

Opinion No. 88.

Clerk of the District Court — City Councilman—Mayor—Offices, Incompatibility of—Public Offices.

HELD: 1. A clerk of the District Court is not prevented by any provision of the Montana Constitution or by the common law principle of incompatibility from simultaneously holding the office of mayor of a city.

2. A clerk of the District Court is not prevented by any provision of the Montana Constitution or by the common law principle of incompatibility from simultaneously holding the office of city councilman.

August 11, 1954.

Mr. M. J. Traynor
County Attorney
Daniels County
Scobey, Montana

Dear Mr. Traynor:

You have requested my opinion regarding the following questions:

1. May the Clerk of the District Court accept an appointment as mayor of a city and still retain his office as Clerk of Court?
2. May the Clerk of the District Court hold office as city councilman and still retain his office as Clerk of Court?

In 1 Opinions of the Attorney General 67, it was held that no constitutional or statutory interdiction existed as to your first question. You suggest that the dual incumbency posed by your questions might be prohibited by the constitutional doctrine of separation of power or by incompatibility in the event the city and county became legal antagonists. These points were not considered in the opinion noted above and merit clarification.

Article IV of the Montana Constitution expresses the doctrine of separation of power. It provides:

"Section 1. The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

This constitutional provision was relied upon in 22 Opinions of the Attorney General 212, No. 137, to prevent the dual holding of the offices of Justice of the Peace and Public Administrator, and at first glance would seem to forbid the dual office holding presented here, in that a Mayor is an executive officer and a Clerk of the District Court is denominated a judicial officer. However, a Mayor is a municipal officer, whereas a Clerk of the District Court is a state officer. And germane to this distinction, the weight of authority is that the separation of power doctrine has reference to state offices only. Four states with constitutional provisions substantially similar to ours have so held. See *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 Pac. 594; *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. 790; *Peterson v. Culpepper*, 72 Ark. 230, 79 S.W. 783, 2 Ann. Cas. 378; *Santo v. The State of Iowa*, 2 Iowa 220.

The reason for the irrelevance of this constitutional provision to situations below the level of state government is expressed in the early case of *People v. Provines*, 34 Cal. Reports 520, were, construing California's comparable constitutional article, the court said:

"The Third Article of the Constitution means that the powers of the State government—not the local governments thereafter to be created by the Legislature—shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments . . ."

Further in its opinion, the California court takes this Article as applied to dual office holding to mean, ". . . that no member of the Legislative Depart-

ment as defined in the Constitution shall at the same time be a member of the Executive or Judicial Department as therein defined . . ." I might here observe that the office of Mayor is not defined or created as such by our Constitution.

The position taken by California, Arkansas, New Mexico and Iowa gains in persuasiveness when we reflect that the provision for separation of power was designed to provide a check and balance of one department upon the other and that this objective does not obtain where, as here, the offices are on different governmental levels.

I therefore conclude that Section 1, Article IV of the Montana Constitution offers no impediment to one person simultaneously holding both the office of Mayor and Clerk of the District Court.

Dual incumbency is forbidden where the offices are found to be incompatible. Here we must consider whether these offices be incompatible by reason of the fact that in any action involving the city and county, the Clerk of the District Court would be performing duties respecting which he was an interested party.

No case has been found squarely meeting the possibility you mention. However, the Missouri Supreme Court in *State ex rel. Henson v. Sheppard*, 192 Mo. 497, 91 S.W. 477, had this to say regarding a Clerk of a Court as an interested party.

"If Henson had actually exercised clerical duties in his own cases, and the validity of such acts was questioned here, a different question would naturally arise. If such question were up, we would have no difficulty or hesitancy in saying that his acts would be valid, because in a certain sense a clerk is a mere ministerial officer and official acts of a merely ministerial character performed by an interested party, are not, on that account alone, invalidated when assailed *ex post facto*. For instance a clerk may issue process in his own behalf. *Huff v. Sheppard*, 58 Mo., *loc. cit.* 245."

Further in the same decision, the Court says, "A clerk in issuing process whether mesne or final is the instrument of the court."

In his text "Public Officers," Section 607, Professor Troop states the general rule respecting the exercise of power by an interested officer to be ". . . he shall not act where the power is judicial, but he may act where it is ministerial." Many of the instances chosen to illustrate this rule concern the Clerk of the Court. (See Section 614.) It is axiomatic that the office of the Clerk of the Court is essentially a ministerial one. (14 C.J.S. Clerks of Courts, Sec. 1, p. 1211.) A review of his duties and powers as shown by the Montana statutes confirms this. The powers which may be deemed discretionary pertain to marriage and probate, and as such, are not pertinent here.

It is significant that in several states special statutes have been necessary to disqualify a Clerk of Court from performing the duties of his office in respect to any matter in which he has an interest. (See 11 C.J. Clerks of Courts, Sec. 68, p. 885, f. n. 90.)

You are cautioned that this opinion should not be considered to hold that in every instance a Clerk of the District Court can at the same time hold the office of Mayor or City Councilman. This goes no further than to hold that the two specific objections raised by your inquiry and considered herein do not bar the dual office holding.

Therefore, based on the facts of your inquiry and limited to those facts, I am of the opinion that the offices of Clerk of the District Court and Mayor of a City may be held simultaneously by the same person. Based on exactly the same reasoning and limited to the facts of your inquiry, I am of the opinion that the offices of Clerk of the District Court and City Councilman may be held simultaneously by the same person.