

OFFICERS: Probate Judge may be a notary public at the same time as the duties are not incompatible.

October 15, 1941

Honorable Jos. V. Pitts  
Judge and ex-officio Clerk  
Douglas County  
Ava, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of September 22nd, 1941, which is as follows:

"Since 1902 - Oct. I have held a Notary Public's Commission - Renewing continuously down through the years.

"On July 18th. Our Honorable Governor honored me with the Appointment to Office of Probate Judge for Douglas Co. Mo.

"Question: Is there any conflict between the appointments?

"Should I surrender the Commission as N.P.?

"I have known our Prosecuting Attys. to hold a N.P. Commission but they might have been out of line.

"If in your opinion I should surrender my N.P. Commission, O.K. I desire to tract the Laws in all respects."

In a careful research we fail to find any statute or any section under the Constitution, which prohibits a person

from holding the office of probate judge at the same time that he holds a commission as a notary public. It has been repeatedly held that the State Constitution is not a grant but a limitation on legislative power, so the Legislature may enact any law not expressly or impliedly prohibited by the Federal or State Constitution. It was so held in the case of State ex rel. Gaines vs. Canada, 113 S. W. (2d) 783, 342 Mo. 121. And, since the holding by a probate judge of a notary commission is not prohibited either by the Constitution or statutes the same rule applies as applies in the common law. The Constitution does prohibit a state officer holding an office under the United States, as it appears in Section 4, Article XIV of the Constitution of Missouri. The Constitution of Missouri also prohibits, in counties or cities having more than 200,000 inhabitants, the holding, by anyone, of a state office and an office in any county, city or other municipality. This is set out in Section 18, Article IX of the Constitution of Missouri, which also specifically provides that the section shall not apply to notaries public. This section is not applicable to Douglas County.

After a careful research we further do not find any statute preventing a probate judge from holding a notary public commission. Since there is no constitutional or statutory prohibition under the Constitution or the statutes preventing a person from holding the office of probate judge and at the same time holding a notary public commission, we must refer to the common law. In the case of State ex rel. Walker, Attorney-General vs. Bus, 135 Mo. 325, which was passed upon by the Supreme Court of this State June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices, or a State office and a county office, should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of School Director of the City of St. Louis. In that case, at page 338, in setting out the rule of law as to whether or not any two positions are incompatible, the court stated as follows:

"V. 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.'"

The case of State ex rel. Walker, Attorney-General vs. Bus, supra, was followed in the case of State ex rel. Langford vs. Kansas City, 261 S. W. 115, and in that case the court held that the office of deputy sheriff was not incompatible with the office of City Clerk. In paragraph one of the opinion the court said:

"II. The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S. W. 1159."

In that case the court, at page 116, further said:

"In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held

that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S. W. 639):

"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."

Also, in the case of State ex rel. vs. Lusk, 48 Mo. 242, the Supreme Court of this State held that the office of clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was one originating in the Circuit Court of Cole County, Missouri.

Since the matter set out in your request must be considered according to the common law, which results in the fact that the ruling must be made in accordance with the facts in each separate case, the question is whether or not the duties of a probate judge are incompatible with the duties of a notary public. We are holding that the duties of the probate judge and that of a notary public are not antagonistic and in

no way are their duties inconsistent.

CONCLUSION

In view of the above authorities it is the opinion of this department that since the duties of a probate judge and the duties of a notary public are not incompatible and are not inconsistent, a person can hold the office of probate judge and that of a notary public at the same time.

Respectfully submitted

W. J. BURKE  
Assistant Attorney-General

APPROVED:

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VANE C. THURLO  
(Acting) Attorney-General

WJB:CP