

MAINE STATE LEGISLATURE

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May 8, 1923

To Hon. Percival P. Baxter, Governor of Maine
Re: Self-Appointment

Answering your question as to whether you have the legal right under our law to appoint yourself to the office of Notary Public and Justice of the Peace, I wish to say that in my opinion there is no authority for such appointment.

There is a phase of the law under which such an appointment might be considered legal and that is what is called executive construction. The construction of a statute by an executive officer is entitled to great weight in this state and will not be changed by the court unless clearly wrong, so that if the Governor should rule that he had power to appoint himself a Notary Public or Justice of the Peace, the court might and probably would refuse to declare it illegal, but as no necessity for such action appears, it would seem to be unwise to raise the issue. This position is sustained by the following cases:

N.Y. vs. New York City R. Co., 193 N.Y. 543; 86 N.E. Rep. 565.
Wyeth vs. Equalization State Bldg., 74 N.H. 552; 70 Atl.387.

In the united States and in most of the States of the Union, the constitution and laws provide for the appointment of officials and when the manner is provided by statute, that method should be followed. These statutes giving the power to Chief Executives to appoint officers seem to be based on the theory that all subordinate officers are subject to the direction of the superior appointing power. The authority for the above is found in:

29 Cyc., page 1369
Burton vs. Kennebec Co., 44 Me. 388
Opinion of Justices, 72 Me. 547

In all the States of the Union, the executive duties are distinguished from ministerial duties and reference is made to the leading case of Gledhill vs. The Governor, 25 N.J.L. 331; 17 Cyc.1579; 23 C.J. 982.

Executive power is also distinguished from judicial power and should be separately exercised according to the decisions in all the States of the Union and the courts of Maine have so held:

See Miller vs. State, 149 Inc. 607; 49 N.E. Rep. 894.

See also language of the court in re Charge to Grand Jury, 30 Fed. Cases 18,261, and cases cited in 23 Cyc. 1620.

I am, therefore, of the opinion that such an appointment is against the policy of the law in the various States of the Union as defined and set forth in the opinion of the court in the various cases above cited, but there is another and more binding reason for

the above opinion and that is found in the prohibition of the Constitution, Article V, Part First, Section 5 of the Constitution, which provides:

"No person holding any office or place under the United States, this state, or any other power, shall exercise the office of governor."

This constitutional provision in my opinion is broad enough to justify the conclusion that the Governor of the state is not eligible to hold any state office while he is serving as Governor.

I therefore advise you that Percival P. Baxter, as Governor, has no power to appoint Percival P. Baxter, the same person, to the office of Notary Public or Justice of the Peace, all of which is respectfully submitted.

Ransford W. Shaw
Attorney General

NOTE: On a separate sheet was the following, now in the folder on Office, Eligibility:

It is contrary to public policy to permit an office having the power to appoint to an office to exercise that power in his own interest by appointing himself.

Mecham on Public Officers, Sec. 112
Throop on Public Officers, Secs. 120 & 612-13
Fort Wayne vs. Rosenthal 75 Ind. 156
Waymire v. Powell, 105 Ind. 328
Commonwealth v. Douglass, 1 Binn (Penn.) 84
Ohio ex rel. Louthan v. Taylor, 12 Ohio St. 130