

# MAINE STATE LEGISLATURE

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JAMES E. TIERNEY  
ATTORNEY GENERAL



83-19

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, MAINE 04333

April 25, 1983

The Honorable Rodney S. Quinn  
Secretary of State  
State House  
Augusta, Maine 04333

Dear Secretary Quinn:

This will respond to the request of Deputy Secretary of State James S. Henderson for an opinion of this Department as to whether a Justice of the Superior Court may hold a commission as a "Justice of the Peace or Notary Public," and in that capacity solemnize a marriage. Specifically, you asked whether a Justice of the Superior Court whose commission as a justice of the peace expired in 1983, and whose commission was renewed and bears the title "Justice of the Peace or Notary Public," pursuant to 5 M.R.S.A. § 82 (Supp. 1982), is prohibited from accepting such commission, pursuant to Article VI, § 5 of the Maine Constitution, and therefore is ineligible to solemnize a marriage, pursuant to 19 M.R.S.A. § 121 (Supp. 1982). For the reasons set out below, it is the Opinion of this Department that a Justice of the Superior Court may accept a commission which bears the title "Justice of the Peace or Notary Public," and in that capacity may solemnize marriages.

APR 28 1983

I. HISTORY AND FUNCTIONS OF THE OFFICES OF JUSTICE OF THE PEACE AND NOTARY PUBLIC.

A. History of the Offices of Justice of the Peace and Notary Public.

It is difficult to understand completely the issue presented by your question in an historical vacuum. Both notaries public and justices of the peace have a long tradition in Maine history. At the time of the adoption of the Maine Constitution, justices of the peace were considered to be "judicial officers," and enjoyed certain statutory powers. See Bamford v. Melvin, 7 Me. 14, 17 (1830) (judicial powers of justices of the peace); R.S. chs. 116, 170 (1841) (same). Notaries public, on the other hand, were not judicial officers and possessed only limited powers, such as the authority to record and certify certain commercial transactions. See Me. Const. art. V, pt. 1, § 8 (distinguishing between "judicial officers" and "notaries"). See also R.S. ch. 44 (1841) (powers of a notary public). Thus, in the early days of the State's history, there were significant differences between the offices of notary public and Justice of the peace.

After the introduction of Maine's trial court system, see P.L. 1860, ch. 164, justices of the peace were deprived of most of their judicial functions. See 1871 Me. Att'y Gen. Ann. Rep. 6. In addition, the Legislature increasingly vested notaries public with more and more of the powers of justices of the peace. See, e.g., P.L. 1893, ch. 270, codified at R.S. ch. 34 (1903); Duncan v. Grant, 86 Me. 212 (1893) (both justices of the peace and notaries may administer oaths). Despite the historical differences as to their origins, then, notaries public and justices of the peace increasingly performed many of the same functions.

In 1980, the Joint Standing Committee on Audit and Program Review of the Legislature ("Committee") conducted a review of certain departments and agencies under the authority of the so-called "Maine Sunset Law," 3 M.R.S.A. § 501, et seq. (1979 & Supp. 1982) to determine where it might be possible to eliminate unnecessary or duplicative programs. Comparing the current functions of the offices of justices of the peace and notary public, the Committee reached the following conclusions:

These two offices have virtually the same authority in the State. For out-of-state transactions, however, the title "Notary Public" and/or the use of an official seal is more likely to be acceptable.

The Committee finds that maintaining these two offices is confusing and inconvenient to the public. In some cases, either may be used, and in other cases the notary's signature must be obtained.

The Committee recommends that this duplication be resolved by providing that future justices of the peace be appointed by the Secretary of State with all powers of notaries, and should be known officially as "Justice of the Peace/Notary Public". [sic] All other references to justices should be eliminated from the statutes. Notaries public would be continued to be appointed by the Secretary of State

The establishment of a single title (notary public) as the uniform requirement for official purposes would eliminate public confusion over this office.

Report of the Joint Standing Committee on Audit and Program Review on the Department of Transportation, Department of Public Safety, and the Office of the Secretary of State 36 (1980). Based upon this recommendation, the Legislature enacted, as part of a piece of "Sunset" legislation, appropriate amendments to the provisions of law governing the two offices. See generally P.L. 1981, ch. 456, pt. A.

The legislation removed all references to the "justice of the peace" from the statutes and substituted a provision that "[t]he Secretary of State shall appoint justices of the peace who for the purpose of their official duty shall bear the title 'Justice of the Peace or Notary Public.' They have all of the statutory power of a notary public and are subject to all statutory requirements and rules applying to notaries public." P.L. 1981, ch. 456, pt A, § 15, enacting, 5 M.R.S.A. § 82 (Supp. 1982). The section then proceeded to set down various procedural requirements for this appointment of notaries public without any reference to the title of "justice of the peace." In addition, the Legislature added a transition provision which provided that any person who was a justice of the peace on the

effective date of the legislation "shall continue . . . until the expiration of his term, and may have his commission renewed for one additional 7-year term, except that he shall be a notary public as provided in this Act. All subsequent renewals of justice of the peace commissions shall be made under Title 5, section 2." P.L. 1981, ch. 456, pt. A, § 127(2).

B. Function of the Offices of Justice of the Peace and Notary Public.

The Legislature's apparent intention, then, in enacting P.L. 1981, ch. 456, was to abolish the office of justice of the peace in its entirety and to merge its functions with those of a notary public. This action was taken because it was generally believed that the offices of justice of the peace and notary public had become virtually identical, see Part I-A supra, but there continued to be certain differences between the two offices in 1981. Although notaries public were statutorily authorized to perform all of the functions of a justice of the peace, 4 M.R.S.A. § 953 (1979), amended by P.L. 1981, ch. 456, pt. A, § 8, they also were statutorily authorized to perform certain commercial functions that could not be performed by justices of the peace.<sup>1/</sup> These historical differences must be considered when addressing the question of whether a Justice of the Superior Court, who formerly was a justice of the peace, may renew his commission, which is entitled "Justice of the Peace or Notary Public."

II. CONSTITUTIONALITY OF A JUSTICE OF THE SUPERIOR COURT HOLDING A COMMISSION AS A "JUSTICE OF THE PEACE OR NOTARY PUBLIC."

The Maine Constitution provides that "[n]o Justice of the Supreme Judicial Court or any other court shall hold office

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<sup>1/</sup> See 4 M.R.S.A. § 952 (1979) (entry on record of protests of all losses, averages and other matters as "by mercantile usage" appertain to his office); 4 M.R.S.A. § 953 (1979) (presentation of negotiable instruments for payment and accomplish "all acts which may be done by notaries public according to the usages of merchants"); 4 M.R.S.A. § 954 (1979) (protest for nonpayment of negotiable instruments of banks of which the notary is a stockholder, director, officer or employee).

under the United States or any other state, or under this State,<sup>2/</sup> except as justice of the peace or as member of the Judicial Council." Me.Const. art. VI, § 5. The question presented is whether a Justice of the Superior Court would be prohibited by this provision from accepting a commission as a "Justice of the Peace or Notary Public."

Although the Constitution does not authorize a justice of any court to accept a commission as a notary public, it specifically permits him or her to accept a commission as a justice of the peace. See id. Furthermore, the Secretary of State is still authorized to appoint justices of the peace, see 5 M.R.S.A. § 82 (Supp. 1982), and to renew existing justice of the peace commissions, see P.L. 1981, ch. 456, pt. A, § 127(2).<sup>3/</sup> Because the Secretary of State continues to have authority to appoint justices of the peace, it should be concluded that that office continues to exist. Thus, it is the Opinion of this Department, that a Justice of the Superior Court may renew his justice of the peace commission, which is entitled "Justice of the Peace or Notary public."

This conclusion is consistent with the apparent purpose of the constitutional prohibition. The purpose of Article VI, section 5, of the Maine Constitution was to prevent members of the judiciary from holding any other public office so as to insure their integrity and impartiality in adjudicating the disputes which come before them. Because justices of the peace performed judicial functions, see, e.g., Bamford v. Melvin, 7 Me. 14, 17 (1830), they were exempt from the constitutional prohibition. Although justices of the peace were deprived of many of their judicial functions in the late nineteenth

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<sup>2/</sup> It is assumed that the office of "Justice of the Peace or Notary Public," established by 5 M.R.S.A. § 82, is an "office under this State" within the meaning of the constitutional provision.

<sup>3/</sup> Although the transition clause that enables the Secretary of State to renew justice of the peace commissions also contains the language that "he shall be a notary public as provided in this Act," id., that does not alter the conclusion. The power to act as a notary public is not the same as holding the office of notary public.

century, see Part I-A supra, their statutorily authorized powers in 1981 continued to be judicial in nature.<sup>4/</sup> Thus, the issue is whether the merger of the office of notary public, which historically performed commercial functions, see Part I-B supra, with the office of justice of the peace, which historically performed judicial functions, see note 4 supra, would undermine the appearance of integrity and impartiality of a Justice of the Superior Court who also holds the commission of "Justice of the Peace or Notary Public" so as to violate the Constitution. Applying a functional analysis of the historical powers of notaries public and justices of the peace, this Department concludes that a Justice of the Superior Court who holds the commission of "Justice of the Peace or Notary Public" and performs only those functions traditionally performed by justices of the peace would not violate the constitutional prohibition against holding office other than justice of the

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<sup>4/</sup> Justices of the peace, prior to the 1981 change, were empowered to: administer oaths of various kinds, 4 M.R.S.A. § 169, 202 (1979); 13 M.R.S.A. § 2732 (1981); 14 M.R.S.A. §§ 2002, 2704, 6512 (1980); 21 M.R.S.A. §§ 104, 445, 494, 1254 (Supp. 1982); 30 M.R.S.A. § 4154 (1978); issue subpoenas, 16 M.R.S.A. § 101 (1983); issue process for arrest at the order of the District Court, 15 M.R.S.A. § 707 (1980); admit certain persons to bail, 14 M.R.S.A. § 5524 (1980); commit to jail tax collectors who refuse to account for their collections, 36 M.R.S.A. § 898 (1978); select appraisers for forfeited property, 14 M.R.S.A. §§ 7153 (1980) (§ 7154 not amended in 1981); appraise the value of redeemed real estate, 14 M.R.S.A. § 2102 (1980); partition time for the occupation of religious houses, 13 M.R.S.A. §§ 3111 - 3115 (1981); order the cessation of the harassment of any person, 17-A M.R.S.A. § 506-A (1983); acknowledge various documents, 14 M.R.S.A. § 1151 (1980) (not amended in 1981); 19 M.R.S.A. § 532 (1981); 33 M.R.S.A. § 203 (1978); issue warrants calling meetings of various types, 13 M.R.S.A. §§ 2691, 2861, 2904, 3022, 3107, 3110 (1981); 23 M.R.S.A. § 3101 (1980) (not amended in 1981); 30 M.R.S.A. § 2051 (1978); 35 M.R.S.A. § 3201 (1978) (not amended in 1981); 38 M.R.S.A. § 851 (1978) (not amended in 1981); take the testimony of witnesses to the execution of deeds by grantors refusing to do so, and to certify the execution, 33 M.R.S.A. §§ 304, 305 (1979); as well as solemnize marriages, the subject of the present question, 19 M.R.S.A. § 121 (1981). Except as otherwise noted, all of the above citations were amended by P.L. 1981, c. 456 to change the references to "justice of the peace" therein to "notary public."

peace or member of the Judicial Council.<sup>5/</sup>

There is no legislative history to suggest that the Legislature, in merging the functions of the justice of the peace with those of the notary public, intended to prevent Justices of the Superior Court from continuing to discharge the traditional functions of justice of the peace. On the contrary, in creating the new office of "Justice of the Peace or Notary Public," the Legislature intended to eliminate only confusion and inconvenience. See Committee Report, supra 4-5 at 36. Applying the relevant rules of statutory construction,<sup>6/</sup> it should be concluded that the Legislature intended only to streamline and simplify the offices of notary public and justice of the peace, not repeal the authority of Justices of the Superior Court to perform the functions of a justice of the peace. Thus, the best way to interpret the Legislature's action with regard to Justices of the Superior Court, in light of the constitutional provision, is to find that it intended to allow the Justices to hold the newly created office and to discharge its functions to the extent that is constitutionally permissible. Such a reading would best effectuate the Legislature's intent without doing violence to the policy behind the constitutional provision.

### III. POWER OF JUSTICES OF THE SUPERIOR COURT TO SOLEMNIZE MARRIAGES.

The only question which remains is whether a Justice of the Superior Court who holds a commission as a "Justice of the

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<sup>5/</sup> Compare note 1 supra (powers of notary public) with note 4 supra (powers of justice of the peace). This Opinion addresses only the constitutional question. Although it might also violate the Code of Judicial Conduct for a Justice of the Superior Court to perform functions traditionally performed by a notary public, this Department is not authorized to offer an opinion on that question. Cf. 5 M.R.S.A. § 195 (1979) (authority of the Attorney General to offer opinions on issues of law).

<sup>6/</sup> Cf. State v. Rand, 430 A.2d 808, 817 (Me. 1981) (construe statutes to avoid absurd or anomalous results); State v. Davenport, 326 A.2d 1, 5-6 (Me. 1974) (construe statutes to avoid findings of unconstitutionality); State v. Toplin, 247 A.2d 919, 922 (Me. 1968) (construe statutes to avoid repeal by implication).

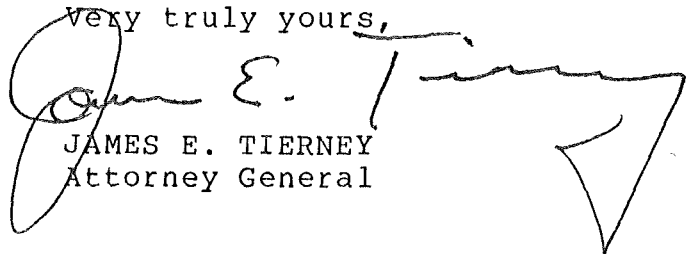


Peace or Notary Public" may solemnize marriages. 7/ The power of a justice of the peace to solemnize marriages is authorized specifically by statute, see 19 M.R.S.A. § 121 (Supp. 1982). It is also a traditional function of a justice of the peace. See note 4 supra. Therefore, it is the Opinion of this Department that a Justice of the Superior Court who also is a "Justice of the Peace or Notary Public" may solemnize marriages in this State. 8/

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I hope that you find this information helpful. If we may be of any further assistance in this matter, please do not hesitate to contact us.

Very truly yours,

  
JAMES E. TIERNEY  
Attorney General

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7/ In light of the conclusion of this Opinion, it is unnecessary to reach the question of whether a Justice of the Superior Court could solemnize marriages as an attorney at law "duly admitted and eligible to practice in the courts of this State" who by statute has "all the powers of notaries public and [is] authorized to do all of the acts which may be done by notaries public with the same effect thereof. . . . " 4 M.R.S.A. § 1056 (Supp. 1982). While Justices of the Superior Court are invariably attorneys at law "duly admitted," it is not clear whether they are "eligible to practice" in view of the prohibition against such practice contained in the Maine Code of Judicial Conduct. See Maine Code of Jud. Conduct Canon 5(F). Cf. note 5 supra (authority of Attorney General to issue opinions).

8/ Applying the same analysis, it should also be concluded that a justice of any court holding the commission of "Justice of the Peace or Notary Public" may also discharge any other functions listed in note 4, supra, which was formerly within the power of a justice of the peace, so long as such function remains within the power of the new office. As to any other function, including those listed in note 1 supra, this Department expresses no opinion.