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Dual Office Holding--Federal, State and Municipal

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by every man and that the same should at least be expected of a trustee.

It has been decided that this duty of prophecy is satisfied if the trustee "merely did as hundreds of thousands of other ordinarily prudent and cautious persons did"⁵⁷ and even though "most men of that degree of prudence and caution that we call ordinary did not foresee"⁵⁸ the "financial cataclysm," the courts cannot harshly condemn them.

ARTHUR S. MARGULIS.

DUAL OFFICE HOLDING—FEDERAL, STATE AND MUNICIPAL.

It is a fundamental principle of the law of government that under certain circumstances a person may not simultaneously hold two governmental offices. The rule had its origin in the common law, and has been reiterated and extended by constitutional provisions, statutory enactment and executive order. The common law rule pertaining to dual office holding is that the acceptance by a public officer of a second incompatible office terminates *per se* the ability of the acceptor to hold the first office as effectively as would a resignation therefrom.¹ The theory of incompatibility underlying the common law rule is set forth in *People ex rel. Ryan v. Green* as follows:

"Incompatibility between two offices, is an inconsistency in the functions of the two; as judge and clerk of the same court—officer who presents his personal accounts subject to audit, and officer whose duty it is to audit it. * * * The force of the word in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one toward the incumbent of the other."²

Whether the offices involved are incompatible is a judicial question,³ and the true test to be applied is whether the two offices are

⁵⁷ *In re Pettigrew's Estate*, 115 N. J. Eq. 401, 171 Atl. 152 (1934).

⁵⁸ *In re Westfield Trust Co.*, *supra* note 21.

¹ *Millard v. Thatcher*, 2 T. R. 81, English Rul. Cas. 320 (1787); *Rex v. Patteson*, 4 B. & A. D. 9 (1832); *State v. Bus*, 135 Mo. 325, 36 S. W. 636 (1896); *Oliver v. Jersey City*, 63 N. J. L. 96, 42 Atl. 782 (1899); *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109 (1886); MECHEM, *THE LAW OF OFFICES AND OFFICERS* (1890) §420.

² *People ex rel. Ryan v. Green*, 58 N. Y. 295, 304 (1874).

³ *Ibid.*

incompatible in their natures, in their rights, or in the duties or obligations connected with, or flowing from them.⁴ The same person may hold different offices if they are not incompatible, unless forbidden by constitutional or statutory prohibition,⁵ and the mere appointment of a person to a second incompatible office does not *ipso facto* nullify his incumbency, but upon qualifying and accepting the second, the first office is *ipso facto* vacated.⁶

The provisions of the constitutions of the various states and of the Federal Government cover substantially the same ground as the common law prohibition against holding incompatible offices; but they also, in many cases, go further than that and arbitrarily prohibit the holding of two offices which the common law might not declare incompatible.⁷ However, where there is a provision that a person holding one office shall be ineligible *to election* to another, it follows that any attempted election to the second is void, and that if, by reason of it, he attempts to hold the second office he will be removed from it.⁸ But, where it is the *holding* of two offices at the same time that is forbidden by a constitution or a statute, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates *ipso facto* to vacate the first.⁹

Whether the right to hold two offices is questioned on the common law rule of incompatibility or on the ground of statutory restrictions, it is often necessary to determine whether the performance of certain services or the duties involved in a particular position constitutes "holding an office" or whether it is a mere "employment," *i. e.* whether a given person is a true office holder or a mere employee. This distinction is not always easy to make, as Chief Justice Marshall said:

"Although an office is an employment, it does not follow that every employment is an office. A man may be certainly employed under a contract express or implied to do an act or perform a service without becoming an officer. But if the duty be a continuing one, which is defined by rule prescribed by government, and not by contract, which an individual is appointed to perform, who enters upon the duties appertaining

⁴ State *ex rel.* Thompson, 20 N. J. L. 689 (1846).

⁵ Badeau v. United States, 130 U. S. 439, 9 Sup. Ct. 579 (1889); Converse v. United States, 62 U. S. 463 (1858).

⁶ People v. Corrique, 2 Hill 93 (N. Y. 1841) (thus acceptance of the office of town clerk by the justice of the peace vacates the latter); People v. Dillon, 38 App. Div. 539, 56 N. Y. Supp. 416 (1899).

⁷ 2 MECHEM, *op. cit.* *supra* note 1, §427.

⁸ *Id.* §428.

⁹ People v. Brooklyn, 77 N. Y. 503 (1879); State v. Draper, 45 Mo. 355 (1871); Dickson v. People, 17 Ill. 191 (1855). *Contra:* McWilliams v. Neal, 130 Ga. 733, 61 S. E. 721 (1908).

to his station, without any contract defining them, if these duties continue though the person be changed, it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer."¹⁰

An office is a public charge or employment if it be one in which the public is interested.¹¹ A public officer is one who is appointed to discharge a public duty and receive a compensation for the same.¹² A person holds a public office where he is required to discharge duties, not for his own benefit or for private individuals, but for the public.¹³ But a person whose duties are occasional and intermittent, who is required to keep no place of business as for public use and who owes no duty to the public, is not a public officer.¹⁴ The definition of the term "officer of the United States" was considered by the Supreme Court in the cases of *United States v. Germaine* and *United States v. Movat*.¹⁵ In the latter case the Court said:

"Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."¹⁶

However, definitions are at best guides; and whether or not a particular position constitutes an office and the incumbent an officer is frequently a question of fact.¹⁷

As has been indicated, the common law rule as to dual office holding has been supplemented by constitutional and statutory enactments, both federal and state. The framers of the Constitution of the United States deemed it necessary to extend the common law restrictions in this respect, in so far as members of Congress are concerned, by providing that:

"No senator or representative shall, during the Time for which he was elected, be appointed to any civil Office under

¹⁰ *United States v. Maurice*, 2 Brock 96, 102, 103, 26 Fed. Cas. 1211 (1823); see THROAP, PUB. OFF. §3 *et seq.*

¹¹ *People v. Brooklyn*, 77 N. Y. 503 (1879).

¹² *Connor v. New York*, 2 Sandf. 255 (N. Y. 1849).

¹³ *People v. Board of Canvassers*, 129 N. Y. 36, 29 N. E. 345 (1891).

¹⁴ *People ex rel. Rooney v. Warner*, 104 N. Y. Supp. 279 (1907).

¹⁵ *United States v. Germaine*, 99 U. S. 508 (1878); *United States v. Movat*, 124 U. S. 303 (1888).

¹⁶ See also *United States v. Hartwell*, 73 U. S. 385 (1867).

¹⁷ Various illustrations of what are offices within the meaning of law forbidding the holding of two offices: *Crovatt v. Mason*, 101 Ga. 246, 28 S. E. 891 (1897); *People v. Drake*, 43 App. Div. 325, *aff'd*, 161 N. Y. 642, 57 N. E. 1122 (1900); what are not offices: *Goodloe v. Fox*, 96 Ky. 627, 29 S. W. 443 (1895); *Olmstead v. New York*, 42 N. Y. Super. Ct. 481 (1877); *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677 (1883); see SEN. REP. No. 563, 67th Cong., 2d Sess.

the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States shall be a Member of either House during his Continuance in Office."¹⁸

In pursuance of this provision members of Congress have had their seats declared vacant for accepting commissions as officers of the volunteer and regular army forces of the United States.¹⁹ However, this is not a problem for the courts, for though essentially a judicial function, the conclusive determination as to whether the constitutional qualifications for membership have been met is, by the Constitution, placed in the hands of each of the two Houses of Congress.²⁰ An interesting incident occurred in connection with President Taft's appointment of Senator Philander C. Knox as Secretary of State. In 1909 when the President-elect indicated that he intended to nominate Senator Knox as Secretary of State, it was pointed out that the latter was constitutionally ineligible, since the salary of the Secretary's office had been increased by a law passed while Knox was a senator. In order to render Senator Knox eligible to the Secretaryship an act was passed by Congress reducing the salary in question to that which it had been before the increase mentioned.²¹

¹⁸ U. S. CONST. Art. I, §6. FANSILL, DOCUMENTS OF THE FORMATION OF THE UNITED STATES, 657-659. In debates in reference to the adoption of what is now Art. I, §6 of the United States Constitution, the members of the convention seeking to have it embodied, argued that, without it the acceptance of a seat in Congress would be utilized by members as a means to an end rather than an end itself, *i. e.* members whose political ambitions extended beyond congressional activities, instead of exerting their faculties solely and wholly with the problems before the Houses and instead of acting in their own discretion, might be persuaded in their selections by the lure of patronage from the Executive. Another argument, advanced in furtherance of the adoption of the proposed provision coincident with the prior statements was to the effect that the Executive would have the unlimited power of controlling the vote of Congress by using his right of appointment to curry favor among insurgent members whose political policies were at odds with his own. The remarkable foresight and logic displayed advanced in these theories must have swept away all opposition, as is evidenced by the adoption of the rule as a provision of the Constitution. It is worthy to note that although the common law rule as regards incompatible offices was advanced for the purpose of limiting the provision, the members to effectuate their purpose decided that a mere adoption of the common law rule would be inadequate, and went beyond it.

See also Art. 2, §1 of the Constitution which provides that "Each state shall appoint in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an office of Trust or Profit under the United States shall be appointed an Elector."

¹⁹ 1 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) §338. A state office does not disqualify for membership.

²⁰ *Id.* §340; U. S. CONST. Art. I, §4, cl. 1.

²¹ 1 WILLOUGHBY, *op. cit. supra* note 19.

The United States Congress, feeling that the prohibition against dual office holding should be extended to office holders other than members of Congress, has by statutory enactment further provided that:

“No person who holds an office, the salary or annual compensation attached to which amounts to the sum of twenty-five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law.”²²

Prior to the passage of this Act there was no legal objection to the same person holding more than one office and receiving the fees earned by discharging the functions of both.²³ However, this section, applying by its terms to offices to which a fixed salary of at least twenty-five hundred dollars is attached, has been held to be inapplicable where the compensation is less. Thus, it does not prevent a clerk of the circuit court from holding the office of commissioner of such court.²⁴

The problem of dual office holding has also been dealt with by the Presidents through Executive Orders. In January, 1873, President Grant issued an Executive Order which provided that, except as to certain minor offices such as justices of the peace and notaries public, the acceptance by federal officers of state or territorial offices would be deemed to vacate the federal offices held by them, and to operate as a resignation from such offices by such federal officials.²⁵ By Executive Order of May, 1927, President Coolidge modified the Executive Order of President Grant by the addition of a paragraph providing that any state, county or municipal officer might be appointed as prohibition officer of the Treasury Department to enforce the provisions of the National Prohibition Act, except in those states having constitutional and statutory provisions against state officers holding office under the Federal Government. More recent Executive Orders have limited further the Executive Order of President Grant. In 1933 President Roosevelt exempted Raymond Moley, Assistant Secretary of State, therefrom in order to permit him to hold the position of a member of the committee to collect facts relating to the present administration of justice in New York State (Commission on the Administration of Justice in New York State).²⁶ By another Order he appointed the following persons, who were then already holding the positions indicated, to serve, without additional compensation, as members of the National Youth Administration:

²² 28 STAT. 205, c. 174, §2 (1894); 43 STAT. 245, c. 214 (1924); U. S. C. A., tit. 5, §62.

²³ *United States v. McCandless*, 147 U. S. 692, 13 Sup. Ct. 465 (1893).

²⁴ *United States v. Durlacher*, 63 Fed. 672 (1894).

²⁵ See also Executive Orders of June 26, 1907 and April 14, 1917.

²⁶ Executive Order No. 6108, April 12, 1933.

Arthur J. Altmeyer, Second Assistant Secretary; John Studebaker, Commissioner of Education; M. L. Wilson, Assistant Secretary of Agriculture; Lee Pressman, General Counsel, Resettlement Administration; Chester H. McCall, Special Assistant to Secretary of Commerce.²⁷

In many states the common law prohibition concerning dual office holding is supplemented by constitutional and statutory provisions.²⁸ New York has treated the subject both in its constitution and in statutes of limited application.²⁹ The New York State constitution provides:

"No member of the Legislature shall receive any civil appointment within this State, or the Senate of the United States, from the Governor, the Governor and the Senate, or from the Legislature, or from any city government, during the time for which he shall have been elected; and all such appointments and all votes given for any such member for any such office or appointment shall be void."³⁰

This provision was interpreted by the court in *Stewart v. Mayor of New York*,³¹ where it was held that the appointment of plaintiff, while a member of the assembly, to the office of clerk of a district court was valid; the prohibition is not absolute as appears from the qualifying words which limit the appointments to those received from the governor, governor and senate, or from the legislature, or from any city government. A civil appointment coming from any other source than is named in the section would therefore be valid. The court added:

"The evil which the amendment [above cited constitutional provision] sought to remedy and prevent was the corruption of the appointing power of the Member of the Assembly, rather than to exclude the Member of Assembly from participation in the civil service of the state; and the reason appears quite plain in the fact that between the several sources

²⁷ Executive Order No. 7096, July 9, 1935.

²⁸ *Long v. Rose*, 132 Ga. 228, 64 S. E. 84 (1909); *People v. Blake*, 144 Ill. App. 246 (1908); *State v. Carroll*, 57 Wash. 202, 106 Pac. 748 (1910).

²⁹ For example, §19 of the New York Second Class Cities Law, providing that "no person shall, at the same time, hold more than one city office" and that "upon the acceptance by a city officer of a second office the office first held by him becomes vacant" applies only to cities of the second class (*id.* §2). See also N. Y. Village Law §42; N. Y. Civil Service Law §3. The general statute prescribing when an office becomes vacant includes no reference to dual office holding (N. Y. Pub. Off. Law §30).

³⁰ N. Y. STATE CONST. art. III, §7.

³¹ *Stewart v. Mayor of New York*, 15 App. Div. 548 (1897); see *Whitmore v. Mayor*, 5 Hun 195, 67 N. Y. 21 (1876); *People ex rel. Gilchrist v. Murray*, 73 N. Y. 535 (1878).

of the power of appointment mentioned in the Constitution and a Member of the Assembly there exists a relation by which one or the other might be influenced in their official action."

By another provision of the New York Constitution the eligibility of those elected to the legislature in respect to offices previously held, is defined.³²

The New York State Constitution also prohibits judges of the Court of Appeals and the justices of the Supreme Court from holding any other public office or trust.³³ In the case of *Cannolly v. Scudder*³⁴ the Court of Appeals in an interpretation of this provi-

³² Article III, §8 of the NEW YORK STATE CONSTITUTION provides that "No person shall be eligible to the Legislature who at the time of his election, is, or within one hundred days previous thereto, has been, a member of Congress, a civil or military officer under the United States, or an officer under any city government. And if any person shall, after his election as a member of the Legislature, be elected to Congress or appointed to any office, civil or military, under the government of the United States, or under any city government, his acceptance thereof shall vacate his seat."

A New York national guard officer is eligible to the legislature within the meaning of this section since he is an officer appointed by the state and cannot be regarded as a military officer under the United States for the purpose of questioning his eligibility. *Op. Atty. Gen. (1919)*, 21 St. Dept. Rep. 276. An officer of the Federal Reserve Corps not in active service is not a military officer within the meaning of this section. *Matter of Flynn*, 203 App. Div. 839, 196 N. Y. Supp. 926 (1932).

In *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360 (1891), the question was whether a member of the park commission of Hornellsville was an officer under any city government, and, therefore, ineligible under this section to election as a state senator. The commission had been created by act of the legislature, and the general character of its relationship to the city government was in many respects similar to that of the educational authorities in New York City to the city government. In holding that the relator was an officer under the city government the court said:

"It is no answer to these views that the power and duties of these commissioners are regulated by law, and thus that they do not act under the direction or control of the city government or any of its officers, and that, therefore, they are in a certain sense, independent officers. This is generally true of all public officers, from the mayor of a city to the supervisor of a town and through all the grades to a town constable."

The fact that education is a state function does not make an educational officer a state officer. *Matter of Hirschfield v. Cook*, 227 N. Y. 297, 125 N. E. 504 (1919); *Lewis v. Board of Education of City of New York*, 258 N. Y. 117, 179 N. E. 315 (1932).

³³ CONSTITUTION OF NEW YORK, art. VI, §19 provides:

"The Judges of the Court of Appeals and justices of the Supreme Court shall not hold any other public office or trust, except that they shall be eligible to serve as members of a constitutional convention."

³⁴ *Cannolly v. Scudder*, 247 N. Y. 401, 160 N. E. 655 (1928); cited in *People v. Tremaine*, 252 N. Y. 27, 168 N. E. 817 (1929).

sion³⁵ held that an acceptance by a Supreme Court Justice of an appointment by the Governor as commissioner in removal proceedings under Section 34 of the Public Officers Law "is acceptance of a public trust within the prohibition of section 19 of Article 6 of the State Constitution and thus the appointment was invalid." It should be noted, however, that the court did not declare that the Justice vacated his first office upon acceptance of the second, but held that he could not hold the second office. This decision would seem to be irreconcilable with the common law rule and a deviation from it were it not for the words of the court to the effect that:

"Equivocal acts will be so interpreted as to escape a violation of the Constitutional command, and even the risk of violation when conduct, though permissible, is close to the line of danger. Here the acts are not equivocal. Nothing has been said and nothing has been done with the will to serve in any other capacity than that of a justice of the court."

In other words the court held that since the Justice of the Supreme Court did not intend to accept a new office but believed that he was merely carrying out his office as a justice, he would not be considered as having abandoned his first office for the second.

The Greater New York Charter,³⁶ Section 1549, creates a statutory incompatibility between federal offices and city offices, between state offices and city offices, and between any two offices connected with or under the city government. In *Hulbert v. Craig*,³⁷ the petitioner, while president of the Board of Alderman of New York City, was appointed by the governor of New York as a member of the Finger Lakes State Park Commission. The respondent, comptroller of the City of New York, refused to pay the petitioner his salary as Board president on the ground that under the said section he instantly vacated his city office. The court, in sustaining the position taken by the comptroller, held that on any construction of the section, the petitioner had vacated the office of president of the Board of Aldermen. Justice Proskauer, writing in the lower court the opinion which was affirmed on appeal, said:

"I am keenly aware of the hardship worked by this conclusion. By accepting membership on this commission petitioner assumed a public duty which brought no gain to him. He acted unselfishly and with public spirit, but the drastic mandate of the Greater New York Charter, Section 1549, permits the court to be affected by no such consideration. It reserves

³⁵ *Supra* note 33.

³⁶ N. Y. Laws of 1917, c. 466 as amended.

³⁷ *Hulbert v. Craig*, 124 Misc. 273, *aff'd*, 241 N. Y. 525, 150 N. E. 539 (1925).

for the city the undivided public service of its officers. It is self executing. When an officer transgresses its provisions he shall be deemed thereby to have vacated his city office."

Petitioner contended that although he vacated the office, he was entitled to salary as a *de facto* officer, since he performed its duties. There is some support for this contention in *dicta* and decisions,³⁸ but the overwhelming weight of authority in other jurisdictions is against it.³⁹ In a later case, *Metzger v. Swift*,⁴⁰ the court also upheld the drastic provision of Section 1549. This was a taxpayers' action to restrain the payment of salary to the defendant, Swift, a member of the Board of Health of the City of New York. At the time Swift was appointed a member of the Board of Health he was a trustee of Hunter College, a member of the Board of Higher Education of the City of New York and a member of Hunter College Retirement Board, and these offices he retained or attempted to retain after his appointment to the Board of Health. The Appellate Division held that "the effect of his assumption of the new office was not merely a forfeiture of the old one, but a forfeiture of the new one too." The offices occupied by Swift were connected with the government of the City of New York. Education is a state or governmental function. This does not mean that one fulfilling such a function is invariably a state as distinguished from a city officer.⁴¹ The names of the departments of the city government in the table of contents of the Charter show that the function of many of them are state and governmental as well as municipal and local. However, the Court of Appeals modified the determination of the Appellate Division, and ruled that the result of the acceptance by Swift of the new office of member of the Board of Health was to terminate his tenure of the offices previously held, but that he was nevertheless entitled to retain the new position.

The importance of this statute can best be appreciated when it is

³⁸ *Reynolds v. McWilliams*, 49 Ala. 552 (1873); *Behan v. Davis*, 3 Ariz. 399 (1892).

³⁹ *Bennett v. United States*, 19 Ct. Cl. 379 (1884); *Dolan v. Mayor*, 68 N. Y. 274 (1872).

In the latter case the court said:

"It is the settled doctrine in this State, that the right to the salary and emoluments of a public office, attach to the true and not to the mere colorable title, and in an action brought by a person claiming to be a public officer for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation."

⁴⁰ *Metzger v. Swift*, 258 N. Y. 440, 180 N. E. 112 (1932).

⁴¹ *Lewis v. Board of Education*, 258 N. Y. 117, 179 N. E. 315 (1932); *Matter of Hirschfield v. Cook*, 227 N. Y. 297, 125 N. E. 504 (1919) cited in note 32, *supra*.

realized that both the legislature and the courts have recently found it necessary to limit its operation in specific instances. The legislature, realizing the far-reaching mandate of the section, passed as an emergency measure an act amending the Charter of the City of New York in order to allow Robert Moses, an unsalaried State Park Commissioner, to accept the appointment of Commissioner of Parks of New York City, and also to allow him to accept any other unsalaried office filled by appointment of the Mayor of New York.⁴²

Even the position of Mayor of New York is not beyond the reach of this statute. In July of this year, a case was reported wherein Mayor La Guardia placed his position in jeopardy by accepting an appointment to the President's Advisory Committee on Allotments, which committee was established by the President for the purpose of obtaining advice on the allotment of funds for public works. The court held that a member of this Advisory Committee is not a person who holds a "civil office of honor, trust or emolument under the government of the United States," within the meaning of Section 1549.⁴³ This was clearly a decision of expediency, and the court has not bound itself to any rule of the applicability of the statute to presidential appointments in general. It does serve, however, as does the legislative exception mentioned, as an excellent illustration of the occasional need for relaxing the strict interpretation of such a prohibitory statute of general application.

Considering and analyzing the subject of dual office holding in its entirety, it is apparent that, notwithstanding the various provisions embodied in the Constitutions of the United States and of New York State and miscellaneous statutes and laws, the common law rule is still in force. Where in a particular case no statute concerning dual office holding applies, the test of the common law rule must still be applied and satisfied; that is, that the positions must not be incompatible, if the officer is to retain both positions.

It further seems well established that while both the common law rule and the constitutional and statutory extensions thereof are unquestionably founded on sound public policy, the rules, if literally applied, occasionally work not only a hardship on the individuals concerned but also react detrimentally to the public they are designed to protect. It might be that some discretion in their application could be expressly given to the courts; but this would in all probability only make for uncertainty and increased litigation. Where hardship is imposed by a technical construction of the law, as in *Hulbert v. Craig*,⁴⁴ it must be accepted rather as a manifestation of justice to the many than of injustice to the individual.

JOSEPH F. BARBANO.

⁴² N. Y. Laws of 1934, c. 2, §607.

⁴³ N. Y. L. J., July 2, 1935, p. 13.

⁴⁴ *Supra* note 37.