

Clerk of the District Court, Appointment When Tie Vote. Elections, Tie Vote for Clerk of the District Court. County Commissioners, Appointment of Clerk of the District Court on Tie Vote.

When there is a tie vote for candidates for the office of Clerk of the District Court, the County Commissioners must appoint some eligible person to the office, as the Clerk of the District

Court is elected for a term of four years, and not until his successor is elected and qualified.

Helena, Montana, May 4, 1909.

Hon. Harry L. Wilson, County Attorney, Billings, Montana.

Dear Sir:

I am in receipt of your letter of April 30, in which you request an opinion upon the following question:

"Is a vacancy created in the office of the Clerk of the District Court in case of a tie vote, so as to authorize an appointment by the Board of County Commissioners, pursuant to the provisions of Section 457, Political Code?"

Section 18, of Article VIII, of the state constitution is the only law we have specifically relating to the term of office of clerks of the District Court. This section provides that the Clerk of the District Court "shall be elected at the same time, and for the same term as the district judge."

Therefore, in order to determine the terms of office of Clerks of the District Court, it is necessary to refer to the term of office of district judges.

Section 12, of Article VII, provides that

"There shall be elected by the electors (of each judicial district) one judge of the district court, whose term of office shall be four years, except that the district judges first elected shall hold their office until the general election in the year one thousand eight hundred and ninety two (1892)), and until their successors are elected and qualified."

Said Section 12, when considered alone, is somewhat involved in its meaning and presents a question as to whether the words "and until their successors are elected and qualified" refers to the district judges to be elected after 1892 or only to the district judges first elected under the constitution and who hold office until 1892. It will be noticed, however, that the first part of this section provides that there shall be elected one judge in each judicial district whose term of office shall be for four years, while the exception contained in said section refers to district judges, and as the word "their," as used in the phrase "and until their successors are elected and qualified" is plural, it would seem that this phrase was intended to refer only to the district judges provided for by exception in said section 12.

However, by turning to Sections 7 and 8 of said Article VIII, which provides for the election of justices of the Supreme Court, all doubt is removed as to the intention of the legislature in using the phrase "and until their successors are elected and qualified" in said Section 12; for we find that by said Section 7 the term of office of Justices of the Supreme Court, except as in this constitution otherwise provided, shall be six years. Then, Section 8 provides for the election of the first Justices of the Supreme Court provided for by the constitution, and states that each of such justices "shall hold until his successor is elected and qualified."

By these sections it is made clear that the legislature intended that the justices first elected after the adoption of the constitution should hold until their successors were elected and qualified, but that the justices thereafter elected should hold only for a period of six years. Therefore, in our opinion, when Sections 7 and 8 are construed together with Section 12, it is apparent that the framers of the constitution intended that the District Judges elected after those whose term expired in 1892 should hold only for four years. Therefore, the construction given to Section 5, of Article XVI., of the constitution, in the case of *State v. Acton*, 31 Mont. 40, in which it was held that Section 457, Political Code, in so far as it attempted to authorize the County Commissioners to appoint a person to office where there was a tie vote for County Superintendent of Schools was unconstitutional, does not apply to the Clerk of the District Court. The Clerk of the District Court being elected for the same term as the District Judges, and the District Judge being elected only for four years and not until his successor is elected and qualified, it necessarily follows that the Clerk of the District Court is elected only for a term of four years, and the phrase "and until his successor is elected and qualified" is no part of his term of office.

You are therefore advised that, in our opinion, Section 457 is in full force and effect, so far as it relates to the Office of Clerk of the District Court, and that whenever there is a tie vote for such office the Board of County Commissioners must appoint some eligible person to the office.

Yours truly,

ALBERT J. GALEN,
Attorney General.