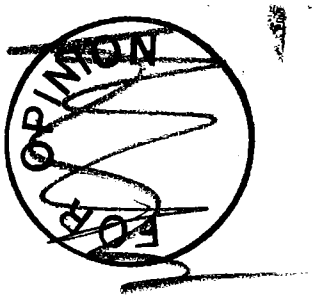
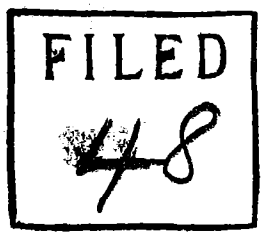
COUNTY CLERKS:
CONSTITUTIONAL LAW:
CONSERVATION COMMISSION:

County Clerks may continue to receive fees as agents for the Conservation Commission in the sale of hunting and fishing licenses.

June 12, 1946





Honorable Edgar J. Keating
Missouri Senate
63rd General Assembly
Jefferson City, Missouri

Dear Senator Keating:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department:

> "As to whether the County Clerk (in counties of the first class) may receive not only the statutory salary as county clerk, but also continue to receive fees as agent for the Conservation Commission in the sale of hunting and fishing licenses."

We are of the opinion that your letter raises two legal issues:

> (1) May the County Clerk, under the constitution, hold the position of a county officer, and also the position of Agent for the Conservation Commission in the sale of hunting and fishing licenses?
>
> (2) Does Article VI, Section 12 of the Constitution prohibit the County Clerk from selling hunting and fishing licenses and thereby receiving a fee for the same?

In answering the first question we must consider the applicability of the rule of law that a public officer may not hold two incompatible offices at the same time. This rule is stated in State vs. Grayston (1942 Mo. Sup.) 163 S.W. (2d) 335. That case makes it clear that the offices must be incompatible in order for the rule to apply. The tests of incompatibility, set out in that case, are:

> "* * * Whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

The Office of County Clerk and the action of the County Clerk in selling hunting and fishing licenses are not, in our opinion, in any way conflicting, and does not fall within any of the tests set out in that case. We know of no other constitutional provision or rule of law which would prohibit the County Clerk from selling hunting and fishing licenses on the basis that he can not hold two such offices at the same time.

An answer to the second question involves the interpretation of Article VI, Section 12, of the Constitution, which reads as follows:

> "All public officers in the City of St. Louis and all state and county officers in counties having 100,000 or more inhabitants, except public administrators and notaries public, shall be compensated for their services by salaries only."

The question which we need to determine is whether this constitutional provision means that county officers are to be compensated for their services, as county officers, only by salary, or whether they are to be compensated for all services they perform by salary only.

It is well to note at the outset that Sections 8913 and 8916, Revised Statutes of Missouri, 1939, designating the County Clerks and the License Collector of the City of St. Louis as the persons who may issue hunting and fishing licenses, have been repealed by the 63rd General Assembly. However, the broad powers given to the Conservation Commission under the provisions of the Constitution, and the interpretation of similar provisions in the 1936 amendment to the Constitution of 1875, by the case of Marsh v. Bartlett, 121 S. W. (2d) 737, leave little doubt that the Conservation Commission has the authority to designate the County Clerks as agents for the sale of hunting and fishing licenses, and to designate a fee which the County Clerks may retain as compensation for the performance of this duty. We, therefore, proceed in this opinion on the assumption that the Conservation Commission will continue to designate the County Clerks as agents for the sale of hunting and fishing licenses, and allow them a fee therefor.

The constitutional provision, above quoted, is new, and was not carried in the Constitution of 1875. There are, therefore, no cases which have construed this provision. However, the Missouri courts have several times construed the provisions of Article V, Section 24, of the Constitution of 1875, on the exact point presented for our determination. Article V, Sec-

tion 24, of the Constitution of 1875, reads, in part, as follows:

> "The officers named in this article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms; and they shall not, after the expiration of the terms of those in office at the adoption of this Constitution, receive to their own use any fees, costs, perquisites of office, or other compensation. All fees that may hereafter be payable by law for any service performed by any officer provided for in this article shall be paid in advance into the state treasury."

It will be noted that this constitutional provision is the same, with regard to the point here at issue, as Article VI, Section 12 of the new constitution for the reason that both sections declare that the salary which certain officers are to receive in lieu of all other compensation is a salary "for their services". Therefore, an interpretation of Article V, Section 24, regarding the meaning of the words "for their services" would, in our opinion, be determinative of the meaning of these words in Article VI, Section 12 of the new constitution.

Article V, Section 24 of the Constitution of 1875, has been construed in several Missouri cases.

In State ex rel. Barrett v. Boeckler Lumber Co., 302 Mo. 187, 257 S.W. 453, the court had before it the question of whether the Attorney General could be allowed a fee in addition to his salary for the prosecution of unlawful combinations in restraint of trade. The court in that case held that the Attorney General was not entitled to such a fee for the reason that the prosecution of these cases was a part of the duties of the Attorney General. They made it clear, however, that the statutory limitation on salaries under Article V, Section 24, of the Constitution of 1875, would not apply if a duty imposed upon the Attorney General did not, in any way, pertain to the Office of the Attorney General. In this regard the court said: (l.c. 204-5)

> "Realtor describes the duties imposed on the Attorney General by the statute, in relation to the prosecution of trusts and combines in restraint of trade, as 'unusual and extraordinary.' If by that he means that the duty is not incident

> to the office of Attorney-General, and such is the fact, his second position is well grounded. For while the Constitution says that he shall receive a salary for his services, and that he shall perform such services 'as may be prescribed by law' (Sec. 1, Art. V), yet it could not have been intended that duties should be imposed upon him which in no way pertain to the office of the Attorney General. It is for the performance of those duties, and those only, that the salary is given him. It would no doubt not be competent for the Legislature, for example, to require the Attorney-General, as attorney-general to perform the duties of warden of the penitentiary, or superintendent of one of the hospitals for the insane. But if it should designate him as the person to fill either of these offices, and he accepted, a provision for compensating him for the services to be performed in connection therewith would not be obnoxious to the Constitution. Such is the substantial basis of decision in State v. Walker, 97 Mo. 162."

In Thatcher v. St. Louis, 343 Mo. 597, 122 S. W. (2d) 915, the Supreme Court of Missouri had before it a question almost identical with that in the Boeckler case. In the Thatcher case the question was whether the Attorney General could retain a fee paid out of a trust fund which was to be paid to attorneys for the Attorney General of Missouri. The court in that case again discussed the same constitutional provision as it did in the Boeckler case, and cited the Boeckler case with approval, quoting much of that part of the Boeckler case which is quoted above in this opinion.

The court held that the allowance of such fees was unlawful, giving the same reason as given in the Boeckler case, namely, that the services performed by the Attorney General's office were duties which pertained to that office.

It is, therefore, clear that the words "for their services", in Article VI, Section 12 of the Constitution, must be interpreted as meaning only those services which the county officers perform as county officers.

The determination remaining, therefore, is that of whether the selling of hunting and fishing licenses can be said to pertain in any way to the office or to the duties of a County Clerk. In this connection the case of State ex rel.

Buchanan County v. Imel, 280 Mo. 554, 219 S.W. 634, is enlightening. In that case the Supreme Court of Missouri construed a statute which provided that whenever the amount of fees collected for any year, by any Probate Judge, should exceed a sum equal to the annual compensation provided by law for a Judge of the Circuit Court having jurisdiction in said county, the excess less ten per cent, should be paid into the County Treasury. The court held that the words "compensation provided by law for a Judge of the Circuit Court" meant the Circuit Judge's salary for judicial services, and did not mean to include money received by the Circuit Judge for other fees such as his services as jury commissioner. With reference to the services other than those to which the statute referred, the court had this to say: (l.c. 564)

> "* * * Other compensation authorized to be paid to this class of officials is for added duties in no sense judicial, the performance of which has been imposed upon them arbitrarily by the Legislature, more as a matter of convenience than for any other apparent reason. The statutes (Laws 1905, p. 174, and 1907, p. 322) designating certain circuit judges as jury commissioners afford illustrations of this character of legislation. In construing them in State ex rel. Harvey v. Sheehan, 269 Mo. l.c. 429, we held that the remuneration therein provided for constituted no part of the judge's compensation for judicial services.* * * *"

We are of the opinion that the designation, by the Conservation Commission, of the County Clerks as agents of the Commission for the sale of hunting and fishing licenses partakes of the nature of that which is imposed, to use the words of the Imel case, "more as a matter of convenience than for any other apparent reason."

Furthermore, since the Conservation Commission is an agent of the state, we think that the County Clerks would be acting as agents of the state rather than as agents for the county. Also, there is no statutory duty placed upon the County Clerks to sell hunting and fishing licenses. It cannot be said, therefore, that this is a duty placed upon the clerk by any legislative authorization, and that, therefore, the sale of licenses constitutes a portion of the statutory duties of one who holds the Office of County Clerk. It should

be noted, also, that the selling of licenses is not so connected with the county that it can be said to be a part of the administration of county affairs.

We think, therefore, that selling hunting and fishing licenses does not pertain to the Office of the County Clerk, and that the provisions of Article VI, Section 12 of the Constitution are applicable only to compensation which pertains to the Office of the County Clerk.

CONCLUSION

It is, therefore, the opinion of this department that the County Clerk, in counties of the first class, may continue to receive fees as agents for the Conservation Commission in the sale of hunting and fishing licenses.

Respectfully submitted,

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Assistant Attorney General

SNC:dc

APPROVED:

J. E. TAYLOR
Attorney General