

PROBATE JUDGE: Probate judge and ex officio magistrate
MAGISTRATE: may not be a member of a county library
OFFICERS: board.



May 10, 1949

5-11

Hon. Homer F. Williams
Prosecuting Attorney
Rollinger County
Marble Hill, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads as follows:

"Can the Probate Judge and ex-officio Magistrate also legally serve on the board of trustees of a County Library established under Section 14768, Chap. 110, Art. 6, R.S. Mo. 1939?"

There is no constitutional or statutory prohibition in the state of Missouri prohibiting the holding of two offices by the same person. The general rule concerning this question is to be found in 46 C. J., page 941, which reads as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the

offices has the power to remove the incumbent of the other or to audit the accounts of the other."

In an opinion to Hon. V. C. Rose, Circuit Judge, Unionville, Missouri, under date of April 13, 1939, this office held that the office of circuit judge and that of school director are incompatible, and that sound public policy and the adjudged cases make inappropriate the holding of both of said offices at the same time by the same individual. In part, the reasoning leading to that conclusion was that the actions of the circuit judge as a member of the school board might be influenced by the fact that if a controversy arose as to the validity of such action it would be determined by that same person sitting as circuit judge. The opinion recognized that the circuit judge would usually disqualify himself in such a proceeding, but nevertheless applied the test of incompatibility or inconsistency of duties; that there might be a conflict of interest, and as circuit judge the individual would have some supervisory power over the same individual as a member of the school board.

Section 14769, R. S. No. 1939, reads as follows:

"Said _____ county library district' as such body corporate, by and through said county library board, shall have power to sue and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches thereof, and to sell and convey real estate and personal property for and on behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property."

Laws of Missouri, 1945, page 770, provides for jurisdiction of magistrates as follows:

"Each magistrate shall have jurisdiction coextensive with his county and the magistrates may organize into a court or courts with divisions.

"Except as otherwise provided by law, magistrates shall have original jurisdiction of all civil actions and proceedings for the recovery of money, whether such action be founded upon contract or tort, or upon a bond or undertaking given in pursuance of law in any civil action or proceeding, or for a penalty or forfeiture given by any statute of this state, when the sum demanded, exclusive of interest and costs, does not exceed five hundred dollars in counties which now have or may hereafter have not more than 70,000 inhabitants, seven hundred and fifty dollars in counties which now have or may hereafter have more than 70,000 and less than 100,000 inhabitants, one thousand dollars in counties which now have or may hereafter have 100,000 or more inhabitants. Magistrates shall have jurisdiction of all actions against any railroad company in this state, to recover damages for killing or injuring horses, mules, cattle or other animals within their respective counties, without regard to the value of such animals, or the amount claimed for killing or injuring the same. Provided, such magistrates shall have exclusive original jurisdiction in all such cases where the amount involved is less than fifty dollars."

Laws of Missouri, 1945, page 804, provides for jurisdiction of probate courts as follows:

"Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands

by administrators, curators and guardians."

Taking into consideration the above-named sections, it is apparent that cases may arise where the library district might sue or be sued in any one of a number of possible situations. If the sum in question was of a small enough amount, jurisdiction of the case might be in the magistrate court. Again, Section 14769, supra, provides that the library district may receive gifts of real and personal property. If these gifts were made in the form of devises or bequests, the jurisdiction of the magistrate court would be invoked in the administration of the estate. In that instance the probate judge might be influenced by virtue of his being a member of the county library board. We recognize that by statute a judge of probate is prohibited from sitting in a case in which he is interested (Laws 1945, p. 763). However, the incompatibility exists nevertheless, and the interests are in conflict.

We note in passing Article II of the Constitution of 1945 that it provides as follows:

"The powers of government shall be divided into three distinct departments - the legislative, executive and judicial - each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

In *People v. Sanderson*, 30 Cal. 160, the California Supreme Court was interpreting that section in a case wherein the chief justice of the Supreme Court was by law made a trustee of the state library. In the course of the opinion the court said, i.c. 167:

"It is very certain that the duties of Trustee of the State Library are not judicial, as may be seen by reference to the Act. They properly fall within the sphere of the executive department of the Government.

"This provision of the Constitution, so far as it relates to the judicial department of the State, is, in our judgment, eminently wise. One of its objects seems to have been to confine Judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and another still to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain. * * *"

Conclusion.

Therefore, it is the opinion of this department that the office of probate judge and ex officio magistrate and that of member of a county library board are incompatible, and that sound public policy makes inappropriate the holding of both of said offices at the same time by the same individual.

Respectfully submitted,

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APPROVED:

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JRB:ml