

have presented the following facts and question to me:

"The duly elected, qualified and acting County Coroner of Granite County, Montana, has filed a nominating petition for the office of Mayor of the Town of Philipsburg, Montana.

"Assuming that this person is elected to the office of Mayor of the town of Philipsburg, my question is: Can the duly elected, qualified and acting Coroner of a county in Montana also legally hold the office of Mayor of an Incorporated Town in said State?"

There is no general statutory prohibition against the holding of two offices by one person. However, it is the universal holding that in the absence of a statute prohibiting the same person from holding two offices, the courts will look to the common law to determine whether such will be permitted.

The settled rule of the common law prohibits a public officer from holding two incompatible offices at the same time. In the case of *Howard vs. Harrington*, 114 Me. 443, 96 Atl. 769, the court stated that "the doctrine of incompatibility of offices is bedded in the common law and is of great antiquity."

Montana has recognized this doctrine, and the leading case on the subject is *State vs. Wittmer*, 50 Mont. 22, 144 Pac. 648. In that case the court determined that the office of Alderman of the City of Great Falls and the office of City Purchasing Agent were incompatible. In so holding the court laid down the test of incompatibility, stating:

"Offices are incompatible when one has the power or removal over the other, . . . when one is in any way subordinate to the other, . . . when one has power of supervision over the other, . . . or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

A study of the cases reveals the fact that two cases rarely arise involving the same offices; consequently, it is difficult to decide a question of this character under specific case holdings. Rather, the question must be decided by comparing the powers and duties of

Opinion No. 74

County Coroner—Mayor of an Incorporated City or Town—Public Offices—Incompatibility—Constitution, Section 5 of Article XVI—Statutes 11-703, 11-802, 16-3401 to 16-3410, Revised Codes of Montana, 1947—Elections

Held: There is no Constitutional or Statutory provision which prohibits the same person from retaining the office of County Coroner and the office of Mayor of an Incorporated City or Town. Whether a person may retain two offices at the same time is tested by whether the two offices are incompatible, in the absence of any Constitutional or Statutory prohibition.

Restriction imposed upon the right of a person to hold office should receive a liberal interpretation in favor of the right of the people to exercise freedom of choice in the selection of officers.

April 3rd, 1952.

Mr. Pershing D. Hanifen
County Attorney
Granite County
Philipsburg, Montana

Dear Mr. Hanifen:

In requesting an official opinion you

the offices involved under the guide of the common law test, as interpreted by the decisions of the jurisdiction involved.

The office of County Coroner is created by Section 5 of Article XVI of the Constitution of the State of Montana; the duties and powers of that office are set out in Sections 16-3401 to 16-3410, Revised Codes of Montana, 1947. A study of those sections reveal that his primary duty is to conduct inquests and to act as Sheriff, when the holder of that office is a party to an action or proceeding.

The office of Mayor of a town is authorized under Section 11-703, Revised Codes of Montana, 1947, and the duties and powers are enumerated by Section 11-802, Revised Codes of Montana, 1947. His powers are largely executive, generally being, execute the ordinances and resolutions of the city or town council and to supervise the various city or town officials.

Fitting the powers and duties of the offices of County Coroner and Town Mayor into the definition of "incompatibility" as found in the case of *State vs. Wittmer* (supra), it does not appear that one has the power of removal over the other, or that one is subordinate to the other, nor under the supervision of the other. Also, it does not appear that there are any considerations of public policy which would make it improper for one person to retain both offices.

The argument might arise that it is against public policy to retain the office of Mayor and the office of Coroner, in that there is a physical inability to perform the duties of both at the same time. However, the courts are practically unanimous in holding that mere physical inability to perform the duties of both personally does not constitute incompatibility, and the generally accepted holding is that physical impossibility is not the incompatibility of the common law; rather, inconsistency in the functions of the two is what constitutes incompatibility. See *Ryan vs. Green*, 58 N. Y. 295.

It is my opinion that the offices of County Coroner and Mayor of an incorporated town are not incompatible, and that there is no direct prohibition against retaining both offices at the same time in the Constitution or Statutes of the State of Montana, nor is

there a prohibition of the common law which would prohibit the same persons from holding both offices. I am further of the opinion that restrictions imposed upon the right of a person to hold office should receive a liberal interpretation in favor of the right of the people to exercise freedom of choice in the selection of officers.

Very truly yours,
ARNOLD H. OLSEN
Attorney General