

2051

1. COURT OF APPEALS—MAY APPOINT SAME PERSON TO ACT AS OFFICIAL SHORTHAND REPORTER AND COURT CONSTABLE—MAY FIX COMPENSATION FOR SERVICE IN EACH POSITION.
2. POSITION, SHORTHAND REPORTER OF COMMON PLEAS COURT NOT INCOMPATIBLE WITH POSITIONS SHORTHAND REPORTER OR COURT CONSTABLE, COURT OF APPEALS—COMPENSATION.

SYLLABUS:

1. A court of appeals may appoint the same person to act as its official shorthand reporter and court constable and may fix the compensation to be paid such appointee for service in each of such positions.

2. The position of shorthand reporter of the common pleas court is not legally incompatible with either of the positions of shorthand reporter or court constable of the court of appeals, and in case of the disability of the shorthand reporter of a court of appeals, such court may designate the shorthand reporter of the court of common pleas of the county where such court of appeals is then sitting, to act as its shorthand reporter and court constable, and he may so act so long as he is physically able to perform the duties of those several positions, and the court of appeals may fix his compensation for such additional service.

Columbus, Ohio, July 17, 1947

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your communication, in which you request my opinion, such request reading as follows:

“Section 1692, General Code, permits each court of appeals to appoint court constables whose compensation as fixed by the court is paid from the county treasury under the provisions of Section 1693, General Code.

May we respectfully request your opinion upon the following questions:

May the court of appeals appoint as court constable the official stenographer, appointed under authority of Section 1520, General Code, and fix a salary to be paid by the county in addition to his compensation as official stenographer?

In case of disability of the official stenographer, may the court of appeals appoint the common pleas court stenographer or any other person as court constable, and assign to such appointee the official duties of the official stenographer of the court, and fix the compensation of such court constable to be paid from the county treasury?”

Section 1520, General Code, provides in part, as follows:

“Each court of appeals may appoint one or more official shorthand reporters. They shall take an oath of office, serve at the pleasure of the court, perform such duties as the court directs,

and have such powers as are vested in official shorthand reporters of the common pleas court.”

Section 1521, General Code, provides that the compensation of such shorthand reporter shall be fixed by the court and be payable from the state treasury. As to the powers of the shorthand reporters of the court of common pleas to which reference is made in the above quoted statute, I find by reference to Section 1546 et seq., General Code, and particularly Section 1554, that such shorthand reporters, in addition to their ordinary duties of taking testimony in court proceedings and making transcripts thereof, are authorized by Section 1554 to act as referees when appointed by the court to take and report evidence in pending cases and to administer oaths to witnesses. I do not find that they are endowed with any other special powers.

Section 1692, General Code, relative to the appointment of court constables, provides as follows:

“When, in the opinion of the court, the business thereof so required, 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.”

Section 1693, General Code, provides that a court constable shall receive such compensation as the appointing court shall determine.

Your inquiry appears to raise the question as to the compatibility of the positions mentioned and the right of a court constable appointed by the court of appeals to hold at the same time, the position either of the official stenographer of that court or an official stenographer appointed by the court of common pleas.

There is no statutory inhibition against the holding by the same person of any two of the positions in question. Questions of incompatibility, both as to officers and public employes, in the absence of any

statute, have to be determined on principles of the common law. The rule laid down in *Dillon on Municipal Corporations*, page 166, is as follows:

“Incompatibility in office exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one incumbent to retain both.”

In the case of *State ex rel. v. Kinney*, 20 O. C. C., 325, it was said:

“In the absence of express provisions, disqualification to hold two or more offices is limited to offices the duties of which are necessarily incompatible.”

The generally accepted rule on the subject is thus stated in *State v. Gebert*, 12 O. C. C. (N. S.), 275:

“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.”

In an opinion found in 1920 *Opinions of the Attorney General*, page 205, it was held:

“A court stenographer may legally serve as a prosecuting attorney’s stenographer, providing that it is physically possible to properly perform the duties of both positions, and such stenographer under such circumstances is entitled to receive additional compensation from funds allowed to the prosecuting attorney for the payment of a stenographer.”

In the course of the opinion, it was said:

“It is the opinion of the attorney general that there is nothing in the law making either of the positions you mention subordinate to or a check upon the other, and if it is physically possible for a court stenographer to properly perform and discharge the duties of both positions, the same may be done and such court stenographer under such circumstances would be entitled to receive additional compensation from the funds allowed to the prosecuting attorney for the payment of a stenographer.”

In 1924 *Opinions of the Attorney General*, page 60, it was held:

“An assignment commissioner regularly appointed under Section 3007-1, General Code may also be appointed court constable under the authority in Sections 1692 and 1693, General Code, 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.”

In 1922 Opinions of the Attorney General, page 947, it was held that a court constable could not also hold the position of county attendance officer. This opinion turned on the fact that the county attendance officer is a full-time salaried officer, and that the nature of his duties was such that he was subject to call at all times. I do not consider that opinion as having any controlling bearing on the questions you submit.

Referring, therefore, to your first question, I am unable to see from the statutes relating to the duties of a court constable appointed by the court of appeals and an official stenographer of the same court, anything which would render those positions incompatible. In the case you present, the court would have abundant opportunity to see to it that the duties of one position did not infringe upon the duties of the other.

Your second question presents a somewhat more complex situation. The shorthand reporter appointed by a court of common pleas is appointed for a term “not exceeding three years”, his salary being fixed by that court. To a limited extent he is subject to the order of the court, in that the court may under Section 1548, General Code, order him to take the testimony and proceedings in any trial, and under Section 1557, General Code, may require him to make transcripts.

In 1935 Opinions of the Attorney General, page 17, it was held :

“1. The official shorthand reporter of the common pleas court of a county may not legally be employed by the clerk of the common pleas court of such county as deputy during such time as the said shorthand reporter is not engaged in performing the duties of shorthand reporter and receive pay therefor from the county.

2. The prosecuting attorney of a county may legally employ the official shorthand reporter of the common pleas court in his office providing that it is physically possible for the shorthand reporter to properly perform the duties of both positions.”

The holding as to the position of deputy clerk was based **on the** ground that the clerk and his deputies are supposed to be found in their office at all times, and on the further ground that under Section 1552, General Code, the clerk is required to certify to the correctness of the

amount of compensation due the shorthand reporter for making transcripts when paid from the county fund.

As to the official shorthand reporter being also employed as stenographer by the prosecuting attorney, the Attorney General cited with approval the former opinion found in 1920 Opinions of the Attorney General, page 205, from which I have already quoted.

When we consider, however, that the court of appeals is required by the Constitution, Article IV, Section 6, to hold at least one term in each of the counties constituting its district, it becomes evident that the shorthand reporter of the common pleas court, of a given county could not be subject to call in the court by which he is regularly appointed and at the same time be traveling with the court of appeals as its official shorthand reporter and court constable. However, there is nothing essentially incompatible between these positions, and since neither the constable nor the shorthand reporter of the court of appeals is appointed for a term but holds at the pleasure of the court, it is my opinion that under the conditions mentioned in your letter, to wit, during the disability of the shorthand reporter of the court of appeals, the shorthand reporter of the common pleas court in a county where the court of appeals is then sitting, could legally be appointed to serve the court of appeals as its shorthand reporter and constable, provided he is physically able to perform the duties of each of those several positions.

Respectfully,

HUGH S. JENKINS,
Attorney General.