

Appointment, Tenure of Office of County Attorney Under.

A person appoint to the position of county attorney will hold his office until his successor is elected and qualified.

Overruling opinion to H. C. Shultz, November 20th, 1906.
(Opinions of Attorney General, p. 406.)

Helena, Mont., March 2nd, 1907.

H. C. Shultz, Esq., County Attorney, and
Hon. W. A. Beebe, Chairman, Board of
County Commissioners, of Sanders County,
Thompson, Mont.

Gentlemen:—

After mature reflection and consideration of the opinion heretofore

rendered by this office to H. C. Shultz, County Attorney, on November 20, 1906 (See opinions Attorney General, 1905-06, p. 406) respecting the right of said Shultz to hold over until his successor was elected and qualified; I feel constrained to overrule said opinion, so far as it relates to the office of county attorney.

Section 5 of Article XVI of the State Constitution, applied in said opinion, is general in its language as to all county officers, and provides that "Persons elected to the different offices named in that section shall hold their respective offices for the term of two years and until their successors are elected and qualified". And further that "Vacancies in all county * * * offices except that of county commissioners shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election."

The decision of the supreme court in *State ex rel Chenewith v. Acton*, 31 Mont. 37, in construing this section of the constitution, so far as the same is applicable to the office of county superintendent of schools, lays down the rule that there is a clear line of demarkation and distinction as to the tenure of a person elected to office and one appointed. In the former case the officer holds over until his successor is elected and qualified, and in the latter only until the next general election, but I notice that in section 5 of Article XVI of the constitution, the office of county attorney is not specially mentioned and this section seems to have to do more particularly only with the offices therein enumerated, for the reason that, before dealing with the subject of vacancies, it is stated "persons elected to different offices named in this section, etc." Section 34 of Article VIII of the state constitution deals specially with the subject of county attorneys and prescribes a different rule than that laid down in said section 5 of Article XVI of the constitution. By the provisions of Section 34, Article VIII "Vacancies in the office of * * * county attorneys * * * shall be filled by appointment by the board of county commissioners of the county where such vacancy occurs." And "a person appointed to fill such vacancy shall hold his office until his successor is elected and qualified". This special provision of the constitution dealing with the office of county attorney was by my office overlooked in giving the opinion above referred to, and it was merely attempted to apply the general provisions of Section V of Article XVI of the constitution to the case presented, without knowledge of the existence of the constitutional provision dealing particularly with the subject. This being a constitutional provision prescribing the rule with reference to a particular office, it cannot be changed or modified by the more general provisions of the constitution.

You are therefore now advised, that in view of the constitutional provision of Section 34 of Article VIII above referred to, Mr. Shultz may hold the office of county attorney until his successor is duly elected and qualified; and under the facts heretofore presented, he is and ever since his appointment has been, the duly authorized, empowered

and acting county attorney of the county, and should be recognized and paid as such; it appearing that his successor to office has not qualified. Such being the case, he is de jure county attorney, and the only means by which he can be removed, is by proceedings instituted under the provisions of the statute providing for the summary removal of officers for wilful or corrupt misconduct or malfeasance in office, as prescribed by Chapter 2, Title II, Part II of the Penal Code of the State of Montana. It is beyond the power and jurisdiction of the Board of County Commissioners to remove him.

I am pleased to have made discovery of the mistake in our former holding, and to be in position to set the matter aright before resulting confusion, annoyance, difficulty or expense is occasioned the County, the Board of County Commissioners or the officer affected by virtue of such holding.

Respectfully submitted,

ALBERT J. GALLEN,

Attorney General.