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INCOMPATIBLE OFFICE—COURT CONSTABLE, ASSISTANT PROSECUTING ATTORNEY — APPOINTMENT UNDER SECTION 2701.07 RC, 1692 GC.

SYLLABUS:

The office of court constable, appointed under the provisions of Section 2701.07, Revised Code, Section 1692, General Code, is incompatible with the office of assistant prosecuting attorney.

Columbus, Ohio, November 17, 1953

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Recently our Common Pleas Court established a Reciprocal Uniform Support department to carry out the provisions of the Uniform Support of Dependents Act (G.C. 8007-1 to 8007-19).

Pursuant to sections 16 and 17 of said Act, the Common Pleas Court designated one of its court constables appointed under G.C. 1692 to head the department and assist the Court in carrying out its duties under the Act.

“The department, under the supervision of the court, will interview obligors and obligees, accept for filing and process cases where the Court is acting as an initiating state, receive and process cases where this Court is acting as a responding State, receive and disburse support payments to obligees or the court of the initiating state, and perform all the other duties prescribed in the Act.

“Section 12 of the Act provides that when the court of this state, acting as a responding state, receives from the court of an initiating state a petition for support, it shall, after docketing the cause, ‘notify the prosecuting attorney or his representative who shall thereafter represent the initiating state,’ set a time and place for a hearing, and take such action as is necessary to obtain jurisdiction.

“The designated court constable in question is an attorney-at-law. Being an attorney and because of his familiarity with all phases of the work of the department, in order to carry out the provision of section 12 of the Act, the Court would like to have the Prosecuting Attorney appoint this constable an assistant prosecuting attorney under G. C. 2915, without compensation.

“The question arises whether the positions of court constable and assistant prosecuting attorney are compatible. Can the court constable be appointed an assistant prosecuting attorney and retain his position and rating as such court constable? I consider these questions of state-wide interest and therefore respectfully request your opinion as to the compatibility of these two positions in the circumstances above described.”

The test of incompatibility of public offices most commonly recognized in Ohio is stated in 32 Ohio Jurisprudence, 908, 909, Section 48, as follows:

“* * * One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other,—as an officer who presents his personal account for audit and at the same time is the officer who passes upon it,—or is in any way a check upon the other, or where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both.”

Section 2701.07, Revised Code, Section 1692, General Code, provides for the office of court constable in the following language:

“When, in the opinion of the court, the business thereof so requires, each court of common pleas, court of appeals, 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 judges of the court of common pleas regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court, each constable has the same powers as sheriffs to call and impanel jurors, except in capital cases.”

From the language it is abundantly plain that the officer in question is wholly under the supervision and control of the court making the appointment, and the extent of the control, under the suggested plan, will scarcely be lessened by the proposed arrangement whereby he will continue to receive his sole compensation in his present capacity, and will receive no compensation as an assistant prosecuting attorney.

It will thus be observed that under the suggested plan the individual concerned will be charged with duties pertaining to both the judicial and to the executive departments of the government. The effect of such an arrangement is referred to in 67 Corpus Juris Secundum, 144, Section 23, in the following language:

“* * * Constitutional and statutory provisions prohibiting an officer of one department of the government from holding office in another department are construed in such a manner as to carry out their intent. Such an incompatibility, moreover, is often inferred from the common provisions in the state constitutions intended to secure the distribution of the three powers of government among the three departments of government. * * *”
(Emphasis added.)

On the question of the separation of powers among the three principal departments of government in Ohio, we find the following comment in 8 Ohio Jurisprudence, 231, 232, Section 128:

“The principle as to the separation of the powers of government operates in a broad manner to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary. The distribution of the powers of the state, by the Constitution, operates, by implication, as an inhibition against the imposition upon any department of those powers which distinctively belong to one of the other departments. Each of these departments can exercise such power, and such only, as falls within the scope of the express delegation. One branch of the government cannot

encroach on the domain of another without danger. The safety of our institutions is thought to depend in no small degree on a strict observance of this salutary rule. Each of the three grand divisions of the government must be protected from encroachments by the others, so that its integrity and independence may be preserved. It is incumbent on each officer of the different departments of our government to perform the duties and exercise the authority of his office without in any wise interfering with the power, discretion, or authority of the officers in either of the other departments.

“Acquiescence for no length of time can legalize a clear usurpation of powers where the people have plainly expressed their will and the Constitution has appointed judicial tribunals to enforce it.”

The contrariety and antagonism which would result by an attempt by one person to discharge the duties of both offices here involved become readily apparent when it is recalled (1) that such person serves solely at the pleasure of the court in the only capacity in which he is compensated and (2) that as an attorney representing a litigant in such court it may well become his duty to question the propriety of the court's action by appeal or otherwise. The duty of an attorney in this situation to the court and to his client is commented on in 4 Ohio Jurisprudence, 435, 436, Section 23, in the following language :

“* * * It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. The obligation of this canon of professional ethics is usually understood to be implied in the attorney's oath. This does not mean that the attorney has no recourse against injustice by the judiciary, for whenever there is proper ground for serious complaint against a judicial officer, it is the right and duty of the lawyer to submit his grievance to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them protected.

“If in good faith an attorney believes that a rule of court circumscribes the rights which the law gives to his client, he has the right to proceed by ordinary legal methods to test the validity of the rule, and ought not to be regarded in contempt of court for doing so. * * *”

The final statement above is taken from the opinion by Judge Parker in *Hunt v. State*, 5 C. C. (N.S.) 621, affirmed without opinion, 72 Ohio State, 643, which reads in part, pp. 640, 641 :

“* * * And it seems to us that an attorney ought not to be regarded as in contempt of court, nor his client, if they in good faith believe that a rule in some way circumscribes the rights the law gives them and, thus believing, proceed by ordinary legal methods to test its validity. And unless there is something very extraordinary about the case, calling upon the court to invoke this extreme course of proceeding to punish them, we regard contempt proceedings as quite inappropriate. *Haines v. Haines*, 35 Mich., 138; *Weeks v. Smith*, 3 Abb. Pr. (N. Y.). 211.

“Obviously, an attorney who would refrain from thus proceeding, or who would induce his client to thus refrain, where he was acting in good faith and upon an honest belief that such action was necessary to preserve his client’s interests or to maintain his own rights, an attorney who under such circumstances would fail to act, through fear of consequences either in the way of disfavor upon the part of the judge or punishment by fine or imprisonment, would and ought to be branded as a craven and a poltroon, and he would be quite unworthy of his high commission as a member of the bar. He would be recreant to the honorable traditions of the bars of England and America, which bodies have always been in the van in every movement and effort to resist the tyrannical exercises of arbitrary power by government or its agents. * * *.”

With this notion in mind as to duty of the officer concerned, in his capacity as assistant prosecuting attorney, I find it impossible to conclude that such could be carried on completely free of any subordination to his superior in his capacity as court constable, and so conclude that the two offices described are incompatible.

In this situation, for the reasons hereinbefore indicated, it is my opinion that the office of court constable, appointed under the provisions of Section 2701.07, Revised Code, Section 1692, General Code, is incompatible with the office of assistant prosecuting attorney.

Respectfully yours,

C. WILLIAM O’NEILL
Attorney General