

County Attorneys—Absence—Vacancies—County Commissioners—Officers.

Absence from the state for more than sixty days by the county attorney does not create a vacancy in the office without a judicial proceeding.

Board of County Commissioners,
Shelby, Montana.

May 7, 1926.

Gentlemen:

You have requested my opinion whether the office of county attorney in your county is vacant by reason of the absence of the county attorney from the state for more than sixty days.

The answer to this question depends upon the construction to be given to section 4739 R. C. M. 1921. This section provides:

"A county officer must, in no case, absent himself from the state for a period of more than sixty days, and for no period without the consent of the board of county commissioners, and if he does so absent himself he forfeits his office."

California had a statute very similar to ours and it was held in *People ex rel. Fleming vs. Shorb et al.* 35 Pac. 163 that absence from the state for the required period ipso facto created a vacancy in the office.

The California statute, however, differs from ours in that it does not contain the words "and if he does so absent himself he forfeits his office." Hence, our statute, unlike the California statute, specifically provides what the consequences shall be in case of such absence from the state. What then is meant by the term "he forfeits his office?"

The supreme court of Texas had a similar phrase before it in the case of *Galveston H. & S. A. Ry. Co. vs. State*, 17 S. W. 67. In that case the charter of a railroad company contained a clause that if its road be not completed in a certain time "the charter shall be forfeited." The court held that the failure to complete the road within the specified time did not ipso facto forfeit the charter, but simply gave rise to a ground or cause of forfeiture by judicial proceedings. It said:

"In cases where such words are employed, the uniform construction is that they prescribe a ground of forfeiture, and that the manner must be a judicial proceeding instituted directly for that purpose. We doubt if any case can be found in which the words, 'shall forfeit its charter,' or 'its charter shall be forfeited,' have been construed to provide a forfeiture which is to take effect by the mere happening of a contingency. In that connection the term 'forfeit' has been imbued with a technical signification, and is the word universally used in charters for prescribing the grounds upon which a judicial forfeiture may be claimed."

To the same effect is *Woodecock vs. Bolster*, 35 Vermont 632, which has to do with the forfeiture of an office. The court in that case said:

“So where statutes use the word, forfeit, or forfeiture, they have usually been construed to mean cause of forfeiture; and some proceeding or action must be had to effect it, before any actual forfeiture is incurred.”

To the same effect is U. S. vs. Distillery at Spring Valley, 25 Fed. Cas. 854, case No. 14,963.

It is my understanding that no proceedings of any kind have been taken to compel the forfeiture but on the contrary that the county commissioners have from time to time consented that the county attorney might continue absent from the state for periods beyond the sixty days named in the statute. It is also my understanding that the county attorney has now returned to the state and has resumed the duties of his office.

It is, therefore, my opinion that there is no vacancy in the office of county attorney and that the county commissioners are without authority to appoint anyone to that office.

Very truly yours,

L. A. FOOT,
Attorney General