

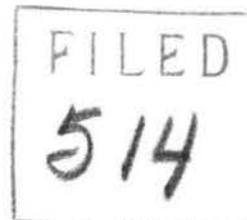
INCOMPATIBILITY OF OFFICES:  
PROSECUTING ATTORNEY:  
PUBLIC ADMINISTRATOR:

The offices of the prosecuting attorney  
and the public administrator are in-  
compatible.

OPINION NO. 514

November 23, 1966

Honorable Don W. Owensby  
Prosecuting Attorney  
Buffalo, Missouri 65622



Dear Mr. Owensby:

This opinion on the question whether the elective offices of public administrator and prosecuting attorney of a third class county may be held at the same time by one person and are incompatible is written to respond to your recent request.

Compatibility and incompatibility of offices is a common-law doctrine which was discussed in the leading Missouri case of *State ex rel. Walker v. Bus*, 135 Mo. 325, l.c. 338, where the court said:

"V. 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.

"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 from which the law declares that the acceptance of the one is the vacation of the other. The force of the word,

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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.'"

Where incompatibility of offices exists, the courts of this state have held that the office holders may not hold such offices. This is a common law limitation prohibiting the holding of two offices which are incompatible. Further inhibitions must be expressed either by the Constitution or in the Statutes (we find none here expressed). (Bruce v. St. Louis, 217 S.W.2d 744, 748; State ex rel. Gragg v. Barrett et al., 180 S.W.2d 730).

Examination of the statutes with respect to the duties of these two offices will afford an example of incompatibility, particularly, in the field of inheritance tax.

It is the duty of the public administrator in certain cases (defined by Section 473.743 and 473.747 RSMo., 1959) to take charge of certain decendant's estates. Under Section 473.750 RSMo., 1959, the public administrator exercises the same powers and is subject to the same duties etc., that are enjoined upon executors and administrators, guardians and curators by Chapters 472 to 475 RSMo., 1959, as may be applicable. This includes, among other things, certain obligations and duties with respect to inheritance taxes. Section 145.120 RSMo., 1950, provides that the executor or administrator has a duty to pay the inheritance tax. Section 145.130 RSMo., 1955, imposes a personal liability upon the administrator or executor for such taxes until they are paid.

By Section 145.270 and 145.280 RSMo., 1959, the Prosecuting Attorney has a duty imposed upon him to represent the state in inheritance tax matters and to institute suit for collection thereof when such taxes are past due.

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It is obvious that there is conflict existing where the public administrator is delinquent in paying the inheritance tax due on a decendant estate and where the same person as prosecuting attorney files a suit against himself as the public administrator to collect the inheritance tax on a basis of a personal liability of the public administrator.

Perhaps more important than the example on incompatibility given above is the responsibility that the prosecuting attorney has to initiate quo warranto pursuant to Section 531.010 RSMo., 1959 when any person shall usurp, intrude into or unlawfully hold or execute any office as directed by Section 531.020 RSMo., 1959. The prosecuting attorney has a duty in the public interest to see that public officers faithfully and honestly perform their duties. If the prosecuting attorney held another county office, he would be compelled to sit in judgment on himself. Obviously, this posture is plainly incompatible and should not be countenanced. See also Section 106.220 and 106.230 RSMo, 1959, respecting the duty of the Prosecuting Attorney with relation to other county and city officers.

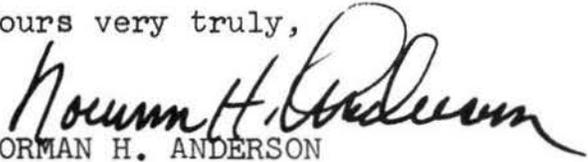
For this reason, we conclude that the office of public administrator and the prosecuting attorney of the same county are incompatible. This is true regardless of the class of the counties.

#### CONCLUSION

It is the opinion of this office that the offices of public administrator and prosecuting attorney of the same county are incompatible and that the same person may not therefore hold both offices.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General