

OFFICERS:--Under Section 4 of Article XIV of the Constitution of Missouri, a person cannot hold office under the United States and under the State of Missouri, and the acceptance of an office under the United States would vacate the office of Probate Judge.

September 13, 1934.



Mr. Nat B. Rieger,
Prosecuting Attorney,
Kirksville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would appreciate an official opinion of your office as to whether or not a person holding the office of Judge of the Probate Court in Missouri is privileged to and can legally be appointed Conciliation Commissioner, under and as provided in the new amendment to the Federal Bankruptcy Act. As I understand it, a Conciliation Commissioner is to be appointed in each county to, in a measure, represent a bankrupt's estate and the bankrupt's creditors and is to receive a fee for his services.

"The question is, is this such a dual holding of offices as might vacate his office as Probate Judge."

Section 4 of Article XIV of the Constitution of Missouri provides as follows:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

It is obvious from what is stated in your letter that the person appointed Conciliation Commissioner under the Federal Bankruptcy Act is holding an office of the United States. He receives fees for his services, which makes it an office for profit. By accepting that appointment of Conciliation Commissioner the person, therefore, becomes an office-holder for profit under the United States. The general rule is that where a person holding a public office accepts another public office the acceptance of the second office will be treated as an automatic resignation of the first. The rule is laid down in State ex rel. vs. Bus, 135 Mo. 325, 330 where it is said:

"The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first."

"Where the holding of two offices by the same person, at the same time, is forbidden by the constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. In such case, the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal; it is made so in one case by the policy of the law, and in the other by absolute law. In either case the law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied."

In view of the foregoing constitutional provision and the above case, we are of the opinion that if a Probate Judge is appointed Conciliation Commissioner under the Bankruptcy Act he is holding an office for profit under the United States; that by the acceptance of the second office he automatically resigns from the first. Such being true, the acceptance of the appointment of Conciliation Commissioner would vacate his office as Probate Judge.

Very truly yours,

FRANK W. HAYES,
Assistant Attorney General.

APPROVED:

(Acting)
Attorney General.

FWH:MS.