District Judges, Term Of—Vacancy, Appointment of, Governor to Fill

In order to comply with the provisions of Section 18 of Article VIII of the Constitution the District Judge must be elected at the same time as the clerk of the District Court and where such clerk has been elected at the presidential election, an additional judge whose office has been newly created by the legislature must be elected at the same time as the successor of such clerk; that is, at the presidential election.

Under the provisions of Section 12, of Article VIII, of the Constitution, all district judges hold for the term of four years and until their successors are elected and qualified, and a failure to elect the successor of any such judge does not create a vacancy authorizing an appointment, under Section 34 of Article VIII, but the present incumbent holds over until his successor is elected and qualified.

February 7, 1905.

Hon. Joseph K. Toole, Governor of Montana.

Dear Sir:—In compliance with your request I have the honor to submit the opinion of this office upon an inquiry verbally made by your Excellency as follows:

Is there a vacancy in the offices of Judge of the 12th Judicial District and 3rd Judge of the Second Judicial District?

Before answering the above inquiry it will be necessary to give a brief history with regard to the two offices mentioned.

Chouteau County, as well as Silver Bow County, was in existence at the time of the adoption of the constitution, and in 1889 each of said counties, along with the other counties of the state, elected District Court

clerks, whose term expired on the first Monday in January, 1893. Each of said counties at the election of 1892 and at each presidential election thereafter, elected clerks to serve four years. Valley County, which together with Chouteau, now constitutes the Twelfth Judicial District, was created in 1893. Its first clerk of the district court was named by the bill creating the County, and in 1894 a clerk was elected for two years; while in 1896, and every four years since that time, a clerk has been elected for the term of four years. The past and present status of these counties with reference to the respective clerks of the district court will become of importance in the course of this opinion, and are therefore stated at this time.

By the action of the seventh legislative assembly creating the 12th Judicial District (Laws of 1901, p. 155) and an additional judge in Silver Bow County (Laws 1901, p. 156) appointments became necessary to fill the said offices. and the Honorable John W. Tattan was named by your Excellency as Judge of the Twelfth Judicial District and the Hon. John B. McClernan, as additional judge of the Second Judicial District. In the election proclamation issued by your Excellency for the general election of 1902, an election was called for the purpose of electing the successors of the two judges so appointed, and at such election each of said Judges was elected as his own successor, and election certificates were issued to each for the term of four years.

No election was called for the election of the successors of such judges at the general election of 1904, and it has been held, at least so far as Judge McClernan is concerned, that no election was as a matter of fact held for that purpose. State ex rel Breen v. Toole, .. Pac. ....) The Supreme Court, however, did not pass upon the question of whether or not an election should have been held, and it becomes necessary to pass upon this question before the question asked by your Excellency can be properly answered. So that there are two questions presented for consideration and determination, as follows:

1. Should an election have been called and held in November, 1904, for the election of the successors of Judge Tattan and Judge McClernan?

2. If so, does the fact that no election was held for said offices create a vacancy within the meaning of Section 34 of Article VIII of the Constitution, authorizing your Excellency to fill same by appointment? In other words, is the term of district judges in this state four years only, or do they hold until their successors are elected and qualified?

I. The question with which we are first confronted is: Were Judge Tattan and Judge McClearnan at the election of 1902, elected for a full term of four years, or for only two years? If the election of said Judges in the year 1902 was for the term of four years, then there should have been no election in 1904 and the present incumbents will hold office until the general election of November, 1906; but if the election of 1902 was only to fill vacancies, and for the remainder of the term of four years, expiring on the first Monday of January, 1905, then, under Section 34 of Article VIII of the Constitution, they were elected to hold office until the expiration of the term for which the persons they succeeded were elected and their successors should have been elected in 1904. Strictly speaking

neither of said judges was the successor of any person, for the reason that until the act of the legislative session of 1901 no such offices existed. But, assuming that they were elected to hold for the unexpired term of office of a regularly elected judge, that term would be as prescribed by Section 12 of Article VIII, of the Constitution, which, for the present, we will assume to be four years only. It has been generally held that provisions as to filling of vacancies in office apply to vacancies occurring in newly created offices, which have never had an incumbent. (Mechem's Public Offices and Officers, Sec. 132 and cases cited in notes 2 and 3.)

The constitution provides when the judges first elected under it shall take office, and how long they shall hold (Sec. 12, Art. VIII), the second election of judges being required to be held in November, 1893, a presidential election. Consequently, as to all judges whose offices were in existence at the time of the adoption of the constitution, there can be no question but that their successors must in all cases be elected at a presidential election. This does not of itself require additional judges to be elected at the same time. Section 18 of Article VIII provides that the clerk of the district court "shall be elected at the same time and for the same term as the district judge." If it should so happen that a new county was created at the same time as a new judicial district, and such new county constituted the new district, it is conceivable that both the new judge and the new clerk could be elected for a full four year term at an election other than a presidential election, without violence to any provision of the constitution. But where a clerk has already been elected, as is the case in Silver Bow, Chouteau and Valley Counties, his election is for the term of the judge who was elected at the same election, and must therefore be four years. The legislature has no power to disregard the section of the constitution last above cited, by passing a law which will necessitate the election of the judge for a four year term at a different election than that at which the successor of the clerk must be elected. In the Act creating the Twelfth Judicial District, and in the Act creating the additional Judge for Silver Bow County, there is no language employed which requires the election to be held at any particular time, it being simply provided that the appointees of the Governor shall hold until their successors are elected and qualified.

In the case of Judge McClernan, unless his successor for the four year term is elected at a presidential election, there is no possible way in which said section can be complied with, for the other two judges are elected at that election, as well as the clerk, and the section can be followed only by electing all three judges at the same election.

In the case of Judge Tattan, unless his successor is elected at a presidential election, the terms of the clerks now serving in Chouteau and Valley Counties must either be shortened or lengthened two years, which result, whether directly or indirectly accomplished by the legislature, would be violative of express provisions of the constitution. (Sec. 31, Article V.)

To provide that the clerk must be elected at the same time as the judge, is equivalent to providing that the judge must be elected at the same time as the clerk. It is probably true that in case of a deadlock,

so to speak, between the question of whether the election of the clerk should yield to that of the judge, or vice versa, the major office, that of judge, would control; but this would not be true where some other provision of the constitution would necessarily be thereby violated.

As we have above indicated, there is no way in these particular cases in which the successors of Judge Tattan and Judge McClearnan can be elected for the full term of four years at any other election than the presidential election, without violating some provision of the constitution. While by holding that their successors for the full term of four years must be elected at a presidential election harmony is maintained with all of the provisions of the constitution, and incidentally uniformity in the election of judges of the district court is secured, conformable to the spirit, if not the letter, of Section 26 of Article VIII.

In what is above said it has been borne in mind that the condition of affairs which might apparently necessitate the election of the successor of Judge McClernan and Judge Tattan at an election other than a presidential election, was brought about by the action of the legislature, and not by force of the operation of the provisions of the constitution alone. The legislature might have provided that the election of 1902 should be to fill the balance of the unexpired term of said judges and that an election should be held in 1904 for the full term of four years. Whether it did so or not, the Acts will be so construed, if it becomes necessary, as to reconcile them with all the provisions of the constitution.

It is therefore my conclusion that there should have been an election held in November, 1904, for the successors of Judge Tattan and Judge McClernan for the term of four years. As already stated, the Supreme Court has held that so far as Judge McClernan is concerned, there never was such election, and we will assume for the purposes of this opinion that the same is true with reference to Judge Tattan's office.

II., A more difficult question is presented in determining whether, under Section 12 of Article VIII of the constitution the term of a district judge expires aboslutely at the end of four years, or whether such judge holds over until his successor is elected and qualified.

There is no doubt but that where the constitution limits the term of a public officer to a fixed period of time it is not within the power of the legislature to provide that he shall also hold until his successor is elected and qualified. (Mechem Pub. Offices and Officers, Sec. 129.)

It has been held by the Supreme Court of California that the term of judge of the superior court, being fixed by the constitution at six years cannot be extended by the Code. (People v. Campbell, 70 Pac. 918.)

That case, however, is not applicable for the reason that the provisions of the Constitution of California are different from ours. By Section 6 of Article VI of the California Constitution it is provided that "the term of office of the judges of the superior courts shall be six years from and after the first Monday of January next succeeding their election." And it is further provided that "if a vacancy occur in the office of judge of the superior court the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which

election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term."

Our Constitution contains provisions indicating that the term of district judge is for four years, and until his successor is elected and qualified; while in the case of an appointment to fill a vacancy the appointee holds until the next general election, and until his successor is elected and qualified.

By Section 12 of Article VIII it is provided that there shall be elected in each district a district judge "whose term of office shall be four years, except that the district judges first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two (1892) and until their successors are elected and qualified." Upon first reading, this section might be construed to mean that the term of office of the judge of the district court is four years only, and the qualifying clause "and until their successors are elected and qualified" migh. be construed as applying only to the district judges first elected. A careful reading and consideration of this section, in connection with other sections, and with the general scope and spirit of the constitution, will lead to the irrisistible conclusion that the qualyfying clause above quoted applies not only to the district judges first elected but to all district judges; and, therefore, that all district judges hold office not only for the term of four years but until their successors ere elected and qualified.

In an early California case in which a similar question was discussed and settled, the Court said: "But the construction we have given the constitution is not only supported by the language of the instrument, but by its general scope and spirit. The executive officers are elected by the people, and under an elective system it is more proper that these officers should hold over than that the duties should devolve upon those in whose selection the people have had no voice." (People v. Whitman, 10 Cal. 46.)

By Section 34 of Article VIII it is provided that vacancies in the office of judge of the district court shall be filled by appointment by the governor of the state, and that a person appointed to fill such vacancy shall hold his office until the next general election and until his successor is elected and qualified. It would seem strange, indeed, that the constitution should provide that a district judge holding his office by virtue of an appointment to fill a vacancy, made, we will say, during the year 1904, should hold not only until January 2, 1905, but until his successor is elected and qualified, while a district judge who holds his office by virtue of an election at the general election of 1900 would hold only for the term of four years, and that the term of such elected judge would expire on the second day of January, 1905, regardless of whether his successor had been elected and qualified or not. It is apparent that no such anomalous and inconsistent condition was intended by the framers of the constitution in providing for the terms of district judges elected and for the terms of those appointed to fill vacancies in such offices.

Section 12 of Article VIII should be so construed, if it can reasonably be done, as to prevent the occurrence of a vacancy in the office of district

judge. The law abhors a vacancy in any office. Unless the section is construed to make the term of a district judge four years and until his successor is elected and qualified this situation might arise with reference to every district judge in the State of Montana. The district judges elected at the general election of 1904 take office on the first Monday of January, 1905, which falls upon the second day of the month. If their term of office is four years and no more, such term would expire absolutely upon the second day of January, 1909, regardless of whether their successors have been elected and qualified at that time or not. The judges elected at the election of November, 1908, will take office on the first Monday in January, 1909. That day will fall upon the seventh day of January, while the terms of the predecessors of all of such judges will have expired upon the second day of January, leaving an interim of five days, to-wit, from the second day of January until the seventh day of January during which there is an "absolute vacancy" in the office of every district judge in the state. (Mechem Pub. Offices and Officers, Sec. 127.) If a construction can be reasonably and consistently given to said Section 12 which will avoid the possibility of such a condition of affairs it should be done. That such a construction can be given, reasonable and entirely consistent with all other portions of the constitution, will be apparent when the exception clause contained in Section 12 is considered as parenthetical. The section would then read as follows: "The state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court, whose term of office shall be four years, (except that the district judges first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two,) and until their successors are elected and qualified." The final clause "And until their successors are elected and qualified" then relates not only to the judges first elected but to all district judges. The fact that the plural is used,—"their successors," instead of the singular, does not necessarily mean that it has reference exclusively to the district judges first elected instead of to the "one judge of the district court." If it were expressly intended that the clause should refer to all district judges in the State it would still need to be in the plural in order to be grammatical. In any event mistakes in grammatical construction are to be disregarded in arriving at the true intent and meaning of the language employed in the constitution or in any statutes. (Sutherland St. Constr. Sec. 409 and cases cited.)

Section 12 of Article VIII should be construed by comparison with other similar sections of the constitution in arriving at the true intent and meaning of the language employed. (Sutherland St. Constr. Sec. 344 and cases cited.)

Similar sections are Section 1 of Article VII, providing that all state officers shall hold for the term of four years and until their successors are elected and qualified, with an exception clause as to the officers first elected.

Section 9 of Article VIII is almost identical in language with Section 12. In Section 9, however, no confusion arises through grammatical

construction, because the word "clerk" is in the singular number all through the section, and the qualifying clause, "and until his successor is elected and qualified," evidently applies not only to the clerk first selected, but to all clerks that may be elected at any time.

That such section has that meaning has been impliedly held by our Supreme Court in the case of State v. Acton, 77 Pac. 301. It is true that in that case Section 9 was not directly involved, and the decision may be said to be in the nature of dictum, yet the question under consideration in that case was the identical one here involved, and it is therefore entitled to more than the weight ordinarily accorded to dictum. There was involved the validity of Section 1171, Political Code, which was by the court held unconstitutional, and in commenting upon that section the court said: "It may not be amiss to say that the invalidity of Section 1171, Pol. Code, becomes more apparent when it is analyzed with reference to other constitutional provisions. Sec. * * * Section 9, Art. 8. * * *."

On account of the similarity of the language employed, and its being a part of the same Article, the construction of Section 9, **supra**, is of paramount importance in its bearing upon the construction of Section 12 **supra**, and deserves further notice. In order to confine the exception clause of Section 9 to the supreme court clerk first elected, it is necessary to hold that the term "his successor" refers and relates back exclusively to "the clerk first elected." and not to the "clerk of the supreme court who shall hold his office for four years." But the only argument for this construction is that the hold-over clause is placed next after the exception clause as to the clerk first elected, and is not expressly made to apply to all clerks elected. Immediately following the exception clause occurs the following: "He shall be elected by the electors at large of the state, and his compensation shall be fixed by law, etc." Does this clause apply also to the clerk first elected, or to all clerks? And by what course of reasoning can it be demonstrated that the first qualifying clause applies only to the clerk first elected, while the one immediately following it applies to all clerks? These two qualifying clauses evidently have equal and identical application; that is, both clauses apply to all clerks of the supreme court who may be elected at any time, or else both are limited to the clerk first elected under the constitution. It is so clear that the last clause in Section 9 applies to all clerks, that no argument is necessary, and it follows that the term of every clerk of the supreme court is for six years, and until his successor is elected and qualified.

The same argument above outlined applies to Section 19 of Article VIII, with reference to the term of office of county attorney, the language in that section containing also the apparent error of grammatical construction as found in Section 12.

It is true that the provisions with reference to the justices of the supreme court seem to be different, and by the constitution their term is made six years, without any express provision as to holding over until a successor is elected and qualified. (Sec. 7, Art. VIII.) But. assuming that without such express provision they cannot hold over, there is also

a very plausible reason why a distinction should be made between supreme court judges and district court judges, in the matter of terms of office, and it is this: The Supreme Court is composed of three members, of whom a quorum may act; only one judge is elected at a time, so that there will always be two judges with unexpired terms upon the bench; while in the case of district judges, as a rule, there is but one judge in the district, and it is exceedingly important that there should be no vacancy in such office, hence the provision as to holding over until their successors are elected and qualified.

It seems to be well settled that it is the policy of the law that a vacancy occurring in an elective office from any cause whatsoever should be filled by election rather than by appointment, and that where an appointment is made to fill such vacancy the appointee holds only until an election can be held to fill the vacancy. This policy is shown in our constitution by Section 34 of Article VIII. So, where an officer has already been elected to an office, in the absence of a constitutional or statutory provision to the contrary, it would be the policy of the law that he should hold over to avoid a vacancy which would otherwise be occasioned by the expiration of his term, rather than that an appointment should be made to fill the vacancy.

And right here it is perhaps pertinent to say that there is no provision in the constitution or laws of the state to the effect that the expiration of the term of an officer creates a vacancy in such office which should be filled by appointment. Section 1101. Political Code, enumerates the events upon the happening of which a vacancy occurs, but does not include among such events the expiration of the term of the incumbent. In fact, all of the events enumerated are such as must occur "before the expiration of the term" of the incumbent. It may be that the legislature considered it superfluous to provide that the expiration of the term should create a vacancy; on the other hand, it is more likely that, in view of the provisions of the constitution and of Section 994, Political Code, they deemed that the expiration of the term of an incumbent could never occur until a successor to the office had been elected and qualified.

"The policy of the provision that certain elective officers shall hold their offices until their successors are elected and qualified rests upon the theory, that in case the electroal body fails to discharge its functions, it is wiser and more prudent to authorize the incumbent to hold over rather than that a vacancy should occur, to be filled by the appointing power. State v. Harrison, 113 Ind. 434. 16 N. E. 384, 3 Am. St. Rep. 663." (State v. Acton, 77 Pac. 301.)

"It is usually provided by law that officers elected or appointed for a fixed term shall hold not only for that term, but until their successors are elected and qualified." (Mechem Pub. Offices and Officers, Sec. 397 and cases cited in note 2.)

"Where, however, no such provision is made the question of the right of the incumbent to hold over is not so clear, but the prevailing opinion in this country seems to be that, unless such a holding over be expressly or impliedly prohibited, the incumbent may continue to hold until some

one else who is elected and qualified assume the office." (Ibid. Sec. 397 and cases cited in note 3.)

"Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where from a failure to elect or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended." (Ibid.)

Applying the principles above announced to the construction of Section 12 of Article VIII, we observe, first, that there is neither an express or an implied prohibition against holding over; on the contrary there is an express authority for such holding over. the only question being whether it is general or limited in its application.

Indeed it has been held that "it can make no difference whether the language expressly authorizing a party to hold over and discharge the duties of an office temporarily until a successor duly elected and qualified appears. is found in the constitution or in the statute. The same construction should be given to the same language used in the same connection in reference to a similar subject matter when used in a statute as when used in the constitution." (People v. Tilton, 37 Cal. 614, 621.)

This rule would apply, of course, if the constitution expressely prohibited such holding over, but it becomes of great importance in a doubtful case in determining whether or not the framers of the constitution intended to prohibit such holding over. Indeed, the very existence of the statute in such a case (Sec. 994, Pol. Code) would be in the nature of legislative interpretation of the constitutional provisions, and entitled to weight as such.

In conclusion, I will say that in my opinion there is now no vacancy in either of the offices mentioned for the reason that I believe that the present incumbents hold over until their successors are elected and qualified. No election haveing been held, no duly elected and qualified successor can present himself for either of said offices in any event until after the general election of 1906. If Judge Tattan and Judge McClernan have the right to hold over until their successors are elected and qualified. it is their duty to do so. (State v. Acton, 77 Pac. 299.)

The period for which the incumbents may be entitled to hold over until their successors are elected and qualified is as much a part of their terms as any part of the four years. (People v. Whitman, 10 Cal. 38.) Therefore no appointment by your Excellency could give any right to such appointee to hold the office as against the present incumbents. For such appointments are to be made only in case of a vacancy, and that there is no vacancy in case of an incumbent holding over on account of failure to elect has been held by the Supreme Court of this State in the case last above cited. (State v. Acton, supra.)

If, however, your Excellency is doubtful of the construction given herein to Section 12 of Article VIII, and desires to appoint the present incumbents to the offices they now hold, no harm can result even if no good is done; but if I am correct in the views herein expressed such ap-

pointments are not only superfluous, but unwarranted under the constitution.

Yours very truly,
ALBERT J. GALEN,
Attorney General.