

OFFICERS: Right to be both Judge of Probate and Justice of the Peace.

2-17

February 8, 1935.

Hon. David E. Impey,
Prosecuting Attorney,
Houston, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of January 16, 1935, such request being in the following terms:

"The Prosecuting Attorney for Texas County requests the opinion of the Attorney General upon the following question:

(1). May one, being a justice of the peace, who has been elected and qualified and serving as Judge of Probate of his county, continue lawfully to act as justice of the peace?

(2). May one, being Judge of Probate of his county, run for and, if elected, serve as justice of the peace of the township of his residence?"

"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

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'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.' " State ex rel. Walker v. Bus, 135 Mo. 325, 333, 36 S. W. 636.

An examination of the statutes relating to probate judges and justices of the peace has revealed nothing which would make it incompatible or improper for the same person to hold both offices. The Constitution of Missouri, Article IX, Section 13, which prohibits in certain instances the holding of two offices by the same person, expressly excepts justices of the peace from its provisions, thus indicating that a justice of the peace is contemplated as not being necessarily confined to holding only that office. As to probate judges, R. S. Mo. 1929, Section 2053, provides that "the judge of probate, if otherwise qualified, may practice as an attorney and counselor at law in any of the courts of this state, except his own; * * *", thus indicating that a probate judge is not required to give all of his time to the duties of his office, but is entitled to function in other capacities.

In conclusion, it is our opinion that a justice of the peace who has been elected and qualified as judge of probate, could lawfully continue to act as justice of the peace, or, while holding the office of judge of probate, could be a candidate for the office of justice of the peace, and if elected, could legally serve as justice of the peace, while continuing to hold the office of judge of probate.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General