

Elections, of Judicial Officers. Nomination, of Judicial Officers. Judicial Officers, How Nominated. County Attorney Not a Judicial Officer Within the Meaning of Chapter 113, Session Laws 1909. State Senator, Not a Judicial Officer Within the Meaning of Chapter 113, Session Laws 1909. County Coroner, Not a Judicial Officer Within the Meaning of Chapter 113, Session Laws 1909.

Chapter 113, Session Laws 1909, providing that all nominations for judicial offices shall be made only by petition, does not apply to the offices of county, attorney, state senator, and county coroner, for the reason that these offices are not judicial offices within the meaning of said chapter.

Helena, Montana, October 24, 1910.

Mr. Thos. J. Walker,
County Attorney,
Butte, Montana.

Dear Sir:—

Replying to your inquiry of recent date, requesting an opinion of this office as to whether or not the offices of county attorney, state

senator, and county coroner are judicial offices within the meaning of Chapter 113, Session Laws of 1909, providing that: "Hereafter all nominations for judicial offices shall be made only in the manner provided by Section 1313 of the Political Code of the state of Montana;" and whether or not nominations for such offices should be made by party convention or petition under the provisions of Section 1313 of the Political Code, I will say:

Section 1, Article IV, of the Constitution of the State of Montana, provides that the powers of the government of this state are divided into three distinct departments: legislative, executive and judicial,—the office of county attorney being enumerated under the head "judicial department," and the office of state senator under "legislative department," while the office of county coroner is not mentioned under any of these heads.

The object of the framers of the Constitution was to classify the departments of the state rather than to exclusively establish the different offices (State vs. Womack, 29 Pac. 939), and the mere fact that the office of county attorney is named under the title "judicial departments" does not in our opinion make it a judicial office.

Chapter 113, Session Laws of 1909, provides that hereafter all nominations for "judicial offices" shall be made only in the manner provided by Section 1313 of the Political Code of the State of Montana, and the question to be decided is: What is a judicial office within the meaning of this chapter?

Judicial offices are those which relate to the administration of justice, and which must be exercised by the person appointed for that purpose, and not by deputies..

Throop on Pub. Offices, Sec. 22.

The term "judicial officer" includes judges and justices of all courts and all persons exercising judicial power by virtue of their office.

Settle v. Van Evrea, 49 N. Y. 230.

In the absence of a positive enactment of the statute or constitution to the contrary, we look only to the jurisdiction of the court or officer and the duties of an incumbent for the purpose of arriving at a correct conclusion as to the character of the offices, (Waldo vs. Wallace, 12 Ind. 569), and in the offices under consideration it is apparent that none of them exercise judicial powers or functions; they do not exercise judicial discretion nor render a judgment in any respect. A judicial officer is one who determines what the law is upon a given state of facts and has the power of imposing a judgment thereon, and enforcing the same, by the exercise of a perfect freedom of opinion.

Section 1, Article VIII, of the Constitution, provides:

"The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace and such other inferior courts as the legislative assembly may establish in any incorporated city or town."

This section determines in what courts the judicial power of the state shall be vested, but it will be noticed that it also includes the

senate "when sitting as a court of impeachment," but the mere fact that a state senator may be called upon in his official capacity as a legislative officer to sit as a member of a court of impeachment would not make the office which he holds a judicial office—it is distinctly a legislative office.

A judge will be none the less a judicial officer because some duties he may have to perform are administrative in their character; nor will an administrative officer become a judicial officer simply because some acts he may be required to perform are judicial in their character.

Waldo vs. Wallace, 12 Ind. 569.

It is therefore my opinion that the offices herein referred to are not judicial offices within the meaning of Chapter 113, Session Laws of 1909, and therefore the nominations for such offices do not come within its provisions and are not required to be made by petition.

Section 545, Revised Codes, provides that where any person is nominated for the same office by more than one party or convention his name shall be placed upon the ticket under the designation of the party which first nominated him, unless he declines in writing one or more of such nominations, or by written election indicates the party designation under which he desires his name printed. If he shall fail or neglect to file such an election, the officer with whom the certificate of nomination is required to be filed shall place his name under the designation of the party by which he was nominated, but under no other designation whatever, and no person who has been nominated by petition or otherwise shall have his name printed on the ticket if the same already appears under a party designation. Therefore if any person who has been nominated by party convention has also filed a nomination by petition and fails to notify the county clerk in writing that he elects to have his name printed upon the ballot as a non-partisan nominee, the clerk will place his name upon the ballot under the name of the party by which he was first nominated. He cannot have his name placed upon the ballot, both as a party nominee and nominee by petition.

Trusting the above opinion will fully advise you in the matter, I remain,

Yours very truly,
ALBERT J. GALEN,
Attorney General.