November 1, 1972

Governor Kenneth M. Curtis — Executive

John W. Benoit, Jr., Deputy — Attorney General

County Commissioner and Clerk of Superior Court; Doctrine of Incompatibility of Offices.

This is a response to your inter-departmental memorandum dated October 16, 1972 (supplemented by facts orally stated) asking whether a person who is now holding the office of Sagadahoc County Commissioner (which term of office will expire in December, 1974) may legally hold, simultaneously, the office of Clerk of the Superior Court of Sagadahoc County, if he is elected to such office November 7, 1972. For the reasons given below, we answer the question in the negative.

The law relating to incompatibility of public offices arose in the common law and is a matter of public policy. Howard v. Harrington, 114 Me. 441. At common law, two offices whose functions are inconsistent are regarded as incompatible. Attached to this memorandum is an Appendix containing language from Howard v. Harrington, supra, showing the reasoning supporting the common law rule.

Incompatibility arises from the given facts because the nature and duties of the reference offices (County Commissioner and Superior Court Clerk) are such as to render it improper, from considerations of public policy, for one person to retain both offices. Note that county commissioners are allowed, by statute, all necessary traveling and hotel expenses connected with travel outside the county seat on official business, including public hearings, inspection and supervising construction, snow removal and maintenance of roads in unincorporated townships in their respective counties. 30 M.R.S.A. § 106. All bills for such traveling and hotel expenses "shall be approved by the clerk of courts and the county attorney of their county." Ibid. It would be against public policy to permit a clerk of courts to approve his own traveling and hotel expenses incurred in connection with duties performed while a county commissioner. With respect to such traveling and hotel expenses incurred by county commissioners under § 106, the clerk of courts and the county attorney are intended to have independent, discretionary reviewing powers. As such, incompatibility arises because the nature and duties of the two offices involved (county commissioner and clerk of courts) are such as to render it improper, from considerations of public policy, for one person to retain both offices. Abry v. Gray, 58

According to the provisions of 30 M.R.S.A. § 201, the clerk of the Superior Court in each county is designated the clerk of the county commissioners. The clerk of the Superior Court is charged, by statute, with making a daily record of the doings of the county commissioners. Ibid. Moreover, the commissioners are required to examine the records kept by the clerk and, when correct, to certify them so that they may be copied into the records of the county commissioners. Now, the shoe is on the other foot. If a county commissioner also held the office of clerk of the commissioners, he would, as county commissioner, determine the correctness of his own doings as clerk of the commissioners. The test of incompatibility is found in the character and relation of the offices, as where the function of the offices are inherently inconsistent and repugnant. State v. Goff, 15 R.I. 505. Consider the situation where the county commissioners are conducting a meeting at which one of the commissioners is also the clerk of the commission by virtue of being the clerk of the Superior Court in the county. When the commissioners act, one of the commissioners makes a record of the proceedings. At such a meeting, one of the commissioners wears two hats, i.e., he is acting simultaneously as county commissioner and as clerk of the commissioners. As the meeting progresses, the commissioner-clerk removes one hat in favor of the other hat whenever the duties of one office become paramount over the other office. The result of that is incongruous.

> "I there did meet another man.
> With his hat in his hand."
> Anecdotes of Johnson by
> George Stevens.

On at least one occasion, county commissioners have been required to commence litigation against the clerk of the commission for the purpose of seeking a court order compelling compliance by the clerk with a directive of the commissioners. See, for example, Adams v. Ulmer, 91 Me. 47. In that case, the commissioners ordered a warrant of distress to issue by the clerk of the commission in an amount sufficient to pay the account resulting from the construction of a bridge by an agent of the commissioners. Although all proceedings were in accordance with the law, the clerk of the county commissioners refused to issue a warrant of distress. The Court concluded that it was the duty of the clerk of the commissioners to issue a warrant of distress in accordance with the judgment and order of the county commissioners. Return again to the assumption one person held both offices, and assume the county commissioner-clerk of Superior Court was at odds with the other two county commissioners respecting a matter of

county business. The dissenting commissioner, as clerk, need only refuse to obey the order of the commissioners and thereby force the commissioners to court. Conversely, if the dissenting commissioner were not simultaneously the clerk of the commission, then the decisios of the other commissioners voided to a "non-interested" clerk of the commission would likely be obeyed. (Words giving authority to three or more persons authorize a majotity to act. 1 M.R.S.A. § 71.).

While it may be possible to enlarge the content of this memorandum by presenting other reasons in support of the ruling of incompatibility made here, such extension of argument is not necessary. Two offices are incompatible when the holder cannot in every instance discharge the duties of each.

One final comment is required respecting the point of time at which incompatibility occurs and the result that flows therefrom. It is the acceptance of the second office that vacates the former office. Howard v. Harrington, supra. So the facts of the present situation are such that by accepting and qualifying for the office of clerk of the Superior Court, the person would, by operation of law, vacate the office of county commissioner.

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APPENDIX

"The answer to the question before us does not necessarily depend upon constitutional or statutory provisions. The doctrine of the incompatibility of offices is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is, what constitutes incompatibility? This question has been answered by the courts with varying language, but generally with the same sense. We cite a few examples. "Two offices are incompatible when the holder cannot in every instance discharge the duties of each. The acceptance of the second office, therefore, vacates the first." The King v. Tizzard, 9 B. & C., 418. This language is cited with approval by this court in Stubbs v. Lee, supra. "Incompatibility must be such as arises from the nature of the duties, in view of the relation of the two offices to each other." Bryan v. Cattell, 15 Iowa, 535. "Incompatibility arises where 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." Abry v. Gray, 58 Kan., 148. "Incompatibility between two offices exists when there is an inconsistency in the functions of the two." People, ex rel. Ryan v. Greene, 58 N.Y., 295. "The functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices." Kenney v. Georgen, 36 Minn. 190. "The test of incompatibility is the character and relation of the offices, as where the function of the two offices are inherently inconsistent and repugnant." State v. Goff, 15 R.I., 505. "The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them." State ex. rel. Clawson v. Thompson, 20 N.J. Law, 689. The foregoing cases may also be cited in support of the doctrine that acceptances of the later of two incompatible offices vacates the former. See also Cotton v. Phillips, 56 N.H., 220; People v. Carrigan, 2 Hill, 93; Van Orsdale v. Hazard, 3 Hill, 243; Magie v. Stoddard, 25 Conn., 565; 3 Com. Dig. Tit. Officer (K. 5.) Mechem on Public Officers, sect. 420. An office holder is not at common law ineligible to appointment or election to another and incompatible office, but the acceptance of the latter vacates the former."

Howard v. Harrington, 114 Me. 443, at 446, 447.