

Clerk of the Court, Term of Appointee. Election of Clerk of Court, When Held to Fill Vacancy. Officers, Election of in Case of Vacancy.

Where there is a vacancy in the office of clerk of the district court, which has been filled by appointment, the person so appointed holds only until the first general election thereafter, when a person must be elected for the balance of the term in which such vacancy occurred.

Helena, Montana, March 12, 1910.

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

Dear Sir—

I am in receipt of your letter of March 9, requesting an opinion upon the following proposition:

Mr. Jones was appointed by the board of county commissioners to fill the vacancy in the office of clerk of the district court which occurred by reason of the tie vote for the candidates for such office at the last general election in 1908. Query: "Does Mr. Jones hold the office in question until the next regular election for District Judges, which will occur in 1912, or does he hold only until the election this fall?"

In an opinion rendered by this office to county attorney Schultz, on October 17, 1906, (Opinions of Attorney General, 05-06, p. 402), it was held that where a person was appointed to fill a vacancy in the office of clerk of the district court that he would hold merely until the first general election after his appointment, and as such general election was not the one at which district judges and clerks of district courts are elected throughout the state, that a candidate should be nominated and a person elected to fill out the balance of the four year term, in accordance with the provisions of section 34, article VIII, of the state constitution.

Following said opinion of this office, nominations were made and a clerk of the district court elected at the general election in 1906. Thereafter the person appointed by the bill creating Sanders county took the matter into court, and our supreme court, in the case of *State ex rel Livesay v. Smith*, 35 Mont., 523, held that the person appointed in the bill creating Sanders county held until the next election at which clerks of the district court were elected throughout the state. This opinion construed the words "next general election," as used in the bill creating Sanders county, to mean the next general election at which clerks of the district court were elected. Thereafter, the supreme court, in the case of *State ex rel Jones v. Foster*, considered the legality of the appointment of Mr. Jones, and held that there was a vacancy in the office which entitled the board of county commissioners to make an appointment, and the Jones was entitled to the office pursuant to his appointment by the board of county commissioners.

In the opinion in this case, as prepared, a certain paragraph read as follows:

"Relator became, upon qualification pursuant to his appointment, entitled to the office, and the salary and emoluments, attached thereto, until the next regular election for district judges. *State ex rel Livesay vs. Smith*, 35 Mont. 523."

Thereafter, on motion for re-hearing in such case counsel for Foster called the court's attention to the language of section 34, article VIII, of the state constitution. Whereupon the court modified its opinion by

striking out the words "until the next regular election for district judges. State ex rel Livesay v. Smith, 35 Mont. 523."

Upon receipt of your request for an opinion I interviewed the members of the court regarding the modification of this opinion, and they stated that neither counsel for the appellant or respondent in the case of State ex rel Livesay v. Smith referred to section 34, of article VIII, of the constitution, or raised any question at all thereunder, and that upon examination of such section of the constitution, when called to their attention in the motion for re-hearing in the case of Jones v. Foster, a serious doubt arose in their minds as to the correctness of the conclusions reached in said case of Livesay v. Smith, and for that reason they decided to strike out the part of their opinion based upon the authority of Livesay v. Smith and leave the question open until it can be again presented to the court in some future action.

Therefore, in our opinion, the conclusions we reached in the opinion given to the county attorney Schultz, referred to above, should be followed in your county this fall. For it is highly probable that upon this question being again presented to the supreme court that it will reverse the decision of Livesay v. Smith.

The only safe course to follow is to nominate candidates for the office of clerk of the district court at the coming election, and the person elected this fall, under said section 34 of the constitution, will be elected only for the remaining two years of the four year term, which began on January 1, 1909.

Very truly yours,

ALBERT J. GALEN,

Attorney General.