

MAGISTRATES: Judge of the county court may not serve as
COUNTY COURTS: clerk of magistrate court.
OFFICERS:

January 20, 1949

Honorable W. A. Despain
Prosecuting Attorney
Shannon County
Eminence, Missouri



Dear Mr. Despain:

This will acknowledge your request for an official opinion, which reads as follows:

"At the request of one of the Associate Judges of the County Court, I'm writing you for an opinion as to the eligibility, of an Associate and acting Judge of the County Court, serving as Clerk of the Magistrate Court, while serving in the capacity of County Judge.

"That is the now existing condition in this County, one of our associate Judges is the now acting and officiating Clerk of the Magistrate Court."

Your request poses the single question as to whether an associate judge of the county court of Shannon county, Missouri can hold that office while also qualifying and serving as clerk of the magistrate court of such county. The fact that the first office mentioned is elective in its nature and the second is appointive will not be of consequence when determining the question.

In the absence of direct or positive statutory prohibition against a judge of the county court qualifying and serving as clerk of the magistrate court in a county of the 4th class, to which class of counties Shannon county belongs, the common law rule must be stated as reiterated and adopted by the Supreme Court of Missouri in the case of State ex rel. Walker, Attorney General, v. Bus, 135 Mo. 325, wherein they stated at l.c. 330:

"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. * * *"

The only inquiry remaining is whether the duties of the office of judge of the county court and those of the clerk of the magistrate court are so inconsistent and incompatible as to render it improper that the same person hold both offices at the same time. In admeasuring the inconsistent and incompatible nature of duties and liabilities attendant to the offices in question, the following rule must be kept in mind, the same being found stated in State ex rel. Walker, Attorney General, v. Bus, supra, at l.c. 338,

"* * *At common law the only limit to the number of offices one person might hold is 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."

We need only to examine the statute providing for payment of salaries of clerks of magistrate courts to find an incompatibility which would prove fatal to a design for the holding of the two offices being discussed by a judge of the county court of Shannon county, Missouri.

Section 21 of S.B. No. 94, passed by the 64th General Assembly of Missouri, Laws of Missouri 1947, Vol. 1, page 241, provides, in part, as follows:

"* * *The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to

provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this act.* * *"

In an opinion rendered by this department under date of August 8, 1947, to Honorable H.L.C. Weier, prosecuting attorney of Jefferson county, Missouri, construing Section 21 of S.B. No. 94, supra, it was ruled that the salaries of the clerks of the magistrate courts could be increased by the county court beyond what is payable by the state, such increase to be paid by the county court out of county funds. Having ruled that the county court has discretionary power to increase the salary of a clerk of the magistrate court over the amount paid by the state, such increase to be paid out of county funds, it necessarily follows that if the judge of the county court of Shannon county is also serving as clerk of the magistrate court in said county, he would then be in a position to vote to raise his own salary as such clerk of the magistrate court. No clearer example could be made outlining the incompatibility of offices than we have in this instance. The facts bring this case clearly within the rules stated in State ex rel. Walker v. Bus, supra, and it is not necessary to delve further into the jurisdiction, powers and duties of the county court of Shannon county which make it so necessary to keep the membership of the county court from assuming duties connected with other offices, elective or appointive.

CONCLUSION

Therefore, it is the opinion of this department that an associate judge of the county court of Shannon county, Missouri is not eligible to serve as clerk of the magistrate court of such county and such service would be against public policy and his appointment would be invalid.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General