LEGISLATORS:

ASSISTANT PROSECUTING ATTORNEY: Member[illegible] General Assembly may not be appointed Assistants Prosecuting Attorney in counties of the fourth class in this State during the term for which they are elected to the General Assembly.

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Honorable Curt M. Vogel
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Mr. Vogel:

This will be the opinion which you recently requested from this Department asking if a member of the State Legislature may be appointed Assistant Prosecuting Attorney of a county of the fourth class under Section 56.240, RSMo 1949, (Laws of Missouri, 1945, Section 4, (R.S. Mo. 1939, Section 12939.9)), and retain his position as State Representative. Your letter states:

> "At the present time I am Prosecuting Attorney of Perry County, Missouri a county of the 4th class, having been elected for a term of two years for the years 1951 and 1952. I am also a reserve officer in the Air Force Reserve, and having reason to believe that I will be called to active duty within a short time.
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> "We have three other attorneys in the county, of whom two are engaged in active practice. Of these two, one is a State Senator and also a reserve officer, the other is the County Representative at Jefferson City. This latter attorney is the only one who would be eligible to serve at this time in the event I am called. My question therefore is,
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> "Can a State Representative be appointed assistant Prosecuting Attorney of a county

> of the 4th class under R.S. Mo. 1939, Laws of 1945, Section 12939.9 and retain his position as a State Representative.
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> "A reply to this would be appreciated within a reasonably short time, and if further information concerning this question is desired please call me collect at any time. Your attention in this matter will be appreciated."

Section 56.240, RSMo 1949, reads as follows:

> "The prosecuting attorney in counties of the third and fourth classes may appoint one assistant prosecuting attorney who shall possess all the qualifications of a prosecuting attorney and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are now or may hereafter be liable. * * * ."

Section 12, Article III of the present Constitution of this State, disqualifying members of the General Assembly of this State from holding any office or employment under the United States, this State or any municipality thereof, reads as follows:

> "No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or

> representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

Respecting the holding by one person of two offices, 46 C.J. 941, 942, states the common law rule on the subject 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. * * *."

We believe, under the provisions of Section 56.240, supra, prescribing the qualifications and responsibilities of an Assistant Prosecuting Attorney in counties of the fourth class in this State, that such office of Assistant Prosecuting Attorney would be an office under this State. The Supreme Court of this State in the case of State ex rel. Walker, Attorney General vs. Bus, 135 Mo. 325, gives its approval to the common law rule prohibiting the holding of two offices which are incompatible, because against public policy, and also holds that where the holding of two offices by the same person at the same time is forbidden by the Constitution or a statute, such holding is illegal as in the case of holding incompatible offices at common law, pointing out that where such illegality is declared by positive law, incompatibility in fact is not essential to prohibit such holding. The Court, so holding, l.c. 330, said:

> "The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, <u>ipso facto,</u> terminate without judicial

> proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. State ex rel. v. Lusk, 48 Mo. 242; Mechem, Pub. Offices, secs. 420-426; Throop, Pub. Officers, secs. 30, 51.
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> "The rule, it is said, is founded upon the plainest principles of public policy, and has obtained from very early times. King v. Patteson, 4 B. & Ad. 9.
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> "'The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary.' 1 Dill. Mun. Corp. (4 Ed.) sec. 225; People ex rel. v. Brooklyn, 77 N.Y. 503.
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> "Where the holding of two offices by the same person, at the same time, is forbidden by the constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. In such case, the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal; it is made so in one case by the policy of the law, and in the other by absolute law. * * *."

The Court was considering, in the Bus case, supra, the question of whether the offices of deputy sheriff of the City of St. Louis and a member of the school board of said city could, under the Constitution, be held at the same time by one person. The Court immediately was construing Sections 10, 12 and 14 of Article 9 of the 1875

Constitution of this State to determine the question whether the deputy sheriff was a "state" officer or a "county" officer, and,also, if a "county" officer, the further question of his right to hold the office of school director to which place he had previously been elected. The Court held in that case, under the particular language in said sections of said Article 9, that the deputy sheriff was not an officer "under this state", but was a "county" officer, and, as such, was not prohibited from holding the additional office of school director in the city.

In its construction of the constitutional provisions of Article 9, and in arriving at the Court's conclusion pointing out the distinction between "county" offices and offices "under this state", the Court also quoted and gave its definition and construction of the phrase "officers under the state", as contained in Section 12 of Article 4 of the 1875 Constitution and made clear the difference between the provisions of Section 12 of Article 4 and the provisions of Sections 10, 12 and 14 of Article 9, in their respective uses of the phrase "officers under the state" where, l.c. 334 and 335, the Court, holding that officers of a county, under Section 12 of Article 4, though not named, would be included under the expression "officers under the state", said:

> "Section 12, article 4, of the constitution provides: 'No senator or representative shall, during the term for which he shall have been elected, be appointed to any office under this state, or any municipality thereof; and no member of congress or person holding any lucrative office under the United States, or this state, or any municipality thereof (militia officers, justices of the peace, and notaries public excepted) shall be eligible to either house of the general assembly, or remain a member thereof, after having accepted any such office or seat in either house of congress.'
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> "Under this section all officers (except those under the United States)

> are divided into two classes, viz.; 'officers under the state' and officers 'under a municipality thereof.' The language 'officers under the state' would include justices of the peace, or they would not have been excepted. Officers of a county, though not named, would be included under the expression 'officers under the state.'"

The Court held, construing the language in Sections 10, 12 and 14 of Article 9 of the Constitution of 1875, that the office of deputy sheriff of the City of St.Louis was a "county" office, but, nevertheless, it was not an office "under this state", and that the acceptance thereof by the deputy sheriff did not prevent him from retaining the office of school director. Whereas, the Court held in its construction of the provisions of Section 12 of Article 4 of the 1875 Constitution that county offices are offices "under this state".

It will be observed that Section 12 of Article 4 of the Constitution of 1875 is now, with no change in substance or effect, Section 12 of Article III, supra, of our present Constitution. The construction of Section 12 of Article IV of the former Constitution given by the Court in the Bus case, in saying that county officers, though not named, were, by such terms of said Section 12 officers under the State, as applied to the terms of Section 12 of Article III of our present Constitution, must likewise be held to mean that county officers, though not named, are officers "under the state".

Section 56.240, supra, provides that the Assistant Prosecuting Attorney in counties of the fourth class, when appointed by the Prosecuting Attorney shall possess all of the qualifications of a Prosecuting Attorney, take and subscribe to the oath or affirmation of office required by the Prosecuting Attorney, and discharge all the duties imposed upon the Prosecuting Attorney by law, and possess all of the responsibilities of the Prosecuting Attorney.

Sections 56.060, 56.070, 56.080, 56.090 and 56.100, RSMo 1949, respectively, prescribe the duties of the Prosecuting Attorney and his assistant, when appointed. These

duties and the mandatory direction by the statutes for them to perform such duties constitute express authority by law for the Prosecuting Attorney and his assistant to perform and they do perform thereby functions of sovereign government for the benefit of the public.

The power to appoint an Assistant Prosecuting Attorney in counties of the fourth class has been delegated by the Legislature to the Prosecuting Attorney. The appointment and the oath taken by the assistant must be filed in the office of the Circuit Clerk of the County. This becomes the formal record evidence of his appointment and induction into the office. It constitutes his "commission" to perform the duties of the public office of Assistant Prosecuting Attorney as and when required of him by law. He thereby becomes a public officer. With respect to the status of an "assistant" to a public officer 67 C.J.S. 449, gives the following definition:

> "The term 'assistant', when used with respect to an assistant to a public officer, has been held to refer to one who helps a public officer in the performance of the latter's duties, that is, one who stands by and helps or aids an officer. * * * ."

The question of the authority as an officer of an Assistant Prosecuting Attorney, upon his appointment by the Prosecuting Attorney, was before the Supreme Court of this State in the case of State vs. Carey, 1 S.W. (2d) 143. The defendant was charged with a felony. The defendant questioned the right of the Assistant Prosecuting Attorney to file the information under which he was charged with the offense. Holding that when the occasion arises an Assistant Prosecuting Attorney may perform any duty of the office, and in affirming the conviction, the Court, l.c. 145, said:

> "The legality of the act of the assistant prosecuting attorney in filing the information is challenged, and, as a consequence, the validity of the information. It is conceded by the appellant that the assistant was appointed under the authority of sections 751, 752, and 753, R.S. 1919.

"Section 751 confers the power of appointment of an assistant upon the prosecuting attorney, defines the qualifications of the appointee, and declares his official liability to be those of the prosecuting attorney.

"Section 752 prescribes how the appointment shall be made and the manner in which the appointment shall qualify for the discharge of his duties.

"Section 753, so far as the same relates to the matter at issue, provides that the assistant shall perform the duties of the prosecuting attorney (1) when the latter is sick, (2) absent from the county, or (3) engaged in the discharge of the duties of his office and cannot attend.

* *
* *

"When, therefore, either condition defined in the statutes arises, an assistant prosecuting attorney may perform any act within the range of the duties of that office. This conclusion is in harmony with a well-established rule in construing statutes defining the powers of public officers, that:

"'Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed. Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also.' Mechem's Offices and Officers, Sec. 571."

Discussing the question of the status of a public officer being established by the exercise of some portion of the sovereign functions of government, the Kansas City

Court of Appeals, 91 Mo. App. Rep. 438, considered the case of State ex rel. vs. Gray. The question at issue was whether the engineer for the city hall was an officer or merely an employee. Holding that such person was an officer because of the duties, including governmental functions, which were imposed upon him, the Court, l.c. 443, said the following:

> "* * * Definitions of a public office, or a public officer, are numerous and are all necessarily couched in general language. Mechem on Public Offices and Officers, section I, states the following, which has also been stated by our Supreme Court (State ex rel. v. Valle, 41 Mo. 29; State ex rel. v. Bus, 135 Mo. 325), viz.: 'A public office is the right authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.'"

We have cited authorities which establish, we believe, that the office of Assistant Prosecuting Attorney in counties of the fourth class in this State is an office under this State. We will now consider the further question whether such office is a "lucrative office".

Section 56.240, RSMo 1949, providing for the appointment and payment of compensation of one assistant by a Prosecuting Attorney of class four counties, in the last sentence of the section states:

> "* * * In counties of the fourth class the assistant prosecuting attorney shall be paid only by the prosecuting attorney and may assist the prosecuting attorney at his request in any case and the former shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney."

"Lucrative", as an adjective, is defined in Webster's New International Dictionary, Second Edition, page 1465, definition 1, as: "Yielding lucre; gainful; profitable; making increase of money or goods; as, a lucrative business or office."

The word "lucre", as a noun, is defined on the same page of the same work in definition 1, as: "Gain in money or goods; profit; riches."

We believe the facts submitted to us and the authorities we have read on the question, citations from which are herein quoted, conclusively determine that the office of Assistant Prosecuting Attorney in class four counties is a lucrative office under this State. This conclusion is supported by a paragraph in the Bus case, supra, l.c. 332, 333, which states:

> "It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be 'a public charge or employment.' U.S. v. Maurice, 2 Brock. 96. Whether a public employment constitutes the employe a public officer depends upon the source of the powers and the character of the duties."

There is no case in this State in which the phrase "lucrative office" has been defined by our Appellate Courts. The Supreme Court of Tennessee decided a case, State ex rel. Little vs. Slagle, 89 S.W. 326, 115 Tenn. 336, in which the phrase "lucrative office" was defined and its meaning was construed. That case construed a constitutional provision of Tennessee precisely the same in effect, and similar in words, to the first sentence of Section 12 of Article III of our present Constitution. The facts were in that case that a person was elected constable of a certain district in a county of that State. Thereafter, he was appointed by the sheriff of the county as one of his regular deputies. The county court, acting under such constitutional provision, without citation or notice, and without a trial, summarily declared the office of constable vacant, and appointed Slagle

to fill the vacancy. Quo warranto was filed by the State at the relation of the ousted constable to test the right of Slagle to hold the office. The Chancellor dismissed the proceeding on demurrer. An appeal followed to the Supreme Court of that State. The Court held that a deputy in the office of the sheriff was an officer, and that the office of deputy sheriff was a "lucrative office" in the constitutional sense. Affirming the judgment of the Chancellor that Court, l.c. 326, said:

> "The first question to be determined is whether the same person can hold the office of constable and that of deputy sheriff at the same time without violating article 2, sec. 26, of the Constitution of 1870, which declares that no person in this state shall hold 'more than one lucrative office at the same time.'
>
> "Is a deputy sheriff an officer, in the legal sense of that term? and, if so is the office he holds a lucrative one in the constitutional sense?"

The Court in further discussing the case, l.c. 327, said:

> "* * * Although he is appointed by the high sheriff, and holds to him the peculiar relations already mentioned, yet his rights and powers are derived from the law, and his duties are those of an officer of the law. It was so held in State ex rel. v. Bus (Mo.) 36 S.W. 639, 33 L.R.A. 616.
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> "Is the office of deputy sheriff a lucrative one? A lucrative office is one whose pay is affixed to the performance of its duties (State v. Kirk, 44 Ind. 401, 15 Am. Rep. 239); and, when the duties of the office are fixed by statute, it is immaterial that the compensation of the officer is fixed by some other board or officer (Chambers v. State (Ind. Sup.) 26 N.E. 893, 11 L.R.A. 613).

> In the case of a deputy sheriff in this state, if there be no contract between him and the high sheriff as to compensation, he is entitled to the same fees that the high sheriff himself receives for the same kind of service; if there be a contract between the two as to compensation, then for such compensation as the contract may fix; but in either event the office is equally a lucrative one within the intent and meaning of the Constitution.
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> "Was it necessary that Mr. Little should have been cited before the county court, after he had accepted the office of deputy sheriff, before his office of constable could be legally declared vacant and a successor appointed?
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> "The rule at common law is that, where one accepts a second office incompatible with one already held by him, the office first held is thereby ipso facto terminated without judicial proceedings of any kind (State v. Grace, 113 Tenn. 9, 18, 82 S.W. 485; State ex rel. v. Bus, supra, and authorities cited); and the same rule obtains where the incompatibility arises from an inhibitory provision in a Constitution against holding two offices * * * ."

The Supreme Court of Indiana has construed the phrase "lucrative office" in numerous cases as applied to a provision in the Constitution of that State similar to our Section 12, Article III, supra. In the case of Creighton et al. Township Trustees vs. Piper, 14 Ind. 182, the Court held that the respective offices of supervisor of a road district and township trustee were "lucrative offices". A supervisor of a road district by the acceptance of the office of township trustee vacated his office and was not a proper party to join in the prosecution of the case. A motion to dismiss was overruled and judgment for plaintiff followed. There was an appeal to the Supreme Court. That Court in holding that both were lucrative offices, l.c. 183, said:

> "Section 9 of art. 2 of the constitution declares that no person shall hold more than one lucrative office at the same

> time; hence, it is argued that Farras, by accepting the office of trustee, vacated his office as supervisor; while, on the other hand, it is insisted that township trustee is not a lucrative office within the purview of the constitution. This latter position does not seem to be correct. Pay--supposed to be an adequate compensation--is affixed to the performance of the duties, both of trustee and supervisor. 1 R.S. pp. 462, 497, secs. 1, 19. This plainly determines each of them to be a lucrative office, and the offices cannot, therefore, be held by one person at the same time."

The same question was before the Supreme Court of Indiana in Chambers vs. State ex rel. Barnard, 26 N.E. 893. The Court in that case, quoting from one of its former decisions, in defining "lucrative office", l.c. 894, said:

> "* * * It is held in State v. Kirk, 44 Ind. 401, that the office of councilman in a city is purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the state; and, although the office is a lucrative one, it is not a lucrative office within the meaning of section 9, art. 2, of the constitution of the state. In Mohan v. Jackson, 52 Ind. 590, it is held that the office of city clerk is not an office within the meaning of section 16, art. 7, of the constitution of the state. It must therefore be regarded as the settled law of this state that if an office is purely municipal, the officer not being charged with any duties under the laws of the state, he is not an officer within the meaning of the constitution; but if the officer be charged with any duties under the laws of the state for which he is entitled to compensation, the office is a lucrative office within the meaning of the constitution. This, although it may be a narrow construction of the constitution, must be regarded as settled. It then remains to be determined whether the

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> office of school trustee of an incorporated town is charged with any duties under the laws of the state such as make the office a lucrative one within the meaning of the constitution. It has been held by this court that the office of township trustee, who is also school-trustee, and the office of supervisor, are lucrative officers within the meaning of section 9, art. 2, of the constitution. Creighton v. Piper, 14 Ind. 182. * * * ."

And so, in this case, the Assistant Prosecuting Attorney, under the terms of said Section 56.240, in a class four county taking his authority from the State, would have the power to perform all the duties and exercise all of the functions of the office, and would be entitled to compensation from the Prosecuting Attorney for the performance of his duties. The office would, therefore, by reason of the statute, be a "lucrative office" under this State, and, therefore, under the provisions of said Section 12 of Article III of the Constitution, a Member of the General Assembly would be, and is, prohibited from accepting or holding the office of Assistant Prosecuting Attorney in any county of the fourth class in this State.

CONCLUSION.

It is, therefore, the opinion of this Department, considering the above authorities, that a State Representative cannot be appointed Assistant Prosecuting Attorney of a county of the fourth class, under the provisions of the Constitution of this State hereinabove cited, and at the same time retain the position as a State Representative, because such office of Assistant Prosecuting Attorney is a lucrative office under this State.

Respectfully submitted,

APPROVED:

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