OFFICERS: County judge cannot be employed as deputy county assessor.

December 21, 1942

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

Dear Sir:

We are in receipt of your request for an opinion, under date of December 17, 1942, which reads as follows:

> "I would appreciate an opinion from your office in regard to county court members working in the office of county assessor. I would like to know if it is permissable for the assessor to employ county judges to work on his books."

In a careful research we fail to find any statute or any section under the Constitution which prohibits a person from holding two county offices, or serving as a deputy county officer. 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 two hundred thousand (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.

Since there is no constitutional prohibition under the Constitution or the statutes preventing a person from holding two county offices, we must refer to the common law. In the case of State ex rel. Walker, Attorney General v. 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 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 in the City of St. Louis.

The case of State ex rel. Walker, Attorney General, v. Bus, supra, was followed in the case of State ex rel. Langford v. Kansas City, 261 S. W. 115, and in that case the court held that the office of a deputy sheriff was not incompatible with the office of city clerk. In paragraph 1 the court said:

> "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. v. 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, 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. v. Lusk, 48 Mo. 242, the Supreme Court of this state held that the office of the clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was a case 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, it results that the ruling must be made in accordance with the facts in each separate case.

The question involved in your request is whether or not the office of judge of the county court, and a deputy county assessor are incompatible and against public policy. Under Section 13824 R. S. Missouri, 1939, the powers of the county court are specifically set out. Their principal power is to audit, adjust and settle all accounts to which the county shall be

a party.

Under the facts in your case the judge of the county court would be auditing and allowing his own claim against the county.

Section 13495 R. S. Missouri, 1939, reads as follows:

> "The number of all deputies required by any county office shall be submitted to the county court, and the county court shall by order of record, permit each number as in their opinion the necessary duties of the office require, and it shall be the duty of each officer to submit the names of the deputies appointed not to exceed in number the number allowed by the county court, and such names shall be made a matter of record by the county court."

Section 13496 R. S. Missouri, 1939, reads as follows:

> "No deputy shall be employed unless the principal in such office devotes his entire time to the duties of his office."

Under the two above sections the county court approves the number of deputies in any county office, and provides that no deputy shall be employed unless the principal in such office devotes his entire time to the duties of his office. Therefore, the judge of the county court is not eligible as a deputy county assessor.

Section 13497 R. S. Missouri, 1939, sets out a penalty for the violation of the Act.

The judge of the county court, in paying his salary, as a deputy county assessor, would be issuing a warrant and receipting for same, which practice, in some offices, is prohibited by statute.

The legislature enacted what is now Section 13799 R. S. Missouri, 1939, which provides that sheriffs, marshals, clerks, collectors or the deputies of any such office shall not be eligible to the office of treasurer of any county. The Supreme Court construed that section in the case of State ex inf. Noblet, ex rel. McDonald v. Moore, 152 S. W. (2d) 86, 347 Mo. 1170, when it held that:

> "The purpose of the statute providing that no sheriff, marshal, clerk, or collector, or the deputy of any such officer shall be eligible to the office of treasurer of any county was to obviate the situation where one could be chosen treasurer and take and hold the office when, in all probability, public money in his hands in his former official capacity would have to be redeemed and receipted for by himself in his new official capacity."

CONCLUSION

It is, therefore, the opinion of this office that county court members cannot be employed to work on the books of the county assessor, for the reason that the duty of the county judge, and the duty of a deputy assessor would be incompatible, and against public policy.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
Attorney General of Missouri

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