OFFICERS: Offices of mayor of third class city and county collector of third class county are not incompatible nor inconsistent and both may be held by the same citizen at the same time.

March 26, 1958

Honorable Weber Gilmore
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Mr. Gilmore:

Your recent request for a legal opinion of this department has been received, and reads as follows:

> "Could a citizen of Scott County, Missouri, hold, at the same time, the office of Mayor of the City of Sikeston, Scott County, Missouri, and the office of County Collector of Scott County, Missouri?"

It is established by Research Memorandum No. 5 of the Committee on Legislative Research that, in compliance with Article VI, Section 15 of the Constitution of Missouri, and Section 72.030, RSMo 1949, the city of Sikeston is a third class city.

No constitutional or statutory provisions of Missouri prohibit a citizen from holding the offices of mayor of a third class city and county collector of a third class county at the same time.

By virtue of Section 140.670, collectors are required to make settlements and turn over funds in their custody. Had the Legislature wanted to prevent collectors from holding other offices of trust at the same time it would have been an easy matter to have enacted such a law in the words that would have needed no construction, such as Section 54.040, RSMo 1949, which reads:

> "No sheriff, marshal, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

That was not done.

It might be considered that Section 52.310, RSMo 1949, would stand as a bar to the concurrent holding of the offices of mayor and county collector, which states:

> "No collector or holder of public moneys or any assistant or deputy of such holder or collector of public moneys shall be eligible or appointed to any office of trust or profit until he shall have accounted for and paid over all sums for which he may be accountable."

However, upon a reading of Section 52.310, supra, in conjunction with Section 54.040, and in the absence of any other statute with respect to collectors, it is reasonable to construe Section 52.310, RSMo 1949, as a bar only when the officer involved is in default.

On the face of Section 140.720, RSMo 1949, insofar as it relates to the collection of taxes under Sections 140.670 and 140.680, it would appear to apply to third class cities. If it were applicable it would seem that, since no one under Section 140.720 is specifically required to bring suit, it might become the duty of the mayor and council to institute actions to collect on the county collector's bond. Under these circumstances there would tend to be incompatibility between the offices of mayor and county collector. However, such section is not applicable because of the holding of the court in State ex rel. Steed vs. Nolte, 138 SW2d 1016, which states:

> "Relators contend that not only must the taxes of respondent city be collected by advertisement and sale as outlined in the original Jones-Munger Law, but also that they must be collected by county and not city officers. Relators base this claim on Sections 9970 and 9971, Revised Statutes 1929 (Mo. Stat. Ann., pp. 8012-8013); and on certain sections of the Jones-Munger Law.

Section 9970 provides that the collectors of all cities having authority to levy and collect taxes shall annually return to the county collector all unpaid real estate assessments and Section 9971 provides that the county collector shall have power to collect such assessments. These sections were first enacted in 1872 (Laws of 1871-2, page 118) at a time when no city had a lien for, or the power to collect, city taxes. In 1879 and later, as we have already pointed out, various classes of cities were granted a lien for, and the power to collect their own taxes. Notwithstanding this, Sections 9970 and 9971 have been retained in the statutes and Section 9970 was repealed and reenacted in substantially the same form in 1933, the only change being to substitute the words 'first Monday in March' for the words 'first day in May.' (Laws of 1933, p. 450.) The apparent conflict between the statutes, now numbered 6995 and 9970, 9971, respectively, was considered by this court in the case of City of Aurora ex rel. v. Lindsay, 146 Mo. 509, 48 S.W. 642, decided in 1898. It was there held that the city collector, not the county collector, was the proper officer to collect taxes due a city of the fourth class. That ruling has not since been departed from; so, when the General Assembly repealed and reenacted Section 9970 in 1933, in the same form, they are presumed to have adopted the construction so placed on the statutes by this court. (State ex inf. Gentry v. Meeker, 317 Mo. 719, 296 S.W. 411.) In other words, said Section 9970, both before and after its reenactment in 1933, was and is applicable only to the limited number of cities above mentioned, which still return their delinquent taxes to county instead of city officers. The expression 'such cities,' appearing in Sections 9949, 9950, and other sections of the Jones-Munger Law and of the Revised Statutes, refers to such cities as from time to time have been granted the power to collect their own taxes,

> and those sections vest in city officers the same duties as to city taxes as are exercised by county officers as to other taxes. Section 9963c makes this clearer by requiring us to read the word 'city' into the various sections where the word 'county' appears.
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> "Our conclusions in this case apply only to the collection of city taxes in cities of the fourth class. Other cities are governed by different statutes which may or may not compel a different result."

Following the principles as stated, we find that Section 94.150 pertains to the enforcement of taxes in cities of the third class and that, therefore, Section 140.720 does not create any incompatibility.

By the common law, incompatible offices cannot be held by one person at the same time, and, since the common-law doctrine is still in effect in Missouri, we must determine whether the offices mentioned in the opinion request are compatible or incompatible before attempting to answer such an inquiry. The general rule as to when offices are considered to be incompatible has been stated in American Jurisprudence, Volume 42, page 936, as follows:

> "They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible.

> It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other."

The common-law doctrine of compatible and incompatible offices was stated and applied in the case of Walker v. Bus, 135 Mo. 325. In this case it was held that the office of deputy sheriff of the City of St. Louis was not incompatible with that of school director and could be held by the same person at the same time. At l.c. 338 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 officer, as where one has some supervision of the other, is required to deal with, control, or assist him."

As to whether there is any inconsistency and incompatibility between the offices of a mayor of a third class city and the county collector of a third class county in Missouri, to the extent that a citizen cannot hold both offices at the same time, there will be required a consideration of the statutes relating to the nature and the duties of each office.

We therefore direct your attention to the following chapters of the Revised Statutes of Missouri, 1949, for a detailed comparison:

Chapter 52, pertaining to county collectors;

Chapter 77, pertaining to cities of the third class;

Chapter 140, pertaining to collection of delinquent taxes generally.

In general, it is found that the duties of the county collector of a third class county relate to the collection of taxes assessed by the county and to the dissemination of those funds to the appropriate treasurers. There are to be mailed to the taxpayers statements of taxes due and receipts for payment therefor. The county collector is not controlled by the city, or mayor, and his duties are not of an executive nature.

From the provisions of Chapter 77, RSMo 1949, relating to the duties of a mayor, it appears that the mayor is the chief executive of a third class city. As such officer, he has general supervision and control over all other officers and affairs of the city. The statute also provides that he shall be vigilant in the enforcement of our laws and ordinances in the government of the city. It is noted that the powers and duties of the mayor prescribed by statute are limited to the enforcement of all laws, ordinances and affairs of the city of which he is mayor, and that he has no powers and duties to perform as such, nor does he have any supervision or control over any other officers or political subdivisions of the state.

Upon a study of these chapters of the Revised Statutes of Missouri, 1949, and supplements, it is our opinion that the office of mayor of a third class city is not inconsistent nor incompatible with the office of county collector of a third class county, to the extent that the individual in the office of mayor could not at the same time hold the office of county collector.

CONCLUSION

It is our conclusion that a citizen of Scott County, Missouri, can hold the office of mayor of the City of Sikeston,

Honorable Weber Gilmore

Scott County, Missouri, and the office of county collector of Scott County, Missouri, at the same time, provided that at the time of assumption of the office of mayor, the said county collector shall not be in default of the sums for which he is accountable in his capacity of the office of the county collector.

Yours very truly,

John M. Dalton
Attorney General

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