



0-4863

OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable C. H. Cavness  
State Auditor  
Austin, Texas

Dear Mr. Cavness:

Opinion No. 0-4863

Re: Form of State commission  
issued and to be issued  
to Notaries Public, under  
existing constitutional  
provisions.

You have submitted to this Department request for  
opinion concerning the form of commission to be issued to  
Notaries Public, under existing constitutional provisions.  
Attached to your letter is a blank form which you state is  
the one that is being used by the Secretary of State. Such  
form reads as follows:

"IN THE NAME AND BY THE AUTHORITY

===== T H E S T A T E O F T E X A S =====

TO ALL TO WHOM THESE PRESENTS SHALL COME - GREETING:

WHEREAS,

COUNTY, TEXAS

has been appointed by the Secretary of State of Texas a  
Notary Public in and for the above county.

Now, Therefore, I, Secretary of State, by  
virtue of the authority vested in me by The Constitution  
And Laws of This State, Do hereby commission the above  
named person a Notary Public in and for said county, giv-  
ing and granting the said officer all authority, power,  
rights, privileges and emoluments appertaining to said  
office for and during the term ending

JUNE 1, 19

Date issued

EXPIRATION DATE

\_\_\_\_\_  
Secretary of State."

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Water-marked or lithographed into the paper, on which this document is printed, is a facsimile of the great seal of the State of Texas. It is apparent from the wording of the commission that the Governor of Texas does not sign these commissions, but they are purportedly issued in the name of and by the authority of the Secretary of State.

You ask a number of questions concerning this commission. In the interest of brevity of this opinion, we are taking the liberty of rephrasing your questions, a number of which concern the same issue. What you desire to know, it appears to us, is expressed in the following interrogatories:

1. Must all commissions to State officers, including commissions to Notaries Public, be signed by the Governor and attested by the Secretary of State?

2. What is the character of seal which the Constitution of Texas requires should be affixed to all commissions issued by the Governor?

3. When should the seal be affixed?

4. Is a commission valid, (a) which is not signed by the Governor; or, (b) which bears a seal affixed other than the device prescribed by the Constitution to impress upon the document the insignia of the State; or, (c) where the seal of State is affixed to the commission before it is signed by the Governor?

5. If the commissions issued to Notaries Public on the form attached to your letter are invalid, does it follow that the official acts of such Notaries Public are invalid, and that fees have been illegally collected by them?

Article 4, Section 20, of the Texas Constitution, provides:

"All commissions shall be in the name and by the authority of the State of Texas, sealed with the State seal, signed by the Governor, and attested by the Secretary of State."

Prior to the amendment of 1840, Article 4, Section 20, of the Texas Constitution read as follows:

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"The Governor, by and with the advice and consent of two-thirds of the Senate, shall appoint a convenient number of Notaries Public for each county, who shall perform such duties as now are or may be prescribed by law."

In 1940 this Section of the Constitution was amended so that it now reads as follows:

"The Secretary of State shall appoint a convenient number of Notaries Public for each county who shall perform such duties as now are or may be prescribed by law. The qualifications of the Notaries Public shall be prescribed by law."

The sole effect of the amendment was to change the appointing power of Notaries Public from the Governor to the Secretary of State. No change was made or implied in the provision of the Constitution requiring all commissions to State officers, including Notaries Public, to be signed by the Governor and attested by the Secretary of State. The issuance of the commission is separate and distinct from the act of appointment. The authority of the Governor to commission does not depend upon whether he appoints. The Governor, for example, commissions officers elected by the people. The commission is simply evidence of the officer's appointment or election, and of his right to exercise the functions of the Office. Marbury v. Madison, 2 L. ed. 61. Under the Constitution, commissions to State officers, including Notaries Public, can be issued only by the Governor. It follows that a commission issued to such officers by any official other than the Governor is invalid.

The Constitution of the State of Texas prescribes the character of the seal which is to be affixed to commissions.

Article 4, Section 19, of the Constitution provides:

"There shall be a seal of the State which shall be kept by the Secretary, and used by him officially under the direction of the Governor. The seal of the State shall be a star of five points encircled by olive and

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live oak branches, and the words, 'The State of Texas'.

The word "seal" may have more than one meaning. For example, it may mean a device bearing a design so made, as by engraving, that it can impart an impression in relief upon a soft tenacious substance, as clay, wax or paper. On the other hand, it may signify the impression so made by the device. Webster's International Dictionary, Second Ed. (1940).

It is obvious from an examination of the language of Article 4, Section 19, that the word "seal" is used therein in the first sense as meaning the device by which the impression is transmitted. In this connection it is important to note that the section contemplates a single seal, requires that it be "kept" by the Secretary of State, and "used" by him. The words "kept" and "used" make it clear that the framers of the Constitution had in mind a mechanical device to be retained in the possession of the Secretary of State, and used by him to make an impression on the documents officially executed by the Governor of the State of Texas, to attest the Governor's signature and the authenticity of the document.

Since Article 4, Section 20, requires that all commissions shall be "sealed with the State seal", such commissions should bear a seal impressed thereon by the use of the device, which is to be retained in the possession of the Secretary of State, under the provisions of Article 4, Section 19. Any other character of seal does not comply with the constitutional requirements.

It is not contemplated by the constitutional provisions that the seal of the State shall be affixed prior to signature of the document by the Governor. The function of the seal is to attest or witness or establish the authenticity of the Governor's signature. Marbury v. Madison, cited supra, at p. 67. It is obvious that the Governor's signature can not be attested before he has affixed it to the instrument.

We have already noted that a commission is not valid if it is not signed by the Governor, under the provisions of Article 4, Section 20, of the Constitution. Of course, a commission which purports to have been issued by the Secretary of State rather than by the Governor is issued by an officer upon whom the Constitution does not confer authority to issue com-

missions, and is ineffective for any purpose.

Where the commission bears a seal affixed thereto other than by the device prescribed by the Constitution to impress upon the document the insignia of the State, the signature of the Governor is not authenticated as required by the Constitution, and such a commission, therefore, would not furnish proof of the officer's appointment and authority.

Where the seal of the State is affixed to the commission, the presumption is that the Secretary of State has properly discharged the duties of his office; in other words, the presumption is that the seal was affixed by him at the direction of the Governor, and after the Governor has signed the instrument. However, even if the fact be that the seal was affixed by the Secretary of State prior to the Governor's signature, this, while an irregularity, would not invalidate the commission. By far the safer and better practice, however, is for the Secretary of State to use the seal only in accordance with the constitutional requirement, that is, at the direction of the Governor, and after the Governor has affixed his signature.

Lastly, you are concerned, apparently, with the question whether, if the commissions issued to the Notaries Public on the form attached to your letter are invalid, does it follow that the official acts of such Notaries Public are invalid, and that fees have been illegally collected by them? It appears that the Notaries Public have actually been appointed by the Secretary of State, the lawful appointing power. As pointed out above, the commission is merely evidence of that appointment; the authority to act is derived from the appointment -- not from the commission. Marbury v. Madison, 2 L. ed. 61, at pp. 67 and 68. We are of the opinion, therefore, that the official acts of such Notaries Public are valid, though they have not been duly commissioned.

Article 3882, Revised Civil Statutes, 1925, provides as follows:

"No official who fails or refuses to take out a commission shall be entitled to collect or receive either from the State or from individuals any money as fees of office or compensation for official services. Neither the Comptroller,

commissioners court, county auditor nor any other person shall approve or pay any claim or account in favor of any such officer who has so failed or refused. The Secretary of State shall from time to time, as such commissions are issued by him, furnish a list thereof to each commissioners court, each county auditor and to the Comptroller, with the name of the county in which such officers reside. Each State, district, county and precinct officer is required to apply for and receive his commission."

This Article does not prohibit the duly appointed or elected official from acting as such, but prohibits him from collecting or receiving from the State or individuals money as fees of office or compensation for his services, if he has failed or refused to take out a commission. We do not think this statute applicable to the Notaries Public in this case. It is designed, in our opinion, to punish the official who is not commissioned through his own default or neglect. The language of the statute is that no official who fails or refuses to take out a commission shall be entitled to fees of office. Each of these words implies the existence of fault upon the part of the official. Under the circumstances of the instant situation, the failure of the Notaries Public to receive their commissions in proper form is not due to their fault or negligence, but to an erroneous interpretation of the law by the Secretary of State.

We are, therefore, of the opinion that the fees of office received by these Notaries Public have not been illegally collected.

Very truly yours

ATTORNEY GENERAL OF TEXAS

BY

*R. W. Fairchild*

R. W. FAIRCHILD.  
ASSISTANT

RWF-MH

APPROVED JAN 20, 1943

*Ernest B. Mann*

ATTORNEY GENERAL OF TEXAS

