Opinion No. 14

Sheriff—Power to Appoint Under-Sheriff.

HELD: Sheriff in seventh class county has discretionary power to appoint under-sheriff. County commissioners have not the power to disallow such an appointment.

January 11, 1937.

Mr. Nathaniel A. Allen
County Attorney
Golden Valley County
Ryegate, Montana.

My dear Mr. Allen:

You have requested an opinion as to whether or not the sheriff in a seventh class county has discretionary power to appoint an undersheriff if he deems one necessary. Also whether or not the county commissioners have the power to disapprove and disallow such an appointment, in the event that the board arrives at the conclusion that an undersheriff is not needed.

On January 24, 1935, Attorney General Raymond T. Nagle rendered an opinion to Mr. Robert H. Allen, County Attorney at Virginia City, Montana, in which he held that the sheriff had discretionary powers of appointment of an undersheriff.

I have rechecked this opinion and made an invesiigation of the law, and I am compelled to arrive at the same conclusion as set forth in this former opinion.

"Section 4875 RCM, 1935, provides, "The whole number of deputies allowed the sheriff is one undersheriff, and in addition not to exceed the following number of deputies: In counties of the first and second classes, six; in counties of the third and fourth classes, two; in counties of the fifth, sixth, seventh and eighth classes, one. The sheriff in counties of the first, second and third classes may appoint two deputies, and in the fourth, fifth, sixth, seventh and eighth classes, one deputy who shall act as jailer and receive the same salary as other deputy sheriffs." Section 4775, R. C. M. 1935, provides: "The sheriff, as soon as may be after he enters upon the duties of his office, must, except in counties of the seventh and eighth classes, appoint some person under-sheriff to hold during pleasure of the sheriff. Such undersheriff has the same powers and duties as a deputy sheriff."

I cannot subscribe to the view that Section 4775 is repugnant or complicated, nor does it repeal Section 4875, expressly, or by implication or intendment. Section 4775 makes it mandatory upon the sheriff immediately after he enters upon his duties to appoint an under-sheriff, with the qualification and exception that, in counties of the seventh and eighth classes, the sheriff has the discretion as to whether or not to appoint an under-sheriff, and if he does exercise that discretion and appoint an under-sheriff, the undersheriff shall hold office during the pleasure of the sheriff. Section 4775 is not in any way ambiguous, nor does it repeal, either expressly or by implication, the power of the sheriff to exercise his discretionary powers of appointment.

The rule of law is that no statute is positively conflicting and repugnant to another statute. The courts are reluctant to declare repeals by implication, unless there is direct conflict in the statutes.

I call your attention to the rule as adopted by our court in the case of Jobb against County of Meagher, 20 Mont. 424, at page 433.

"Mr. Sutherland, in Section 152 of his valuable treatise on Statuatory Construction, declares the rule: "It is not enough to justify the influence of repeal that the later law is different. It must be contrary to the prior law. It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former, for it may be merely affirmative, accumulative or auxiliary. There must be positive repugnancy, and even then the old

law is repealed by implication only to the extent of repugnancy. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with, or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable."

See also State ex rel Wynne vs. Quinn, 40 Mont. 472.

And so, if the sheriff in a seventh class county finds it necessary to do so, he still retains and has the power of appointing an under-sheriff, and the board cannot curtail that power.