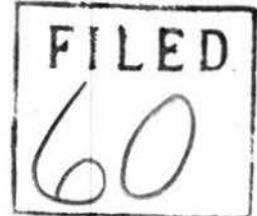


OFFICERS: Deputy County Tax Collector may/be appointed ^{not} Trustee for purchases of lands and lots under Senate Bill No. 311, 60th General Assembly.

August 1, 1939.

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Monett, Missouri



Dear Mr. Medlin:

I desire to acknowledge your letter of July 28, 1939, which is as follows:

"Mr. Elbert Terry is deputy County Collector of this county. He asked me this morning if he would be allowed to act as agent or trustee for the County Court in purchasing properties offered for sale the third time for taxes while holding the position as deputy collector.

"As you know under Senate Bill No. 311 which passed during the last session of the Legislature the County Court has the power to purchase properties offered for sale the third time.

"What is your opinion as to Mr. Terry acting as their agent while filling the position as deputy collector."

Section 9883 R. S. Mo. 1929 is as follows:

"The offices of sheriff and collector shall be distinct and separate offices

in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

Section 9896 R. S. Mo. 1929 is as follows:

"Collectors may appoint deputies, by an instrument in writing, duly signed, and may also revoke any such appointment at their pleasure, and may require bonds or other securities from such deputies to secure themselves; and each such deputy shall have like authority, in every respect, to collect the taxes levied or assessed within the portion of the county, town, district or city assigned to him, which, by this chapter, is vested in the collector himself; but each collector shall, in every respect, be responsible to the state, county, towns, cities, districts and individuals, companies, corporations, as the case may be, for all moneys collected, and for every act done by any of his deputies whilst acting as such, and for any omission of duty of such deputy. Any bond or security taken from a deputy by a collector, pursuant to this chapter, shall be available to such collector, his representatives and sureties, to indemnify them for any loss or damage accruing from any act of such deputy."

Section 9953b of Senate Bill No. 311, passed by the 60th General Assembly, is, in part, as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a

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is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. * * * Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the Collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the Collector. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees. Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots."

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In State ex rel. against Ausk, 48 Mo. 242, the Supreme Court held that one person could at the same time occupy the office of the clerk of the Circuit Court and also clerk of the County Court, saying that the incompatibility of the two offices was not recognized in a legal sense:

"Inasmuch as in one or even in both of the courts, the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible."

In State ex rel. against Bus, 135 Mo. 325, (en banc), the court held that a person may hold the office of school director and constable at the same time in the City of St. Louis, and said at page 338:

"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."

At page 339, the court, quoting from another case, said:

"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."

"We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices,

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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."

A person cannot hold two offices if such be incompatible. In 46 Corpus Juris, p. 941, Sec. 46, the following is said:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of the two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

The purpose of Section 9953b, supra, is to protect the parties interested in the proceeds of general taxes from loss by the discretionary bidding of a trustee, up to the total amount of taxes, penalty, interest and costs. The Bill provides that the trustee is to be appointed by the County Court and a fee fixed by such court which shall not exceed 10% of the price for which such lands are sold by the trustee.

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The collector may appoint a deputy and revoke such appointment at his pleasure and such deputy shall have like authority, in every respect to collect the taxes. The Collector and his deputy are statutory officers.

The deputy collector is the alter ego of the collector whose duty it is to sell lands and lots for taxes. Therefore the appointment of such deputy as trustee might, in some instances, make him seller and buyer of such property with discretionary right to make the purchase price not to exceed the total taxes, penalty, interest and costs or make no bid. He could, at a third sale, as such trustee, bid no more than costs and thereby cause loss to the tax creditors.

The right of selling and buying being vested in the same authority would undoubtedly create a condition where "they must, per se, have the right to interfere, one with the other" and they are therefore incompatible. Also there is always the probability of the interest of seller and buyer coming into conflict or antagonism - which is one of the tests of incompatibility.

Under the provisions of said statute the trustee, after purchasing the land sold for taxes, thereupon again becomes seller, and upon a percentage basis. All of the above powers and rights being vested in one person would surely place him sooner or later, where he must represent different interests which would be adverse and antagonistic.

CONCLUSION

Therefore, it is the opinion of this department that a deputy county tax collector may not be appointed trustee for the purpose of purchasing land and lots and selling the same as such trustee under the provisions of Senate Bill No. 311, 60th General Assembly of Missouri.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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