

# MAINE STATE LEGISLATURE

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*Incomplete Off. Bail Commissioner/District Clerk*

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May 16, 1978

Ronald A. Lausier  
Bail Commissioner  
3 Roosevelt Avenue  
Van Buren, Maine 04785

Dear Mr. Lausier:

You have inquired as to whether a District Court clerk, duly appointed a justice of the peace by the Governor, can serve as a bail commissioner. Under the statute which governs our authority to issue opinions, 5 M.R.S.A. §195, we are unable to formally respond to your question.

It would be my personal view, however, that appointing the same person a District Court clerk and a bail commissioner might create a serious problem. The problem stems from the fact that the clerk in question is empowered to issue arrest warrants. If a clerk were, for a fee, to admit to bail an individual arrested pursuant to a warrant issued by that clerk, the neutrality of the warrant process would be called into question. Put somewhat differently, the clerk would have a potential, pecuniary interest in the issuance of the arrest warrant, but would stand to gain nothing by refusing to issue the warrant.

I hope these comments are of some use to you. I am also enclosing a recent opinion on a related subject. Please let me know if I may be of any further service.

Sincerely,

STEPHEN L. DIAMOND  
Assistant Attorney General

SLD:sm

# STATE OF MAINE

Inter-Departmental Memorandum Date May 2, 1978

To Doris Hayes Dept. State  
From Stephen L. Diamond Dept. Attorney General  
Subject Appointment of Bail Commissioners

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## FACTS:

Title 14, section 5541 of the Revised Statutes, provides that only justices of the peace may serve as bail commissioners. A question has arisen as to whether a clerk of the District Court, who has not been appointed a justice of the peace by the Governor, is nevertheless eligible for appointment as a bail commissioner in light of the fact that 4 M.R.S.A. §158 makes clerks ex officio justices of the peace.

## QUESTION:

Whether a clerk of the District Court, who has not been appointed a justice of the peace by the Governor, is eligible for appointment as a bail commissioner?

## ANSWER:

Notwithstanding the provisions of 4 M.R.S.A. §158, a clerk of the District Court, who has not been appointed a justice of the peace by the Governor, may not be appointed a bail commissioner.<sup>1</sup>

## REASONING:

The appointment of bail commissioners is governed by 14 M.R.S.A. §5541.

§5541. Bail commissioners appointed by court

The Superior Court sitting in each county shall appoint from the number of justices of the peace resident in the county, one or more bail commissioners, who shall hold office during the pleasure of the court. All bail commissioners acting under an appointment by a Justice of the Supreme Judicial Court shall continue in office during the pleasure of the Superior Court.

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1. Nothing in this opinion affects the authority of clerks to take bail, without fee, during the hours when the clerk's office is open for business. See 4 M.R.S.A. §160.

Thus, the statute clearly requires that a prospective appointee be a justice of the peace.<sup>2</sup> The pending question arises from the fact that 4 M.R.S.A. §158 purports to confer that status on all clerks of the District Court.

§158. Ex officio, justice of the peace; may administer oaths

Judges and clerks of the District Court are, ex officio, justices of the peace, and all their official acts, attested by them in either capacity, except those pertaining to the exclusive jurisdiction of Judges and clerks of District Courts, are of equal effect. Judges and clerks of the District Court may administer all oaths required by law, unless another officer is specifically required to do it.

It must be conceded that a literal reading of the above provisions would justify the conclusion that a clerk is eligible for appointment as a bail commissioner in the county in which he resides. The problem stems, however, from Art. V, Part 1, §8 of the Maine Constitution, which provides in relevant part:

He [the Governor] shall nominate and appoint justices of the peace for an initial term only, and additional terms of these officers shall be by renewal of commission, as provided by law.<sup>3</sup>

Accordingly, an interpretation of 4 M.R.S.A. §158 as conferring upon clerks of the District Court full status as justices of the peace produces a direct conflict with the constitutional requirement that such justices be appointed by the Governor.

It is a well established maxim that, whenever possible, statutes should be construed so as to render them free of any constitutional defects. In re Stubbs, 141 Me. 143, 147 (1944). Similarly, it must

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2. This requirement dates back to the original bail commissioner statute enacted in 1873. See P.L. 1873 c. 137, §1.

3. Prior to amendments in 1974 and 1975, the relevant portion of Art. V, Part 1, §8 read as follows:

Section 8. He [the Governor] shall nominate, and with the advice and consent of the Council, appoint all judicial officers (except judges of probate), coroners, and notaries public . . .

The conclusion expressed in this opinion would be the same were the prior version of section 8 still in effect.

Doris Hayes  
May 2, 1978  
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always be presumed that the Legislature intended to act consistently with the Constitution. State v. Fixaris, 327 A.2d 850, 853 (Me. 1974). Applying these principles to 4 M.R.S.A. §158, the relevant inquiry is whether that provision is susceptible of a constitutionally valid interpretation.

An analysis of the history of 4 M.R.S.A. §158 strongly suggests that the Legislature's purpose was to give clerks the powers which they would need to fulfill the responsibilities of their offices. While §158 is clearly based upon prior statutes, it is significant that none of those statutes made clerks justices of the peace. That status was granted, ex officio, only to judicial officers.<sup>4</sup> For example, the relevant sections of the Revised Statutes of 1930 provided as follows:

Chapter 144, §3

Judges of municipal courts and police courts, clerks of courts, trial justices and justices of the peace may administer all oaths required by law, unless another officer is specifically required to do it. . . .

Chapter 97, §34

Trial justices and judges of municipal and police courts are, ex officio, justices of the peace and all their official acts, attested by them in either capacity, except those pertaining to the exclusive jurisdiction of trial justices and judges of municipal and police courts are of equal effect.

Despite language changes, this distinction between clerks and judicial officers in the statutes dealing with the administration of oaths and with ex officio justice of the peace status was maintained in the Revised Statutes of 1954.<sup>5</sup>

Section 158 of Title 4 was enacted as part of a comprehensive bill designed to effectuate the establishment of the District Court.

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4. While it is not necessary to deal with the ex officio justice of the peace status accorded District Court Judges, it should not be assumed that the conclusions expressed in this opinion would be applicable to that issue, since judges are appointed by the Governor in the first instance. By contrast, clerks of the District Court are appointed by the Chief Judge. See 4 M.R.S.A. §159.

5. The relevant sections of the Revised Statutes of 1954 provided as follows:

Chapter 89, §102

See P.L. 1963, c.402, §155. The section's similarity to preceding statutes indicates that the Legislature was simply extending to the judges and clerks of the newly created District Court powers which had existed under prior law. In light of the prior law, it is reasonable to conclude that the Legislature did not intend section 158 to accord clerks of the District Court formal status as justices of the peace. Rather, the intent was to give clerks those powers of justices of the peace which they would need to perform the functions of their office. As noted above, any other interpretation would cast serious doubt on the constitutionality of section 158.

It is the opinion of this Office, then, that while they may have some or all of the same powers,<sup>6</sup> clerks of the District Court are not formally justices of the peace, unless they hold that office by virtue of a gubernatorial appointment. Lacking such an appointment, they are not "justices of the peace" within the meaning of 14 M.R.S.A. §5541, and thus, they are not eligible to serve as bail commissioners.<sup>7</sup>

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Clerks of courts may administer oaths unless another officer is specifically required to do it.

Chapter 111, §10

Trial justices and judges of the municipal courts are, ex officio, justices of the peace and all their official acts, attested by them in either capacity, except those pertaining to the exclusive jurisdiction of trial justices and judges of municipal courts, are of equal effect. Judges of municipal courts, trial justices and justices of the peace may administer all oaths required by law, unless another officer is specifically required to do it.

6. This opinion need not determine the nature and extent of the powers of District Court clerks.

7. Although not raised by the present question, there might be a problem if a clerk of the District Court, duly appointed as a bail commissioner, were to collect a fee for taking bail from a person arrested pursuant to process issued by that clerk. Cf. Connally v. Georgia, 97 S.Ct. 546 (1977). Prior Maine law prohibited a clerk from acting as a bail commissioner in any case wherein the process was made returnable to his court. Revised Statutes of 1954, c.125, §34 (repealed by P.L.1963, c.402, §204).