

OFFICERS: Prosecuting Attorney's and Surveyor's
PROSECUTING ATTORNEY: office incompatible and cannot both
SURVEYOR: be held by same person at the same time.

September 16, 1942

Hon. Alfred F. Moeller
Ste. Genevieve, Missouri



Dear Sir:

This will acknowledge receipt of your letter of Sept. 10, 1942, in which you request an opinion as follows:

"I request an opinion from your office as to whether the offices of County Surveyor and Prosecuting Attorney can be held by one person at the same time."

In order to determine whether one person may hold two offices at the same time it is first necessary to examine the statutes and the Constitution. An examination of the statutes pertaining to the offices of Prosecuting Attorney and County Surveyor reveals no direct statutory prohibition against either of these offices being filled by a person who holds another office. Section 18 of Article IX of the Constitution might be considered as prohibiting such dual office holding. Said section reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

This section was held only to apply to counties and cities of over 200,000 inhabitants in the case of Nickelson v. City

of Hardin, 282 Mo. 198, l. c. 203. There is neither a statutory nor constitutional prohibition against the offices of Prosecuting Attorney and County Surveyor being filled in the County of Ste. Genevieve, for the county has a population of 10,905 by the 1940 Census.

In the case of State ex rel. Walker v. Bus, 135 Mo. 325, dual office holding is discussed at length. There the question was whether a person could be a deputy sheriff and a school director at the same time. From this case the following quotation is taken, at l. c. 338:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result

in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'

"Sheriffs are given power, and it is made their duty, to preserve the peace, arrest and commit to jail all felons and traitors, execute all process and attend upon courts of record.

"The board of directors of the St. Louis public schools has charge, control and management of the public schools and of all the property appropriated to the use of the public schools within said city.

"We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. State ex rel. v. Goff, 15 R. I. 507."

The law remains the same today. Where there is no statutory or constitutional prohibition, one person may hold more than one office at the same time if the duties of the offices are not incompatible.

This brings us to a consideration of the powers and duties of the Prosecuting Attorney and the County Surveyor.

The duties of the Prosecuting Attorney are set out in Article 2, Chapter 85, R. S. Mo. 1939, Section 12942 and Section 12944.

Section 12942 reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 12944 reads as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Further, Section 12829, R. S. Mo. 1939, makes it the duty of the Prosecuting Attorney to bring removal proceedings against officers who are guilty of conduct which would justify a removal proceeding.

The duties of the Surveyor are found in Chapter 90, R. S. Mo. 1939. By Section 13192 of this chapter the Surveyor is required to give bond for the performance of his duties and the turning over of the records of the office at the expiration of his term.

Section 13198 requires the Surveyor to execute all orders directed to him by courts of record for the surveying of land, the title to which is in dispute before the court making the order.

Section 13199 makes it the Surveyor's duty to survey within ten days any tract of land in the county at the expense of the person demanding the survey, if the legal fees are tendered and the Surveyor is not engaged in executing previous orders.

Also, by Section 11001 the Surveyor is made a member of the County Board of Equalization.

Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. State ex rel. Hilton v. Sword, 196 N. W. 467.

The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law. Mechem, Public Officers, Sec. 422, l. c. p. 269. Throop's Public Officers contains similar definition of incompatibility.

It has been held in the case of State ex inf. McKittrick, v. Wymore, 345 Mo. 169, wherein the duties of a Prosecuting Attorney were being discussed, that it is the Prosecutor's duty to institute actions against persons whom he knows, or has reason to believe, have committed crimes. By like reasoning, it would be his duty to bring actions against persons who were failing to perform official duties.

Inasmuch as the Prosecuting Attorney has the duty of enforcing the laws in the county, it would appear that he has some supervisory control over the Surveyor and that the two offices are incompatible. Contrary to this view it may be argued that there is only a possibility of the Surveyor doing any wrongful acts or neglecting his duties to such an extent as to require action by the Prosecuting Attorney, and that, so long as the Surveyor properly discharges his duties there is no conflict between the duties of the two offices, nor supervision of one by the other. And that, the mere possibility

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is so remote as to not create any incompatibility between the two offices. But the writer is unable to see how a Prosecuting Attorney can discharge the duties of his office with fidelity, propriety and sincerity and at the same time be functioning in some other official capacity.

CONCLUSION

It is, therefore, the conclusion of the writer that the offices of County Surveyor and Prosecuting Attorney cannot be held by the same person at the same time.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General of Missouri

WOJ:CP