MAGISTRATES: Magistrate is required by law to appoint a clerk within a reasonable time after being sworn in as magistrate. Magistrate cannot appoint as clerk a school teacher who is employed full time as school teacher and unable to work during office hours as clerk of the magistrate court except on Saturdays and week ends.

January 18, 1947

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Honorable Ben W. Oliver, Member
Missouri House of Representatives
63rd General Assembly
6209 East 15th Street
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

> "I am very desirous of obtaining some information pertaining to the appointment of a magistrate's clerk in a fourth-class county.
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> "In this county, the clerk desired is teaching school and her term will not be completed until five months after January 1st.
>
> "The information desired is whether or not the magistrate is compelled to appoint the magistrate's clerk in January, 1947 or whether it would be possible for the magistrate to hold up such an appointment until May or June, 1947. If this is not possible, can the magistrate appoint the desired clerk in January, and this clerk work evenings and weekends until May or June and then devote full time to the office."

We are assuming for the purpose of this opinion that the party under consideration for the appointment of clerk of the magistrate court is now employed full time as a school teacher. Furthermore, that, if she is appointed to this office, the plan is for her to work some evenings after business hours and on week ends. This is a rather unusual request, in that the applicant for this position does not contemplate spending at least some time during business hours. This department has

had numerous similar requests, but in most every instance, the applicant spent some time during business hours performing the duties of the office.

You first inquire if the magistrate is required to appoint a clerk in January, 1947. Section 21, Senate Bill 207, passed by the 63rd General Assembly, specifically requires each magistrate shall appoint and fix the salary of a clerk of his court and he may appoint such deputies and employees as may be necessary and fix their salaries. Said section reads as follows:

> "In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. 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. All such clerks, deputies and employees shall serve at the pleasure of the magistrate. Each clerk of the magistrate court shall take the oath required of other clerks of courts in this State. Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the State of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of $1,000.00, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. For breach of any of the conditions of such bond suit may be brought as upon other penal bonds. Any magistrate or clerk of the magistrate court

> failing or refusing in his receipts for fees to give an itemized account of such charge, with date, shall upon conviction, be deemed guilty of a misdemeanor. In all counties where magistrates organize into a court with divisions there shall be but one clerk of the magistrate court who may act as clerk for one of the magistrates. There shall not be more than one deputy clerk for each magistrate and all deputies shall be under the direction of the clerk but shall be appointed by the court."

As a general rule, when the word "shall" is used, it is mandatory, and when the word "may" is used, it is permissive. In State ex inf. McKittrick v. Wymore, 119 S.W. (2d) 941, 343 Mo. 98, the court said, l.c. 944:

> "Respondent argues that the remedy provided by this statute is an exclusive remedy against respondent for misconduct. On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.* * *"

By use of the word "shall" in Section 21, supra, relative to the appointment of the clerk and the use of "may" for the appointment of the deputy clerks, we are of the opinion the foregoing rule of construction is applicable. Had the Legislature left the appointment of both the clerk and deputy clerks to the discretion of the magistrate, it would have in all probability used the word "may" in both instances. Therefore, by using "shall" instead of "may," under the foregoing rule of statutory construction, the Legislature made it mandatory upon the magistrate to appoint a clerk and left it to the discretion of the magistrate in the appointment of deputy clerks.

Your second inquiry as to whether you may employ the school teacher as clerk of the magistrate court, is a little difficult to answer on the limited facts stated in your request. The clerk of the magistrate court has several specific statutory duties such as taking the fee upon filing any cause of action in the magistrate court, also the clerk has all of the administrative power and authority vested in the magistrate under the

law, and is required to make certain reports, etc. Section 23, Senate Bill 207, supra, in part reads:

> "Upon the commencement of any proceedings in the magistrate court the party commencing the same shall pay to the clerk of said court a magistrate fee of five dollars ($5.00.)
> *"

Section 145, Senate Bill 207, supra, reads:

> "All acts of an administrative nature including issuance of process, herein required of the magistrate may be performed by the clerk or duputy clerk of the magistrate court."

We do not contend that the duties of the school teacher in this instance and that of the clerk of the magistrate court are incompatible in so far as the duties of one office conflict with the duties of the other. But where it definitely is shown to be a physical impossibility to perform the duties of both offices at the same time and during school and office hours, then we certainly think that it is beyond the stretch of imagination to say that an appointive officer, who has certain statutory duties that cannot possibly be performed except during business hours and while at the office, can hold both offices. In Perkins v. Manning, Superintendent of Public Health, 122 P. (2d) 857, l.c. 861, the court, in holding that it is against public policy for a public officer to accept another public office not only when the duties of the two offices are incompatible but also when it is a physical impossibility for him to perform the duties of both offices, said:

> "We think that public policy requires that anyone accepting and retaining a public office should not place himself, by the accepting of another office, in such a position that it is physically impossible for him properly to perform the duties of both offices, and if the nature of the two offices is such that this impossibility does appear, the offices are incompatible and the acceptance of the second office, ipso facto, vacates the first. Applying that rule, is it possible that petitioner can properly perform the duties of major in the United States army and of superintendent of public health in the state of Arizona? We think it is obvious that he cannot.

> As was said in State v. Buttz, supra, 'Here are two offices held under two distinct governments; the duties of the one are to be performed in Washington, while those of the other are to be performed in this State.' In the present case, petitioner's duties as a major in the United States army not only called him out of the state of Arizona, but may call him out of the United States itself, while the great majority of his duties as superintendent of public health must be performed within the state.
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> "We hold, therefore, that the doctrine of incompatibility of offices depends upon the public policy of the state; that offices are incompatible not only when the duties thereof are in conflict, but when it is physically impossible that they may be performed properly by the same person; that on the facts as shown it was physically impossible for petitioner to perform properly the duties of the two offices which he attempted to retain, and that his acceptance of the duties and emoluments of the second office was, ipso facto, a vacation of the first."

We are not unmindful of certain decisions holding that certain public officers do not forfeit their offices by reason of being inducted into the armed forces of this country in time of war. (See State v. Grayston, 163 S.W. (2d) 335, and State v. Wilson, 166 S.W. (2d) 499.) The question that arose in those cases was whether said officers forfeit their offices by becoming a member of the armed forces of this country. In one case the officer was a circuit judge, and the other a circuit clerk. In State v. Grayston, supra, the court recognized the incompatibility of the office of circuit judge and service in the regular army, but not with a militiaman. In so holding, the court said, l.c. 340:

> "We would recognize as incompatible service in the Regular Army as we understand that term to denote the professional, permanent soldiery, those who have chosen the military service as a career. They should be distinguished from the militiamen who are ordinarily occupied in the pursuits of civil life but are

> organized for discipline and drill and called into the field for temporary military service when the exigencies of the country require it and from the citizen-soldiers who are in the military services only in time of war or emergency."

Regarding the conflicting duties of the two offices in the above case, we are of the opinion the duties of one in the service of the regular army in all probability conflict no more than one in the militia, with the office of circuit judge or circuit clerk. Especially is this true during a war. The principal distinction between one in the service in the regular army and the militia, as stated by the court, is that those in the former are considered more as professional soldiers and most of the time away, whereas the one in the militia is a greater part of the time carrying on the duties as a civilian, such as circuit judge or circuit clerk, except when called into the service in time of war or emergency. Therefore, our court in the above decision must also have considered, at least to some extent, offices to be incompatible when unable to properly perform the functions of the two offices at the same time.

One of the primary rules of statutory construction is to ascertain, if possible, from words used in a statute the legislative intent and to give effect to the lawmakers intent. (See City of St. Louis v. Pope, 126 S.W. (2d) 1201, 344 Mo. 479.) Also, another cardinal rule of statutory construction is that statutes must be given a sensible construction and should not be construed so as to make it unreasonable where it can be given reasonable construction. (See Lambur v. Yates, 143 Fed. (2d) 137; State ex rel. St. Louis Public Service Co. v. Public Service Commission, 34 S.W. (2d) 486, 326 Mo. 1169; also Chrisman v. Terminal R.R. Association of St. Louis, 57 S.W. (2d) 230, 237 Mo. App. 181.)

Section 12828, R.S. Mo. 1939, provides that any person elected or appointed to any county office shall be subject to removal who shall fail personally to devote his time to the performance of the duties of such office, and reads:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or

> who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

While our courts have held that it is not necessary to go to such trouble in removing said officers when they are not appointed for a definite term of office, (see State ex rel. v. Sartorius, 95 S.W. (2d) 873), we are of the opinion that it may be applicable in case such officer should appoint some person and then refuse to remove his appointee from office although under the law said appointee may be subject to removal.

The clerk to be appointed by the magistrate is not appointed for any specific statutory period of time. Therefore, said clerk may be removed at the pleasure of the officer appointing him, in this case it is the magistrate. In State ex rel. Mincke et al. v. Sartorius, 95 S.W. (2d) 873, l.c. 875, the court, in so holding, said:

> "* * * * Where the appointment is for a definite term, the appointment logically confers on the officer the right to serve out his full official period unless forfeited by his own misconduct, since the very fact of the definiteness of the official tenure necessarily negatives any idea of a reservation of power and authority on the part of the appointing power to remove the officer at will. On the other hand, where the law conferring the authority under which the appointment is made is silent as to any limitation upon the right of removal and the duration of the official term is thus left unlimited except by the will and pleasure of the appointing power, then under such circumstances the unqualified power of removal is an incident to the very power of appointment itself, which may be invoked and applied at pleasure without

notice, the making of charges, or a hearing thereon. State ex inf. v. Hedrick, 294 Mo. 21, 241 S.W. 402; State ex rel. v. City of St. Louis, 90 Mo. 19, 1 S.W. 757; Horstman v. Adamson, 101 Mo. App. 119, 74 S.W. 398; 46 C.J. 989; 22 R.C.L. Section 287, p. 576."

(Also, see State ex rel. Brokow v. Board of Education of the City of St. Louis, 171 S.W. (2d) 75.)

In view of the foregoing decisions, the magistrate could appoint a clerk until such time as the school teacher could assume the duties of the office of clerk and then remove said clerk and appoint the school teacher to the office.

CONCLUSION

Therefore, it is the opinion of this department that, as magistrate of the court, it is his mandatory duty to appoint a clerk of said court. Furthermore, that to appoint a school teacher employed full time as school teacher and unable to be at the office of the magistrate during office hours, except on Saturdays and week ends, as clerk of the magistrate court, would be against public policy and not a valid appointment under the law.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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