

1171.

ASSIGNMENT COMMISSIONER APPOINTED BY COMMON PLEAS COURT—WHEN HE MAY ALSO BE APPOINTED COURT CONSTABLE.

*SYLLABUS:*

*An assignment commissioner regularly appointed under section 3007-1 G. C. may also be appointed court constable under the authority in sections 1692 and 1693 G. C. in a one judge county and may draw the salary for each position where the appointing power is satisfied on the question of the efficiency of the services rendered and to be rendered by the appointee.*

COLUMBUS, OHIO, February 1, 1924.

HON. H. A. BURGESS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your recent letter requesting the opinion of this department as follows:

“I respectfully request your opinion relative to the appointment of court constable and assignment commissioner; but first wish to make a statement of the situation existing in this county.

The population is in excess of 80,000. There is but one permanent judge of the court of common pleas of this county; but the volume of business has been such that two judges at least are holding court in this county practically all of the time, non-resident judges being sent here by the chief justice of the supreme court, who, in a letter to the judge of the court of common pleas of this county, stated that the business of this county was such that it was his intention to appoint an additional judge to hold court in this county regularly.

There has been appointed in this county, under section 3007-1, an assignment commissioner, and, for such services, is receiving the salary fixed by the court, in the sum of \$1,800.00 a year.

Section 1693, as amended in Volume 110 O. L. provides, among other things, that: ‘In counties where two judges, and not more than three judges hold court, at the same time,’ constable may receive not to exceed \$1,500.00 each year; and in counties where only one judge holds court such amount shall not exceed \$1,300.00, as may be fixed by the court, and shall be paid monthly from the county treasury, on an order of the court. Said section further provides that where *two or more* judges hold court, such court constables, when placed by the court in charge of the assignment of cases may be allowed further compensation not to exceed \$1,500.00 per year.

*QUERY*

*First.* Under the foregoing statement of facts, is this county considered one in which *two or more* judges hold court at the same time?

*Second.* If the foregoing be answered in the negative, may the person appointed assignment commissioner, under section 3007-1, be also appointed court constable under section 1693 of the General Code; and receive an additional salary not to exceed \$1,300.00 each year?”

Under section 3007-1 G. C., the appointment of an assignment commissioner is

authorized, and as stated in your letter has been made in your county, the salary therefor fixed by the court making the appointment at eighteen hundred dollars per year.

The provisions of section 3007-1 G. C. are as follows:

“When in its opinion the business requires it, the court of common pleas of any county in this state, having not more than one common pleas judge, and having a population of 80,000 or more as shown by the last federal census, with the consent of the county commissioners, may appoint an assignment commissioner whose duty it will be to make assignments of cases to be tried in said court, under the direction of the judge holding such court. Said official assignment commissioner shall hold office during the pleasure of the court making the appointment and shall receive such salary as may be fixed by the court making the appointment, not exceeding eighteen hundred dollars per year, payable monthly.”

It will be observed from a reading of the above section that two things are necessary to meet its requirements, to wit, the county must have more than eighty thousand population, it must not have more than one common pleas judge, and as a matter of course, the opinion of the court making the appointment that it is necessary. However, no question is raised as to the regularity of the appointment of the assignment commissioner mentioned.

From the facts stated in your letter, notwithstanding an additional judge has been assigned to your county for a greater portion of the time, and that the chief justice of the supreme court in a letter to the judge of your court of common pleas has stated that the business of your county was such that it was his intention to appoint an additional judge to hold court in your county regularly, I am nevertheless of the opinion that this is a county commonly known in the law as a one judge county.

I am therefore of the opinion that your first question should be answered in the negative.

Now coming to section 1692 G. C., which is the section authorizing the appointment of a court constable, we find its provisions to be as follows:

“When, in the opinion of the court, the business thereof so requires, each court of common pleas, court of appeals, superior court, insolvency court, in each county of the state, and, in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases.”

The provisions of section 1693 G. C. as amended in 110 O. L. at page 258 are as follows:

“Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, said compensation shall not exceed two thousand two hundred and fifty dollars each year, in counties where two judges and not more than three judges hold court at the same time, not to

exceed fifteen hundred dollars each year, and in counties where only one judge holds court, such amount, not to exceed thirteen hundred dollars each year, as may be fixed by the court, and shall be paid monthly from the county treasury on the order of the court. For counties where two or more judges hold court as herein provided, such court constable or constables when placed by the court in charge of the assignment of cases, or of any duties other than or in addition to preserving order, may be allowed further compensation not to exceed one thousand five hundred dollars per year, as the court by its order entered on the journal determines. In counties where only one judge holds court the constable provided for herein, when not attending the common pleas court, shall upon the order of the judge of such common pleas court, and without additional compensation, attend the probate court and the court of appeals of said county."

The provisions of the above mentioned sections clearly authorize the appointment of a court constable in all counties generally, with certain permissible increased duties and increased salaries in counties meeting the requirements, but those increases provided for are not permitted in a one judge county, under section 1693 G. C.

However, in your county, your assignment commissioner is authorized and appointed under section 3007-1 G. C., and is not dependent upon the provisions of section 1693 G. C. Were his appointment and salary so dependent, I am of the opinion he would not be so entitled to the increase. In fact your inquiry practically concedes this indirectly, for you inquire if he is entitled to the thirteen hundred dollar salary, which is the salary provided for in a one judge county, and not for the increase provided in the act itself of fifteen hundred dollars, for the court constable placed in charge of the assignment of cases, or of any duties other than or in addition to preserving order. In other words, each of these two appointments, to wit, that of assignment commissioner already made, and that of court constable, if made as proposed, will have been made under different sections of the General Code.

The question then arises, are the two positions incompatible?

The determination of the answer to this question will have to be made by the appointing power, to wit, the court making the appointment upon the basis of efficiency of the service rendered and to be rendered by the appointee.

It was heretofore held by this department in Opinions of the Attorney-General for 1915, Volume II, page 1874 that:

"The offices of jury commissioner, assignment commissioner in the court of common pleas and court constable of the superior court are not incompatible nor the duties thereof conflicting and the same person may be appointed to and hold said offices and discharge the duties thereof."

The concluding paragraph of this opinion is as follows:

"In the absence, therefore, of any evidence impeaching the efficiency of their service in the various positions named, there can be no legal objection to their appointments thereto and their continued service therein."

In the Opinions of the Attorney-General for 1921, Volume I, page 317, the syllabus is as follows:

"The office and duties of a criminal court bailiff and those of a court constable are compatible, and the same person may be appointed to dis-

charge the duties of both offices, by the judge or judges of the common pleas court in counties having less than four judges, and may receive the salary for both positions, provided, however, that he is not paid twice for the same service."

The opinion on page 318 contains the following language:

"The rule of incompatibility of office is laid down in the opinion of Dustin J., in case of State vs. Gebert, 12 C. C. (N. S.) 274 as follows:

'Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both.'

As to the physical qualification of such officers mentioned, it has been held by former opinions of this department and the conclusion is well supported by other authority, that it is for those who appoint these officers and fix their compensation, to determine whether or not it is physically impossible for the same person to fill both positions; the law does not prevent it."

Upon the theory of a lack of efficiency in service, or a conflict of duties, it was heretofore held by this department in Opinions of the Attorney-General 1922, Volume II, page 947, that:

"1. The positions of deputy sheriff and county attendance officer may not be held by one and the same person at the same time.

2. The position of court constable (1692 G. C.) and the position of county attendance officer cannot be held by one and the same person at the same time."

It may be noted that apparently an opinion of this department heretofore rendered, to wit, Opinions of the Attorney-General, 1917, Volume II, page 1067, is in conflict with the holding herein. The syllabus of said opinion is as follows:

"A court of common pleas of a one judge county cannot lawfully require a court constable to attend to the assignment of cases.

Court constables of such counties cannot be allowed 'further compensation' as provided for constables who attend to the assignment of cases, in addition to their regular compensation for preserving order and discharging such other duties as the court requires."

We desire to state in distinguishing that this opinion was rendered before the passage of section 3007-1 G. C., and the county therein considered was not such a county as provided for in the last mentioned section.

The provisions of section 1593 G. C. recognize that the same person may be appointed to both positions, to wit, court constable and assignment commissioner upon certain conditions therein stated in counties meeting the requirements of the statute itself, and provide for the increase in salary for the appointee in those counties meeting the conditions.

In the proposed case, however, in appointing the assignment commissioner to be court constable also, there is not sufficient authority in sections 1692 and 1693 G. C. for this to be done, in a one judge county. However, taking the authority found therein in a one judge county for a court constable, when taken in connection with the authority found in section 3007-1 G. C. for the assignment commissioner, I am

clearly of the opinion that it is permissible if the appointing power is satisfied on the question of the efficiency of the services rendered and to be rendered.

Upon the conditions herein stated, I am of the opinion that your second question should be answered in the affirmative.

Respectfully,  
C. C. CRABBE,  
*Attorney General.*

1172.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN THE FOLLOWING COUNTIES: PICKAWAY, MEDINA, MAHONING, (2) SUMMIT, VINTON AND JEFFERSON.

COLUMBUS, OHIO, February 1, 1924.

HON. L. A. BOULAY, *Director of Highways and Public Works, Columbus, Ohio.*

1173.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND WILBUR C. RONAN AND ROBERT G. INGLESON, ARCHITECTS AND ENGINEERS, FOR ARCHITECTURAL SERVICES FOR STAND PIPE AND CONNECTIONS FOR KENT STATE NORMAL COLLEGE—CONSIDERATION FOR THIS CONTRACT WAS COVERED IN CONTRACT FOR PHYSICAL EDUCATIONAL BUILDING AND WOMEN'S DORMITORY.

COLUMBUS, OHIO, February 1, 1924.

HON. L. A. BOULAY, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval contract between the State of Ohio, acting by the Department of Highways and Public Works and Wilbur C. Ronan and Robert G. Ingleson, Architects and Engineers. This contract covers the architectural services for stand pipe and connections for the Kent State Normal College.

From an examination it would seem that it was the intent of the parties to the contract that the consideration mentioned in the contracts executed by the same parties on the same date covering the architectural services for the Physical Educational Building and Women's Dormitory was to cover the services required under the contract before me.

In view of this interpretation as to the intent of the parties in the execution of said contract I approve the same and return it herewith.

Respectfully,  
C. C. CRABBE,  
*Attorney-General.*