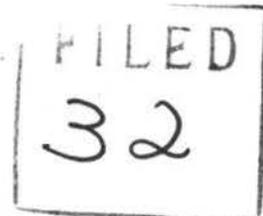


SHERIFFS: Sheriffs in a third or fourth class
PARTITION: county may not be appointed to the
COMPENSATION: office of special commissioner pur-
CONFLICT OF INTEREST: suant to Section 528.540, RSMo 1969,
relating to partitions; a sheriff in
the above counties may be appointed as one of the commissioners
under Section 528.200, RSMo 1969; a sheriff appointed to the
position of commissioner under Section 528.200, RSMo 1969, may
retain the fees he receives as compensation for his service in
that position, and the wife of a sheriff may be appointed to
either the position of commissioner or special commissioner and
may retain the fees that she receives therefor.

OPINION NO. 32

January 13, 1975

Honorable John D. Ashcroft
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Ashcroft:

This is in response to your request for an official opinion on the following questions:

- "1. May a sheriff in a third or fourth class county be appointed a special commissioner pursuant to section 528.540 RSMo 1969 in a private capacity apart from his capacity as sheriff to perform duties with respect to partition suits.
- "2. May a sheriff in the above mentioned counties be selected as one of the commissioners pursuant to section 528.200 RSMo 1969?
- "3. If it is permissible to appoint a sheriff to either of these positions, are his fees accountable to the county or does he act in a 'private capacity' other than as sheriff such that he may retain the fees?

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"4. Would the appointment of the wife of the sheriff as one of the commissioners or a special commissioner, avoid the necessity of accounting for such fees?"

Sections 528.370, 528.380, 528.400, 528.410, 528.430, 528.440, 528.450, 528.460, 528.470, 528.590, and 528.600, RSMo 1969, set out the duties and responsibilities of a sheriff with regard to a partition sale.

Section 528.540, RSMo, provides as follows:

"A majority of the commissioners, in all cases, shall have power to act; and all sales made under the foregoing provisions shall be made by the sheriff of the county in which such lands, tenements or hereditaments, or any portion of them, may be situate, or by a special commissioner appointed by the court for that purpose."

Section 528.580, RSMo 1969, provides that:

"Every special commissioner appointed under the provisions of this chapter shall perform the same duties, and with like effect, as are enjoined by this chapter upon sheriffs; and in the performance of said duties he shall be governed by the same rules applicable to sheriffs in like cases, and he shall receive such compensation for his services as may in each case be fixed by the court."

We feel that this section, speaking in terms of duties "enjoined" upon sheriffs, indicates that these duties are placed primarily upon the sheriff. As a corollary, we feel that ordinarily a special commissioner is appointed only when a sheriff is, for some reason, unable to perform these duties: The sheriff may have some interest in the case, he may be too pressed with other duties, or the sale may be of such complexity that a sheriff would not be able to devote the necessary attention to it. An example of the latter appears in Haley v. Horwitz, 290 S.W.2d 414 (St.L.Ct.App. 1956), in which the court dealt with the reasonableness of the fee granted to a special commissioner.

". . . The additional work done was no more than should be reasonably expected

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from one who expects to be paid a fee in excess of that allowed to the sheriff for making a sale. Otherwise, there would be no point in seeking the service of a special commissioner. . . ." Id. at 420.

In addition, the compensation of a sheriff is fixed by Section 528.610, RSMo 1969, and this fee is required by Sections 57.407.3 and 57.409.3, RSMo 1969, to be deposited into the county treasury in third and fourth class counties. See Opinion No. 108, Holman, 1-9-70. If a sheriff were allowed to be appointed as a special commissioner, this might allow him not only to retain the fees but to receive a fee in excess of the limit fixed by Section 528.610.

We feel, therefore, that the legislative scheme set out in Chapter 528 intends that a special commissioner is to be appointed in lieu of the sheriff and that, as a result, a sheriff may not be appointed to this position. If a sheriff is able to and does conduct a partition sale, he does so in his official capacity and the provisions as to the limit and disposition of fees for performance of this duty apply.

Your second question inquires whether it is permissible to appoint a sheriff to the commission created under Section 528.200, RSMo 1969. This section reads as follows:

"Whenever any judgment of partition shall be rendered, the court shall appoint not less than three nor more than five competent persons as commissioners, residents of the county, or any of the counties in which the premises to be divided shall be situated, to admeasure and set off the dower, if any, and to make the partition so adjudged, according to the respective rights and interests of the parties, as the same were ascertained and determined by the court, and shall designate the part or share, if any, which shall remain undivided."

It is a settled principle of law that unless the Constitution, a statute, or the common law prohibits the holding of two public offices by one individual, an individual may hold two offices simultaneously. United States v. Saunders, 120 U.S. 126 (1887); State ex rel. Zevely v. Hackmann, 254 S.W. 53 (Mo. Banc 1923); State ex rel. Koehler v. Bulger, 233 S.W. 486 (Mo. Banc 1921); State ex rel. Walker v. Bus, 36 S.W. 636 (Mo. Banc 1896);

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and Bruce v. City of St. Louis, 217 S.W.2d 744 (St.L.Ct.App. 1949). Since there are no constitutional or statutory prohibitions in Missouri against the same person serving as sheriff and as a commissioner under Section 528.200, RSMo 1969, the principal issue posed is whether the two positions are incompatible under the common law.

The common law rule is stated in the case of State ex rel. Walker v. Bus, supra, as follows:

". . . 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 others, is required to deal with, control, or assist him. It was said by Judge Folger (People v. Green, 58 N. Y. 295): '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 towards the incumbent of the other. . . . 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.' . . ." Id. at 639-640.

It is our opinion that the positions of sheriff and commissioner are not incompatible in light of this test. The commission, although it is its duty to determine if division of the land is impractical, does not exercise any supervisory power over the sheriff in making the sale which is the result of that determination. The circuit court must first approve the report of the commission,

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and it is the court then who orders the sheriff to make the sale. Section 528.340, RSMo 1969. The sheriff upon making the sale reports to the court. Section 528.540, RSMo 1969. Thus, it is the court rather than the commission which supervises the sale. We conclude that these offices are not incompatible and that a sheriff may be appointed to a commission under Section 528.200, RSMo 1969.

Your third question relates to the disposition of fees paid to the sheriff if it is determined that a sheriff may hold the positions of commissioner or special commissioner. Since we have concluded that a sheriff may hold only the position of commissioner, we need determine only the disposition of those fees. This involves an interpretation of Sections 57.407.3 and 57.409.3, RSMo 1969.

Paragraph 3 of Section 57.407 states:

"In counties of the third class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

Paragraph 3 of Section 57.409 states:

"In counties of the fourth class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

It should be noted that the duties of conducting a partition sale are imposed upon the sheriff by statute. There is no comparable provision which imposes upon him duties of a commissioner. The Missouri Supreme Court in determining whether a deputy constable was acting in an official capacity adopted the following test. "''. . . Would he have acted in the particular instance, if he were not clothed with his official character, or would he have so acted if he were not an officer? . . .'" State ex rel. Kaercher v. Roth, 49 S.W.2d 109, 110-111 (Mo. 1932). In the present context, whether an individual serves on the commission is in no way related to the holding of the office of sheriff. We feel, then, that in serving on the commission, a sheriff is not

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acting in his official capacity. Further, it is our opinion that the above sections relating to disposition of a sheriff's fees refer only to fees accruing to the office of sheriff as compensation for performance of duties imposed upon the sheriff. If a sheriff is not acting in an official capacity, the fees could be retained by him and not deposited in the county treasury. See Opinion No. 304, Holman, 5-7-70. Therefore, the sheriff may retain the fees collected by him as compensation for his service as a commissioner.

With regard to your final question, it is our opinion that so long as the wife of the sheriff is competent to be appointed to the positions of commissioner or special commissioner, her marriage to the sheriff would not prevent her from being so appointed. Furthermore, fees received by her relating to the performance of her duties in these positions should be treated as in the case of any other private individual and should not be deposited in the county treasury.

CONCLUSION

It is our opinion that sheriffs in a third or fourth class county may not be appointed to the office of special commissioner pursuant to Section 528.540, RSMo 1969, relating to partitions; that a sheriff in the above counties may be appointed as one of the commissioners under Section 528.200, RSMo 1969; that a sheriff appointed to the position of commissioner under Section 528.200, RSMo 1969, may retain the fees he receives as compensation for his service in that position, and that the wife of a sheriff may be appointed to either the position of commissioner or special commissioner and may retain the fees that she receives therefor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Presson.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 108
1-9-70, Holman

Op. No. 304
5-7-70, Holman