to the question as to who is eligible to hold public offices within this State.

Section 11 of Article IX of the State Constitution reads as follows:

"Any person qualified to vote at general elections and for State officers in this State shall be eligible to any office therein except as otherwise provided in this Constitution, and subject to such additional qualifications as may be prescribed by the Legislative Assembly for city offices and offices hereafter created."

Section 2 of the same Article of the Constitution defines what persons are qualified to vote at general elections and for state officers in this State and provides therein that:

“Every male person of the age of 21 years or over possessing the following qualifications shall be entitled to vote at all general elections,” etc.

Section 10 of the same Article of the Constitution expressly provides that women shall be eligible to hold the office of County Superintendent of Schools and School District offices. By expressly providing that women were eligible to such offices it is apparent that the framers of the Constitution intended that they should be eligible to no other office, and any question of doubt is settled for the reason that, under said Section 11, no person can be eligible to any other office than that of Superintendent of Schools and School District offices unless he is qualified to vote at general elections, and as no person is qualified to vote at general elections excepting male persons possessing the qualifications defined by said Section 2, it necessarily follows that women are not eligible to hold the office of Notary Public.

There are many states which hold that women can hold this office, but upon investigation of the Constitution and Statutes of such states it is found that they contain no constitutional provision such as found in our Constitution.

2. With respect to the office of Librarian of the Historical Library, there can be no question but that, under the statutes of this State, the same constitutes a public office.

Section 2383 of the Political Code fixes the term of office of the Librarian at two years. Section 2384 prescribes the duties of such officer. Section 2391, as amended by the laws of 1907, fixes the salary of such officer, and Section 2392 provides that such officer must execute an official bond, and, under Section 1010 of the same Code, such officer must take an official oath.

The Supreme Court of Ohio, in the case of *State v. Brennan*, 29 N. E. 594, in defining public office, said:

“From these definitions and illustrations it is clear that the position created by the act in question is an office, and that the defendant, if selected in the manner prescribed by law, is an officer. Upon him is imposed the right to exercise an employment in the purchase and control of property of the public, not as a temporary, casual act, but as a continuous duty. He is to exercise public functions in the supposed interest of the people. These he exercises independently, for others, and without their leave. He is given by the act itself the title or designation of “stationery storekeeper,” and it is not without significance that he is also denominated an “officer.” He is to give bond for the faithful performance of his duties, and is entitled to the yearly salary affixed by the act. The office is an independent one. Its duties are not devolved upon the occupant by a superior, as ministerial duties may be devolved upon a deputy, but are imposed by the statute.”

The Supreme Court of the United States, in *U. S. v. Hartwell*, 6 Wallace, 385, said:

"The office is a public station or employment, conferred by the appointment of government. The term embraces ideas of tenure, duration, emolument, and duties."

The Supreme Court of Georgia, in *Bradford v. Justices*, 33 Ga. 332, said:

"When an individual has been appointed or elected in a manner provided by law, his designation or title given him by law, and exercises functions affecting the public, assigned to him by law, he must be regarded as a public officer."

See also

State v. Spaulding, 102 Ia. 639,

for an exhaustive collection of authorities defining public officers.

Also

Mechem on Public Officers, Secs. 1 and 2.

Throop on Public Officers, Section 3.

It being apparent that the Librarian of the Historical Library of the State is a public officer, it necessarily follows that, in order for a person to be eligible to hold such office, he must be qualified to vote at general elections and for state officers in this State, as provided by Section 11, Article IX, of the State Constitution, and in order to be qualified to vote at general elections and for state officers in this State a person must be a male of the age of 21 years or over and possessing the qualifications provided for in Section 2 of said Article IX.

Constitutional provisions similar to the above have been frequently construed in other states, and it has been uniformly held that "where only qualified voters are eligible to office, women are, of course, excluded in any state that has not extended to them the right of suffrage."

23 Eng. & Am. Ency. of Law, p. 332.

Section 4, Article XV, of the Constitution of Ohio, provides that:

"No person shall be elected or appointed to any office in the state unless he possess the qualifications of an elector," which qualifications are prescribed by Section 1, Article V of said Constitution to be:

"Every male citizen of the United States of the age of 21 years who shall have been a resident of the state one year," etc.

The Supreme Court of Ohio, in construing a law which provided for the appointment of five women to constitute a Board of Workhouse Directors of the Female Department of the Workhouse at Cincinnati for female convicts, held that, under the above constitutional provisions, such law was in violation thereof, and, among other things, the court said:

"Legislative acts are always to be upheld unless clearly in violation of the constitution, but when so, courts are required to declare them void.

In this case we regret to be compelled to so decide, on account of the great value, and we might say necessity, of

having women to attend to the wants and watch over the many unfortunate victims of crime incarcerated in such institutions. The very high character of the ladies who have been appointed to this charge assures us that under their guidance the condition of the inmates would be greatly ameliorated, their characters improved, if not entirely changed, and the public be a great gainer. We are of the opinion that it was a great oversight in our constitution in not making provision for women filling just such positions as that contemplated in this act.

While we have felt constrained to hold that the statute in question attempted to confer on the persons who should be appointed under its provisions such duties and functions as made their office one which, in the contemplation of the constitutional provision, can only be held by an elector, we would not be understood as holding that there are not many positions in said institutions which may be held by women.'

Article VI (Sec. 8) of the Constitution of Oregon, provides that:

"No person shall be elected or appointed to a county office who shall not be an elector of the county."

Section 2, Article II, of the same Constitution defines an elector as a male citizen.

The Supreme Court of Oregon in *State v. Stevens*, 44 Pac. 899, said:

"It necessarily follows that none but male citizens can be elected or appointed to county offices, * * * Whatever views we may entertain as to the propriety of the constitutional provision prohibiting women from holding county offices we have no alternative but to declare that, under the provisions of that instrument, as it now exists, that they are ineligible to the office in question."

See also:

Atchison v. Lucas, 83 Ky. 451.

State v. McSpaden, 137 Mo. 628.

You are, therefore, advised that women are ineligible to the office of Librarian of the Historical Library.

While under the above holding the present incumbent would not be legally holding the office, nevertheless, she is a de facto officer, and any acts done by her are valid as to third persons during such time as she is permitted to hold the office. Of course, the question might arise as to the present incumbent's right to the salary of the office, but as this is not an elective office and there is no one contesting the office, I apprehend that no question will be raised as to her right to the salary, at least for the period prior to the date of this opinion. In discussing de facto officers, *Mechem on Public Offices*, in Section 331, lays down the following general principles:

"But while the acts of the de facto officer are thus valid as to third persons, he cannot himself acquire rights based upon his defective title.

It is well settled, therefore, that he cannot maintain an action to recover the salary, fees, or other compensation attached to the office.

"It is the settled doctrine in this State," says the court in New York, "that the right to the salary and emoluments of a public office attach to the true and not to the mere colorable title, and in an action brought by a person claiming to be a public officer, for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation."

3. With respect to the two assistants whose appointment is provided for in House Bill 181, approved March 4th, 1907, no fixed tenure of office is prescribed, nor are they required to file official bonds. Their duties are purely ministerial and consist of typewriting, stenography, tabulation of reports, classification and arrangement of books and papers in the Library, and other clerical work under the direction of the Librarian. Their duties are not defined by law, and they possess none of the requirements necessary to constitute them public officers within the meaning of the constitutional provision. Their duties are similar to that of the secretary, stenographer, or clerk in the office of the Attorney General, Auditor or Secretary of State, and are clearly distinguished from those of a Deputy State Auditor or Deputy Secretary of State, who has authority to sign warrants or take acknowledgments or to certify over his signature as Deputy to public documents.

Mechem on Public Officers, in Section 38, defines Deputies as follows:

"Whether deputies appointed by public officers are to be regarded as public officers themselves, depends upon the circumstances and method of their appointment. Where such appointment is provided by law, and a fortiori where it is required by law, which fixes the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bonds for the performance of their duties, the deputies are usually regarded as public officers. Thus deputy postmasters appointed and qualified according to law, are public officers. So a deputy marshal is an officer of the United States, and deputy sheriffs are recognized by the statutes of most States as independent public officers.

But where the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer, but a mere servant or agent. So a special deputy employed only in a particular case is not a public officer."

It is perfectly clear in the light of the duties and powers of the assistants to the Librarian of the Historical Library that they are not public officers.

You are, therefore, advised that women are not ineligible to such clerkships.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.