

REPRESENTATIVE
QUALIFYING FOR
OFFICE

Deputy sheriff must resign his office upon qualifying as State Representative.

March 2, 1942

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Honorable John W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

This will acknowledge receipt of your letter of February 27, 1942, which is as follows:

"As you may already know, a special election is to be held in the Second Representative District in Buchanan County, Missouri, on April 7 for the purpose of electing a successor to Dr. Emmett F. Cook, deceased, who was the incumbent prior to his death.

Mr. Clarence M. Stewart, one of our deputy sheriffs, is considering the possibility of becoming a candidate for that place. However, before making up his mind about that he wants to be sure that it will be possible for him to continue in his position as deputy sheriff if he should be elected. Both political parties in Buchanan County have decided to hold conventions for the purpose of nominating party candidates. The Democratic convention will be held on next Tuesday, March 3, and Mr. Stewart and I would appreciate it if you can let us have your opinion on this question by that time.

In this connection, the following questions suggest themselves:

1. Should Mr. Stewart resign from his deputyship immediately after his nomination, if he should be nominated?

2. May he continue to hold his office as deputy sheriff after his nomination and until he is elected?
3. Must he resign his deputyship before taking his oath of office as representative, in the event of his election?
4. If it is necessary for him to resign in any of the above circumstances, and if he is elected, may he at a later date be re-appointed deputy sheriff in the event he should decide to resign as representative?
5. The only remaining possibility which occurs to me at this time is whether or not Mr. Stewart might legally continue to hold his deputyship while serving as a member of the legislature, provided that he did not draw pay from the county during the time he was in attendance at the legislature but took a leave of absence from his office here for a period during which he might be required to be present in Jefferson City during a special session."

The first question to be determined here is whether or not a deputy sheriff of a county is an officer under the State of Missouri. In the case of State ex rel. v. Bus, 135 Mo., 325 L. C. 334, the court has said:

"Section 12, article 4, of the constitution provides: 'No senator or representative shall, during the term for which he shall have been elected, be appointed to any office under this state, or any municipality thereof; and no member of congress or person holding any lucrative office under the United States, or this state, or any municipality thereof (militia officers, justices of the peace, and notaries public excepted) shall be eligible to either house of the

general assembly, or remain a member thereof, after having accepted any such office or seat in either house of congress.'

Under this section all officers (except those under the United States) are divided into two classes, viz.: 'officers under the state' and officers 'under a municipality thereof.' The language 'officers under the state' would include justices of the peace, or they would not have been excepted. Officers of a county, though not named, would be included under the expression 'officers under the state'.* * *"

The Constitution of the State of Missouri, Art. 4 section 12 provides as follows:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

In the case of State ex rel. Owens v. Draper, 45 Mo., Rep. L.C. 356 357 the court said as follows:

"* * *The case is submitted on the pleadings, and they show that whilst Owens was a judge of the Circuit Court he was elected a representative to the Legislature, qualified, took his seat, and performed the duties and functions of that office. There does not appear to have been any resignation of the judgeship, and the

question is whether he could legally hold the two offices and receive the pay appertaining to both at the same time. There has never been any doubt about the principle, so far as I am advised, that at common law, if a party accepts another office which is incompatible with the one he holds, the first one would become vacant.

Suppose Owens, instead of being elected to the Legislature, had been elected to a seat on this bench, and had qualified and entered on the discharge of its duties. It is perfectly clear to my mind that his seat on the circuit bench would have been thereby vacated. Or if the auditor should be elected treasurer or the attorney-general secretary of State, their acceptance of the latter offices would necessarily vacate their former ones. Besides the common-law rule, the State government is divided into separate and distinct branches or departments, the officers of each having separate and independent functions to perform. It was designed that they should be distinguished and divided by a line of demarkation, and that one should not trench upon the other. This principle was deemed of such importance that it was made the subject of an express constitutional provision. In the constitution it is declared that 'no member of Congress, or person holding any lucrative office under the United States or this State (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or shall remain a member thereof, after having accepted any such office, or a seat in either house of Congress.' (Conet. of Mo., art. 4 pp 11)

Under this provision a judge of a court of record is clearly ineligible to a seat in either house of the Legislature whilst he holds the office of judge. The existence of the two offices in the same individual is incompatible, and is peremptorily prohibited.

By the phrase 'shall not be eligible,' I do not think it was intended to prohibit a person who occupied the position of judge from running for or being elected to the Legislature. But if he should run and be elected, he would have to make his choice of which office he would retain, and his acceptance of one would necessarily operate as a vacation of the other. Therefore it follows that when Owens qualified and took his seat in the Legislature he elected to vacate and abandon the office of circuit judge. * * *

In State v. Meath, 132 S. W. (2d) 1001, the court said as follows:

* * * The principle of that case was applied and extended by this court en Banc in State ex inf. Major ex rel. Ryors v. Breuer, 235 Mo. 240, 138 S. W. 515, 516. The facts there were that Judge Breuer, then county collector, was elected circuit judge in November, 1910. He thereafter resigned the office of collector effective December 29, 1910, and on December 31, made final settlement with the county court transferring all books and funds to his successor. On January 2, 1911, he qualified as circuit judge. It was alleged that he was ineligible because of Section 19, Article 2, of the Constitution, which was as follows: 'That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or such receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable.' And also because of Section 11446, R. S. 1909, now Section 9897, R. S. 1929, Mo. St. Ann. Sec. 9897 pp. 7959 * * *

The court further said in the case of ex rel. Bus

"* * *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 proceedings or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. State ex rel. v. Lusk, 48 Mo. 242; Mechem, Pub. Offices, secs. 420-426; Throop, Pub. Officers. secs. 30, 51.

The rule, it is said, is founded upon the plainest principles of public policy, and has obtained from very early times. King v. Patteson, 4B. & Ad. 9.

'The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary.' 1 Dill. Mun. Corp. (4Ed.) sec. 225; People ex rel. v. Brooklyn, 77 N. Y. 503."

CONCLUSION

Therefore, it is our opinion that Mr. Stewart does not necessarily have to resign his office as deputy sheriff while he is a candidate for the office of State Representative but that he must resign his office as deputy sheriff in the event that he is elected State Representative. It follows that he cannot retain both

Mr. John W. Mitchell

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offices because in order to qualify as State Representative he must first resign his office as deputy sheriff.

Respectfully yours,

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APPROVED:

ROY MCKITTRICK
Attorney-General

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