

OFFICERS: Justice of the Peace: Justices of the peace  
may hold the office of  
deputy recorder of deeds  
at the same time.

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January 16, 1943

Honorable H. Tiffin Teters  
Prosecuting Attorney  
Jasper County  
Carthage, Missouri



Dear Sir:

This is in reply to your request for an opinion  
under date of January 13, 1943, in regard to the ques-  
tion which you state has been raised,

" \* \* \* as to whether or not a  
Justice of Peace may also be a  
Deputy Recorder for the limited  
purpose of issuing marriage li-  
censes, particularly when they  
will serve without a salary."

In a careful research we fail to find any statute  
or any section under the Constitution which prohibits  
a person from holding two county offices. The Constitu-  
tion does prohibit a state officer holding an office  
under the United States as it appears in Section 4,  
Article XIV of the Constitution of Missouri. The  
Constitution of Missouri also prohibits, in counties  
or cities having more than two hundred thousand (200,000)  
inhabitants, the holding, by anyone, of a state office  
and an office in any county, city or other municipality.  
This is set out in Section 18, Article IX of the Consti-  
tution of Missouri.

Section 18, Article IX of the Constitution of Missouri reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

Although the above section only applies in cities or counties having more than 200,000 inhabitants and prohibits the holding of a state office, or the office of any county, city, or other municipality at the same time, and prohibits the filling of two municipal offices, yet, it specifically sets out that the section shall not apply to justices of the peace.

Since there is no constitutional prohibition under the Constitution or the statutes preventing a person from holding two county offices, we must refer to the common law. In the case of *State ex rel. Walker, Attorney General v. Bus*, 135 Mo. 325, which was passed upon by the Supreme Court of this state, June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of school director in the City of St. Louis.

The case of *State ex rel. Walker, Attorney General, v. Bus*, supra, was followed in the case of *State ex rel. Langford v. Kansas City*, 261 S. W. 115, and in that case the court held that the office of a deputy

sheriff was not incompatible with the office of city clerk. In paragraph 1, the court said:

"The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of the trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S. W. 1159."

In that case, the court, at page 116, said:

"In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was

most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S. W. 639):

"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."

Also, in the case of *State ex rel. v. Lusk*, 48 Mo. 242, the Supreme Court of this state held that the office of the clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was a case originating in the Circuit Court of Cole County, Missouri.

46 C. J. sets out the rule in Section 46, page 941, as to the construction as to whether or not two offices under the common law are incompatible.

Section 46, of 46 C. J., supra, 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. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

We must therefore look to the powers and duties of justices of the peace and deputy recorders of deeds, respectively.

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We fail to find, in Chapter 89, (R. S. Missouri, 1939), which applies to the recorder of deeds, any duties that are incompatible, conflicting, repugnant and inconsistent with the duties of a justice of the peace, and those of a deputy recorder of deeds. The duties of a justice of the peace are set out in Chapter 11 of the Revised Statutes of Missouri, 1939.

The only officer set out by statute as being ineligible to be a justice of the peace, and another officer at the same time, is a clerk of the circuit court, or clerk of the county court. (Section 2526 R. S. Missouri, 1939).

A justice of the peace is a township officer, for the reason that his jurisdiction and election are confined to a township. A justice of the peace is commonly called, a "county officer." We do not find any constitutional, or statutory, prohibition which would prevent a justice of the peace from holding another county office at the same time, except that of clerk of the circuit court or clerk of the county court, as set out in Section 2526, supra.

The main question involved, where there is no statutory or constitutional prohibition, is, whether or not the duties of a justice of the peace and the duties of a deputy recorder of deeds are inconsistent, conflicting, repugnant or inconsistent. In the State of Pennsylvania, it was held that a justice of the peace and an associate judge of the court of common pleas were not incompatible officers, although the incumbent, as judge, might be called upon to give judgment in the common pleas on a judgment rendered by him as a justice of the peace. (Commonwealth v. Sheriff of Northumberland County, (Pa.) 4 Serg. & R. 275.)

The above citation is set out for the reason that I am assuming that it is probable that the deputy recorder of deeds, so appointed, may have the blanks for marriage licenses, including the application, and may perform a

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marriage ceremony as a justice of the peace. A justice of the peace may solemnize a marriage, as authorized under Section 3363 R. S. Missouri, 1939. Such a procedure, that is, the granting of the marriage license, and the performing of the ceremony, would not be considered incompatible, conflicting, repugnant or inconsistent with the duties of a justice of the peace.

CONCLUSION

It is, therefore, the opinion of this department, that a person may hold the office of justice of the peace, and the office of deputy recorder of deeds at the same time, for the reason that the duties of either office are not incompatible, conflicting, repugnant, or inconsistent with the duties of the other.

Respectfully submitted

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APPROVED:

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ROY McKITTRICK  
Attorney General of Missouri

WJB:RW