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ATTORNEY GENERAL OPINION NO. 83- 48

The Honorable Jack H. Brier
Secretary of State
2nd Floor, Statehouse
Topeka, Kansas 66612

Re: Notaries Public and Commissioners -- Notaries Public -- Revocation of Appointments

Synopsis: An applicant for appointment by the secretary of state as a notary public must include in the application an oath of office, and the failure to take the oath of office may constitute grounds for revocation of a notary's appointment pursuant to K.S.A. 1982 Supp. 53-118. However, whether an oath has been legally administered is a question of fact.

Prior to revoking the appointment of a notary public, the secretary of state must give reasonable notice thereof and provide an opportunity for the notary to respond to the charges being relied upon as grounds for revocation at a hearing held for such purpose. Further, revocation of a notary's appointment pursuant to K.S.A. 1982 Supp. 53-118 operates prospectively, and the secretary of state has no authority to revoke a notary's appointment ab initio.

Even though there may have been a defect in a person's appointment as a notary public, or such person failed to conform to some condition precedent to assuming the office of notary public, such person is nonetheless a de facto officer where such person was issued a certificate of appointment as a notary, such person held himself or herself out to the public as being a duly appointed notary and, in availing themselves of the notary's services, the public, without inquiry, clearly has presumed such person to be a validly appointed officer. As

> a consequence, the acts of such person as a de facto officer are as valid and effectual, where they concern the public or the rights of third parties, as though such person was an officer de jure, and such acts are not subject to collateral attack. Cited herein: K.S.A. 1982 Supp. 53-101, 53-102, 53-104, 53-105, 53-105a, 53-116, 53-117, 53-118, K.S.A. 54-102, 54-104, 54-106.

* * *

Dear Secretary Brier:

You have posed several questions regarding your authority to revoke the appointment of a notary public. All of your questions are predicated on a request made of you by an attorney in Overland Park, Kansas, that appointments of two notaries public be set aside ab initio, because they failed, in his judgment, to properly take the oath of office. In support of his contention, he has provided you with excerpts from depositions taken of these notaries, in which they indicate that they did not verbally take the oath of office required of notaries public. For this reason, the attorney suggests that these notaries' appointments were void from the beginning and, as a consequence, they lacked power and authority to perform notarial acts. Within the context of these facts, you have first asked whether you have authority "to set aside ab initio a notary's appointment."

Before responding to this question, a review of pertinent statutes is appropriate. K.S.A. 1982 Supp. 53-101 authorizes the appointment of notaries public for terms of four years. K.S.A. 1982 Supp. 53-102 imposes conditions precedent to any such appointment as follows:

> "Every person, before entering upon the duties of a notary public, shall file with the secretary of state an application for appointment as a notary public, which shall also include an oath of office and a good and sufficient bond to the state of Kansas in the sum of two thousand five hundred dollars ($2,500), with one or more sureties to be approved by the secretary of state. The bond shall be conditioned upon the faithful performance of all notarial acts in accordance with this act. Every notary public before receiving the appointment as a notary public shall also file with the secretary of state the official signature and an impression of the seal to be used by the notary public." (Emphasis added.)

Upon satisfying these conditions and payment of the fee prescribed by K.S.A. 1982 Supp. 53-104, K.S.A. 1982 Supp. 53-105a provides for the issuance of a certificate of appointment to the applicant, if the secretary of state is "satisfied the applicant is qualified to be appointed as a notary public."

As indicated by the emphasized language in the above-quoted provisions of K.S.A. 1982 Supp. 53-102, one of the prerequisites for appointment as a notary public is including an oath of office with the application filed with the secretary of state. Here, we note that K.S.A. 54-106 provides:

> "All officers elected or appointed under any law of the state of Kansas shall, before entering upon the duties of their respective offices, take and subscribe an oath or affirmation, as follows:
>
> "'I do solemnly swear [or affirm, as the case may be] that I will support the constitution of the United States and the constitution of the state of Kansas, and faithfully discharge the duties of _____. So help me God." (Emphasis added.)

We also note that K.S.A. 54-102 requires that "all oaths shall be administered by laying the right hand upon the Holy Bible or by the uplifted right hand." From the documents submitted with your request, it is apparent that both of the notaries public in question subscribed to the oath set forth in K.S.A. 54-106 and filed a copy of the signed oath with your office. Thereupon, a certificate of appointment as a notary public was issued to each applicant. However, the information provided you by the aforementioned attorney indicates that in neither case did the applicant take the oath verbally or comply with the requirements of K.S.A. 54-102, i.e., that the person taking the oath raise his or her right hand or place it upon the Bible. Thus, the initial issue to be resolved is whether the oath was properly taken under these circumstances.

In 1964, this office issued a letter in response to a municipal court judge's question whether a public officer must be verbally sworn, as well as subscribing to the oath. Acknowledging the statutory language, "take and subscribe an oath or affirmation" used in K.S.A. 54-106, that letter stated:

> "While some unequivocal act is necessary, a person may and should be sworn in a form and mode which he regards as binding on his conscience and where a statute lays down a particular form of oath or affirmation that form

> should be followed. We think it is clear from the statute that it is necessary that a public official take the oath verbally as well as subscribing to it." (Emphasis added.)

We concur in that advice. However, the fact that an oath "should" be taken in the manner indicated in the letter is not determinative of whether the statutes preclude taking the oath in a manner which deviates to some extent from the statutory scheme. The propriety of such deviation depends on whether the statutory scheme is mandatory or directory.

The Kansas Supreme Court has distinguished between directory and mandatory statutory language, as follows:

> "The difference between directory and mandatory statutes, where their provisions are not adhered to, is one of effect only; the legislature intends neither to be disregarded. However, violation of the former is attended with no consequences but failure to comply with the requirements of the latter either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities (2 Sutherland Statutory Construction [3rd ed.] §2801)." Wilcox v. Billings, 200 Kan. 654, 657.

There are numerous cases in which our Supreme Court has enunciated guidelines for determining the mandatory or directory nature of a statute. See, e.g., Wilcox v. Billings, supra; Paul v. City of Manhattan, 212 Kan. 381 (1973); Bell v. City of Topeka, 220 Kan. 405 (1976). However, we think it unnecessary to review those guidelines here. Even though there are no Kansas cases precisely determinative of this issue, we believe the conclusion may be derived implicitly from the decisions of the Supreme Court which have addressed the statutory provisions pertinent to this issue.

In State v. Kemp, 137 Kan. 290 (1933), the defendant-appellant was convicted of perjury in connection with making false statements under oath in a verified pleading. On appeal, he contended that "there was no proof an oath was administered." Id. at 291. Such contention was premised on the failure to observe all the requirements of R.S. (now K.S.A.) 54-102 and 54-104 in administering the oath. The Court discussed this issue, as follows:

> "It was a question of fact whether Kemp swore on oath legally administered. The notary who officiated in the proceeding identified his

> certificate and told what occurred. His testimony respecting what occurred showed none of the statutory requirements relating to administration of an oath were observed. But there was the notary's certificate. The statute says the certificate was evidence the affidavit was duly made. In his brief Kemp discusses presumptions, which Dean Wigmore called artificial rules which stand in place of proof until the contrary is shown, and which the supreme court of Missouri called bats of the law flitting in the twilight but disappearing in the sunshine of actual evidence. We have no presumption here. We have the notary's written statement under signature and seal, made at the time. Under the sunshine of the statute it has the radiance of actual fact. We have the notary's oral statement. It flits in the twilight of memory of things two and a half years old. The jury could believe either.
>
> "Besides what has been said, Kemp went to the notary with a blank form to be made into an affidavit with a certificate that the formalities of a solemn ceremony had been observed. The purpose was to certify an answer to be filed in court, verification being necessary properly to raise the issue which the answer purported to raise. The notary had before him the certificate to be executed, which if executed would declare Kemp was sworn. The notary executed the certificate. Manifestly, both parties intended that out of Kemp's visit to the notary there should come what would have the effect of administration of an oath; and the court holds that in the absence of clear proof the ceremony, or lack of ceremony, was designed by the participants to leave Kemp unsworn, the legal effect of what occurred was the same as if Kemp was sworn according to formalities prescribed for administration of an oath. (State v. Madigan, 57 Minn. 425; Atwood v. State, 146 Miss. 662; Komp v. State, 129 Wis. 20.)" (Emphasis added.) Id. at 291, 292.

A portion of the foregoing excerpt was quoted in State v. Anderson, 178 Kan. 322 (1955), involving a similar prosecution for perjury. There, the defendant, a deputy sheriff, was convicted of perjury for swearing to a false statement for the purpose of having a criminal prosecution instituted. In reaching a conclusion similar to that obtained in State v. Kemp, supra, the Court analyzed defendant's contentions, as follows:

> "Appellant contends he was not under oath when he merely signed the complaint and the judge charged with administering the oath signed the same in silence and made no statements to nor asked him any questions. Our statute (G.S. 1949, 54-102) does provide that: 'All oaths shall be administered by laying the right hand upon the Holy Bible, or by the uplifted right hand.' and it is clear from the evidence that statutory requirements and formality were not had as they should have been. But it is common knowledge that such requirements are not always complied with strictly. The question is whether under the circumstances what was done was an utter nullity. Appellant told the county judge his version of why Gilbert Libby should be arrested and prosecuted and the judge thereupon prepared a complaint the first words of which were 'Duane Anderson being duly sworn, on oath says . . .' After its completion the judge handed the complaint to Anderson, who read it, signed it, and handed it to the judge and saw him sign the jurat and affix his official seal. Surely some weight must be given to opening statements of the complaint and to the physical acts of the parties even though statutory formalities were not observed, and especially is this true in the light of the testimony of the judge that he believed Anderson was swearing to the complaint, and there was no design by either the judge or Anderson to leave Anderson unsworn." (Emphasis added.) Id. at 327.

We also note the case of State v. Jones, 125 Kan. 147 (1928), where the Supreme Court reversed the trial court's judgment sustaining a motion to quash "on the ground that the complaint on which the warrant [for defendant's arrest] had been issued was not properly verified," i.e., the formalities of 54-102 and 54-104 had not been observed.

Several important points are to be derived from these cases. First, it is obvious that the Kansas Supreme Court has not only recognized that there is not always strict adherence to the statutory requirements attending the administration of oaths, but has determined that in certain cases an oath may be properly administered despite a failure to strictly observe the requisite formalities. Implicitly, therefore, the Court has regarded the pertinent statutes as being directory in nature.

Second, in those instances where the Court has determined that an oath had, in fact, been administered, notwithstanding non-observance of some of the statutorily-required formalities, such determination has been founded on the intentions and beliefs of the parties involved. In both Kemp and Anderson, supra, the Court found that the respective parties intended that their actions result in the administration of an oath, and that they believed their actions had, in fact, accomplished that objective.

Finally, and as a necessary consequence of the foregoing conclusions, it is clear that whether an oath has been legally administered is a question of fact. The pertinent facts and circumstances must be established and considered, so that the intentions and beliefs of the involved parties may be ascertained therefrom.

With these observations in mind, it is appropriate to consider the authority to revoke the appointment of a notary public. K.S.A. 1982 Supp. 53-118 provides in pertinent part:

> "(a) The secretary of state may refuse to appoint any person as a notary public or may revoke the appointment of any notary public upon any of the following grounds:
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> "(1) Substantial or material misstatement or omission in the application submitted to the secretary of state;
>
> "(2) conviction of a felony or of a lesser offense involving moral turpitude or of a nature incompatible with the duties of a notary public. A conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this subsection;
>
> "(3) revocation, suspension or denial of a professional license, if such revocation, suspension or denial was for misconduct, dishonesty or any cause substantially relating to the duties or responsibilities of a notary public;
>
> "(4) cessation of United States citizenship;
>
> "(5) incapacitation to such a degree that the person is incapable of reading or writing the English language;
>
> "(6) failure to exercise the powers and duties of a notary public in accordance with this act."

In light of the factual circumstances prompting your request, it would appear that subsection (a)(1) of this statute sets forth a possible basis for revocation. As noted previously, the notary's oath of office is included in the application for appointment as a notary. Hence, if the applicant did not take the oath of office as statutorily required, but indicated by the application that the oath had, in fact, been administered, we believe there is a basis for revoking the notary's appointment on the ground that there was a "[s]ubstantial or material misstatement . . . in the application submitted to the secretary of state." However, it is clear that such revocation would be premised on the fact that the notary did not take the oath of office, and we hasten to reiterate that this is a question of fact. It must be determined whether, under the relevant facts, the persons purporting to administer and take the oath intended and believed the oath was administered and taken, respectively.

This leads to a consideration of your questions regarding the procedures prerequisite to a revocation. Essential to this issue is the fact that notaries public are public officers. In stating this conclusion, we are cognizant that K.S.A. 1982 Supp. 53-101 provides that "[n]otaries public shall not be considered as state officers." However, we note that notaries public: (1) are appointed for a term of four years (53-101); (2) are required to take an oath of office (53-102); (3) are required to give a good and sufficient bond; (4) are required to provide and use a notarial seal to "authenticate all official acts, attestations and instruments" (53-105); (5) must resign their appointments, in order to cease being a notary in Kansas (53-116); (6) are not automatically reappointed as notaries at the expiration of their respective terms, but must comply with the statutory requirements for initial appointments in order to serve for successive terms (53-117); and (7) cannot be removed except upon revocation of their appointments pursuant to specific grounds (53-118). In our judgment, these are all indicia of a public office.

In a letter opinion dated February 21, 1969 (VI Op. Att'y Gen. 656), Attorney General Frizzell identified the necessary elements of a public office, as follows:

> "(1) the office must be created by the constitution or legislature of the state or created by [a] municipality or other body through authority conferred by the legislature; (2) the position must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or

> impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) and the position must have some permanency and continuity, and not be only temporary or occasional. See Jagger v. Green, 90 Kan. 153, 158-159 (1913); Jones v. Botkin, 92 Kan. 242, 246-247 (1914); Miller v. Ottawa Co. Commissioners, 146 Kan. 481, 484, 485 (1937)." VI Op. Att'y Gen. at 656-657."

Clearly, a notary public satisfies these requirements. The position of notary public is statutorily created; notaries' powers and duties are statutorily conferred and defined, respectively; subject only to the secretary of state's authority to appoint and revoke appointments, their duties are performed independently; even though there is no prescribed number of notaries public or continuity of a particular notary's position, there is relative permanency in a particular position, in the sense that a notary is appointed for a specific term; and the authentication of documents, administration of oaths and affirmations and the performance of other notarial acts represent the exercise of a portion of the sovereign power of state government for the benefit of the public.

Finally, absent statutes specifically stating otherwise, notaries generally have been considered public officers. "Originally notaries were mere commercial scriveners. When they became important to the commercial world, their appointment was provided for and their duties regulated by public law. Since their appointment is now provided for by public law, it is generally agreed they are public officers . . . ." 58 Am.Jur.2d Notaries Public §5 (1971).

For all of these reasons, it is our opinion notaries public are public officers exercising a portion of the sovereign power of the State of Kansas, and we do not believe such conclusion is in conflict with the provision of K.S.A. 1982 Supp. 53-101 declaring that notaries are not to be considered state officers. In our judgment, the only legislative purpose served by this provision is to preclude notaries public from any right to the various entitlements, emoluments and perquisites of office, such as salary or other compensation, reimbursement of expenses, office space, retirement benefits and other similar benefits provided elected and appointed officers of the State of Kansas.

Thus, having concluded that a notary public is a public officer, the question arises whether a notary's appointment may be summarily revoked for any of the grounds specified in K.S.A. 1982 Supp. 53-118. Pursuant to the commentator in 63 Am.Jur.2d Public officers and Employees §179 (1972):

> "An implied power of summary removal is not incident to the power of appointment where the extent of the term of office is fixed by the statute. In the absence of any provision for summary removal, appointments to continue for life or during good behavior -- which in contemplation of law is for a fixed term -- or for a fixed term of years cannot be terminated except for cause. It is the fixity of the term that destroys the power of removal at pleasure." (Footnotes omitted.) (Emphasis added.)

Not only has the legislature prescribed a fixed term of office for notaries public, the specific causes for revoking a notary's appointment have been listed in 53-118. Such facts prompt the conclusion that a notary public is entitled to notice and an opportunity to be heard prior to revocation of his or her appointment. In Jacques v. Litle, 51 Kan. 300 (1893), the Kansas Supreme Court considered the propriety of a summary removal of a school district treasurer, an elected officer serving for a term of years and for whom there were statutorily prescribed causes for removal. There, the Court stated:

> "Where an office is held at the pleasure of an appointing power, and also where the power of removal may be exercised at its discretion, it is well settled that the officer may be removed at any time without notice or hearing. (The State, ex rel., v. Mitchell, 50 Kas. 289.) The defendant holds his office by virtue of an election, and is chosen for a definite time. Nothing in the law warrants the implication that a school-district officer who has been elected and qualified and entered upon his duties may be removed at the will or pleasure of any officer. The statute prescribes the causes for which a removal may be had, and fairly implies that the cause must be shown, and that the party charged with negligence and wrong is entitled to notice and a right to be heard in his own defense. It is well established by the great weight of authority, that where an officer is elected by the people for a definite term, and provision is made

> for his removal for cause, the power of removal cannot, in the absence of the positive mandate of statute, be exercised without notice and hearing. The mere silence of the statute with respect to notice and hearing will not justify the removal of such an officer upon a charge of misconduct and negligence, without knowledge of the charges and an opportunity to explain his conduct and defend his course and character. (Field v. Commonwealth, 32 Pa.St. 478; Ex parte Hennen, 13 Pet. 230; Page v. Hardin, 8 B. Mon. 648; The State v. City of St. Louis, 90 Mo. 19; Willard's Appeal, 4 R. I. 601; Chase v. Hathaway, 14 Mass. 222; Dullam v. Wilson, 53 Mich. 392; Mech. Pub. Off., §454.)" Id. at 302, 303.

The foregoing principles were cited in Lynch v. Chase, 55 Kan. 367 (1895), where the Court stated:

> "Where there is no term or tenure fixed by the constitution or the statute, or where the office is to be held during the pleasure of the appointing power, the power of removal is discretionary and without control; but it is well settled that where an officer is chosen for a definite term, and provision is made for his removal for cause, the causes for removal must be alleged, the party notified, and a hearing had. (The State v. Mitchell, 50 Kas. 289; Jacques v. Little, 51 id. 300; Lease v. Freeborn, 52 id. 750.) Where the power of removal is definite, and the limits of its exercise prescribed, it must be exercised in the manner and upon the conditions provided by law. Where the statute gives power of removal for cause, without specifying the causes, the power is necessarily of a discretionary nature, and the removing authority is the exclusive judge of the cause and the sufficiency thereof; but where the statute specifies the causes for removal and prescribes the procedure, it would seem that removals could not be made for other causes nor in any other method than that prescribed by statute." Id. at 370, 371.

See, also, The State, ex rel., v. Stewart, 90 Kan. 778 (1913).

The foregoing Kansas cases are in accord with the following statement of general authority:

> "[A]lthough it has been recognized that there are some exceptions to the rule, an officer is generally entitled to notice and a hearing in order that he may have an opportunity to defend, the statute not providing otherwise, where he holds for a definite term, whether he holds for a term of years, for life, or during good behavior, or, whether or not he holds for a definite term, where, under the law, he may not be dismissed except for cause or for specified causes. In either case, although the law conferring authority to remove does not expressly provide for notice, it is implied that notice was intended. The mere silence of the statute with respect to notice and hearing will not justify the removal of an officer whose term or tenure is declared by law, without knowledge of the charges and an opportunity to be heard." (Footnotes omitted.) (Emphasis added.) 63 Am.Jur.2d Public Officers and Employees §209, pp. 755, 756.

Accordingly, even though there is no contract right or property interest in a public office [Goodrich v. Mitchell, 68 Kan. 765 (1904)], a public officer who holds for a definite term, and who may not be removed except for specific causes, is entitled to notice and an opportunity for a hearing before removal from office. Thus, it is our opinion that, prior to revoking a notary public's appointment, the secretary of state must give the notary reasonable notice and provide an opportunity for a hearing. Although such hearing need not, in our judgment, be an adjudicative or trial-type hearing, we believe it should afford the notary an opportunity to respond to the charges being relied upon as grounds for removal.

It is to be noted that nearly all (if not all) of the grounds for revocation set forth in K.S.A. 1982 Supp. 53-118 involve questions of fact. This is particularly true of the question presented here, i.e., whether in fact the notaries took the oath of office. Hence, a hearing held prior to revocation of a notary's appointment should be designed to establish the presence or absence of the facts necessary to establish the particular grounds for revocation.

The final issue is whether a revocation of a notary's appointment can be made effective ab initio. We think not. In the first place, we do not think the statutes vest such authority in the secretary of state. As stated in Murray v. State Board of Regents, 194 Kan. 686, 689, 690 (1965):

> "Governmental agencies are creatures of the legislature, and can exercise only such powers as are expressly conferred by law and those necessary to make effective the powers expressly conferred. (State, ex rel., v. City of Kansas City, 181 Kan. 870, 317 P.2d 806; State, ex rel., v. City of Overland Park, 192 Kan. 654, 391 P.2d 128)."

Although Kansas courts have recognized the necessity for the implication of powers in some instances, Kansas cases, for the most part, have limited the determination of implied powers to situations where, without them, the governmental agency would have no way to carry out its express statutory powers. See, e.g., Edwards County Commissioners v. Simmons, 159 Kan. 41 (1944); Womer v. Aldridge, 155 Kan. 446 (1942); The State, ex rel., v. Wooster, 111 Kan. 830 (1922); The State, ex rel., v. Younkin, 108 Kan. 634 (1921); Young v. Regents of State University, 87 Kan. 239 (1912); and Brown County v. Barnett, 14 Kan. 627 (1875).

Here, it must be recognized that revoking a notary's appointment ab initio is tantamount to a declaration that the notary's appointment was void. We find no express statutory authority for such action, and we find no basis for concluding that such authority must be implied in order to carry out the powers expressly granted. In our judgment, K.S.A. 1982 Supp. 53-118 contemplates revocations having prospective application only. It provides no authority for declaring an appointment void from its inception.

Moreoever, under the facts you have presented, we think case law would preclude a finding that, from the time of their appointment, the notaries in question lacked lawful authority to perform notarial acts. Even if grounds exist for revoking these notaries' appointments, we believe that the notarial acts performed by them prior to revocation are not subject to collateral attack. Of pertinence to this point is State v. Miller, 222 Kan. 405 (1977), where the Court stated:

> "In Olathe Hospital Foundation, Inc. v. Extendicare, Inc. supra, the legal status of two members of an appeal panel, established under the provisions of Regional Health Programs Act, was challenged on the grounds that their terms had expired and they had not taken oaths of office prior to the hearing in question. Concerning the characteristics of a de facto officer we held:
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> "'A person who assumes and performs the duties of a public office under color of authority

> and is recognized and accepted as the rightful holder of the office by all who deal with him is a de facto officer, even though there may be defects in the manner of his appointment, or he was not eligible for the office, or he failed to conform to some condition precedent to assuming the office.' (Syl. 5.)
>
> "This court has consistently held that a challenge to the authority of a de facto officer must be made at the time he acts and that his actions are not subject to collateral attack. His authority may only be challenged in a direct proceeding brought by the state or one claiming the office. (Olathe Hospital Foundation, Inc. v. Extendicare, Inc., supra; Parvin v. Johnson, supra; and Briggs v. Voss, 73 Kan. 418, 85 Pac. 571.)" 222 Kan. at 414.

Of similar import, we also note the following statement from State v. Roberts, 130 Kan. 754 (1930):

> "The contention of the appellant may readily be conceded that the election of a judge pro tem. in this case was not within the provisions of the statute (R.S. 20-305), but whether properly and legally elected or not, he assumed the duties of the office, was accepted and reputed as being such officer, and was in possession of the office under a fair color or title thereto, which would make him a de facto officer regardless of the legality of his election.
>
> "'An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer of such a length of time, and under such circumstances of reputation or acquiesence by the public and public authorities, as to afford a presumption of appointment or election, and induce people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action . . .' (46 C.J. 1053.)

> "'The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party.' (46 C.J. 1060, 1061.)" Id. at 756, 757.

Even were it determined that the notaries public in question had not taken their oaths of office, we think there can be no question that they are de facto officers. They were issued certificates of appointment as notaries public, they held themselves out to the public as being duly appointed notaries and in availing themselves of the notaries' services, the public, without inquiry, clearly has presumed them to be validly appointed officers. In our judgment, therefore, the actions of these notaries as de facto officers are not subject to collateral attack.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

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