

Opinion No. 263.

**Offices and Officers—Vacancy—
Acceptance of Office—
Incompatibility.**

Held: No public officer under the laws of Montana may hold two incompatible offices at the same time. The offices of clerk and recorder and county commissioner are incompatible. The acceptance by a public officer of another office incompatible with that held by such officer acts as a resignation of the first office. By acceptance is meant qualification in the manner provided by law and induction and actual assumption of the second office. No vacancy in the first office, which would authorize an appointment, occurs until the officer qualifies for and is inducted into and actually assumes the second office. Appointment to fill a vacancy in a county office is made by the commissioners acting as a board and not by them individually.

December 5, 1944.

Mr. J. E. McKenna
County Attorney
Fergus County
Lewistown, Montana

Dear Mr. McKenna:

You have advised me that the incumbent clerk and recorder of Fergus County, whose term does not expire until January, 1947, was elected to the office of county commissioner at the election held November 7, 1944. This situation presents the following questions on which you have requested an opinion:

1. Does the office of clerk and recorder become vacant as soon as the present clerk and recorder qualifies as county commissioner?
2. Does the outgoing board of county commissioners have a right to appoint a successor to fill the office of clerk and recorder vacated by the election of the clerk and recorder to the board of county commissioners, or may the new board, of which the present clerk and re-

recorder will be a member fill the vacancy in the office of clerk and recorder?

An answer to your first inquiry depends upon the question of when an office becomes vacant. Section 511 provides ten separate circumstances which cause a vacancy in public office. Incompatibility or dual office holding is not one of those mentioned. The provisions of this section are exclusive. (*Klick v. Wittmer*, 50 Mont. 22, 26, 144 Pac. 648; *Nagle v. Stafford et al.*, 97 Mont. 275, 291, 34 Pac. (2d) 372.)

However, in the case of *Klick v. Wittmer*, supra, the Court said:

“ . . . for, though we grant that the vacancy is not created by any circumstances not mentioned therein (Section 511) it does not follow that a resignation, which is mentioned therein as a cause of vacancy, may not impliedly arise upon the acceptance of an incompatible office. On the contrary, the authorities are practically unanimous that, as to an office which the incumbent may vacate by his own act, a resignation does occur upon his acceptance of another office incompatible therewith.” (Citing cases.)

This brings up two questions:

1. Are the offices of clerk and recorder and county commissioner incompatible?
2. What is meant by the word “acceptance” as used in this connection?

Mechem, in his work in *Public Offices and Officers*, says at pages 268, 269:

“This incompatibility which will operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper from consideration of public policy, for one person to retain both.”

Our Supreme Court said in the case of *State v. Wittmer*, supra:

“Offices are ‘incompatible’ when one has powers of removal over the other . . . when one is in any way subordinate to the other . . . when one has power of supervision over the other . . .”

Under Section 4465, Revised Codes of Montana, 1935, the board of county

commissioners has general supervisory power over all county officers, including clerk and recorder, and may require them to present their books and accounts for inspection. Under section 5 of Article VII of the State Constitution, as amended, and under Section 4459, Revised Codes of Montana, 1935, the clerk and recorder is made the clerk of the board of county commissioners. And under the provisions of Section 4460, he is required to perform "all duties required by law or any rule or order of the board of county commissioners." (Emphasis mine.)

In *State v. Jones*, 130 Wis. 572, 110 N. W. 431, 432, the Court said:

"It was not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal or important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible."

A study of the duties of both offices clearly and beyond question reveals that the two offices are incompatible.

We then come to the question as to just when the vacancy occurs. Is it at the time he becomes a candidate; when he is elected and qualifies; or when he actually assumes the duties of the second office?

Since the repeal of Chapter 116, Laws of 1937, by Chapter 27, Laws of 1943, there is no law in this state which requires one holding a public office to resign, nor which declares that the mere filing for another office ipso facto acts as a resignation or abandonment of the first office. It is only reasonable to suppose that the legislature in repealing Chapter 116, Laws of 1937, intended that it should not. It is therefore my opinion that the mere filing for the second office does not act as a resignation or abandonment, nor thereby cause a vacancy.

In the case of *People v. Garrett*, 72 Cal. App. at page 455, 237 Pac. 830, the California Court said:

"The rule is settled with unanimity that where an individual is an incumbent of a public office and, during such incumbency, is appointed

or elected to another public office, and enters upon the duties of the latter, the first office becomes at once vacant if the two are incompatible." Citing *Mechem*, Public Officers, Sec. 419; 22 R. C. L. Title "Public Officers" Sec. 63. (Emphasis mine.)

And in the case of *People v. Thompson*, 130 Pac. (2d) 237, 241, (Cal.), the Court said:

"It is not the performance, nor the prospective right of performance, of inconsistent duties only, that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices. '... a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit.'" (Citing *People ex rel. Chapman v. Rapsey*, 12 Cal. (2nd) 640, 107 Pac. (2nd) 390.)

And continuing the Court says:

"... The right to perform duties does not exist until there is at least tenure or term of office; that is, the right to perform the duties incidental thereto; tenure of office refers generally to the right to hold office subject to its termination by some contingency such as age limitation, resignation, death, removal, etc. 'Tenure' is sometimes held to be synonymous with 'term of office' (*Hunt v. Superior Court*, 178 Cal. 470, 173 P. 1097), which ordinarily refers to a fixed period. 62 *Corpus Juris*, 714. Until tenure in the sense of term of office exists, there can be no incompatibility of official duty for the simple reason that there is no 'right . . . and duty . . . duty invested (by law) . . . to perform a public function for public benefit.'" (*People ex rel. Chapman v. Rapsey*, supra.)

And the same Court, in speaking of the term qualifying for office said at page 241, Pacific Report:

"Qualifying for an office by taking and filing the oath or filing a bond before the term of office actually commences is but a preliminary, al-

though sometimes necessary, step to the final assumption of duties. The purpose of such mandatory provisions need not be discussed here. The preliminary performance of statutory requirements cannot vest one with the immediate right to perform the duties of the office, and until there is an authority to discharge the duties as an incumbent there can be no incompatibility of office." (Citing *People v. Garrett*, supra.)

It is therefore my opinion that no vacancy occurs in the office of clerk and recorder until the incumbent actually assumes the duties and obligations of the office of county commissioner.

There being no vacancy until the officer is inducted into and assumes the second office, to-wit, the first Monday in January, 1945, the county commissioners may not appoint one to fill such vacancy until that time.

The appointment to fill a vacancy is made by the board as such, and not by the members thereof, or any one or more of them. Hence, there is no question raised as to the right of the newly elected commissioner appointing his successor.

It is therefore my opinion:

1. No public officer under the laws of Montana may hold two incompatible offices at the same time.
2. The offices of clerk and recorder and county commissioner are incompatible.
3. The acceptance by a public officer of another office incompatible with that held by such officer acts as a resignation of the first office.
4. By acceptance is meant qualification in the manner provided by law and induction and actual assumption of the second office.
5. No vacancy in the first office, which would authorize an appointment occurs until the officer qualifies for and is inducted into and actually assumes the second office.
6. Appointment to fill a vacancy in a county office is made by the commissioners acting as a board and not by them individually.

Sincerely yours,
R. V. BOTTOMLY
Attorney General