

C. M., 1921, as amended by Chapter 64, Laws of 1925.

October 10, 1934.

You have submitted the question whether the names of candidates for District Judge to fill a vacancy shall be printed on the general ballot or on a special ballot.

This question came before former Attorney General Foot who held, in the case of a county commissioner where the special election was held at the time of the general election, that the names of the candidates should be printed upon separate ballots. (Vol. 12, Opinions of the Attorney General, p. 363.)

Section 618, R. C. M., 1921, as amended by Chapter 64, Laws of 1925, provides for the time of filing certificates of nomination with the secretary of state, the county clerks and the clerks of municipal corporations. This section, however, specifically provides: "But the provisions of this section shall not be held to apply to nominations for special elections to fill vacancies." No doubt the reason for this exception was to give the people the opportunity and privilege of choosing their public officers whenever it is possible to do so, so that if a vacancy occurred within the thirty day period before which certificates of nomination in other cases must be filed with the secretary of state or county clerk, the people would not be deprived of the right to select their public officials.

It was said by the late and distinguished Mr. Chief Justice Brantley, in *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 339; 146 Pac. 932: "The general policy of our government as indicated by these provisions is that election to office by the people, when it may be conveniently done, is the general rule, and that appointments to fill vacancies made to meet the requirements of public business shall be effective only until the people may act." The Court cited *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94. In that case Mr. Justice Holloway, speaking for the Court, quoted with approval the language used in *Rice v. Stevens*, 25 Kans. 302: "The theory of our law is, that officers shall be elected whenever it can be conveniently done;

#### Opinion No. 626

#### Elections—Vacancies—District Judge —Courts—Certificates of Nomination—Ballots.

HELD: The names of candidates to fill vacancy in the office of district judge at a special election held at the time of the general election should be printed on a special ballot and not on the general ballot.

Certificates of nomination to fill vacancies may be filed at any time, and are not restricted by Section 618, R.

and that appointments to office will be tolerated only in exceptional cases."

This policy of the law was no doubt in the minds of the legislators when they enacted Section 618, as amended, containing the exception above noted. Having in mind this specific exception, as well as the policy of the law, it is my opinion that a certificate of nomination to fill a vacancy may be filed at any time, but if the candidate desires his name to appear upon the printed ballot it should be filed in time to permit the clerk to print it upon the ballot, which should be a special ballot. Although the election to fill a vacancy in this instance coincides with the date of the general election, it is still a special election and the names should not appear upon the ballot for the general election. Moreover, since it is the policy of the law to fill vacancies by election rather than by appointment, candidates should have the right and privilege of having their names upon the printed ballots. Such special ballots should be withheld from the printer by the county clerk as long as he can safely and conveniently do so. We call attention to the language of former Attorney General Foot, in the opinion above cited, with which we agree.

"It is therefore my opinion that certificates of nomination to fill a vacancy where a special election is called may be filed at any time prior to the date of election, but if the candidate desires his name to appear upon the printed ballot it should be filed in time to permit the clerk to make up, print, and distribute them to the different precincts of the county prior to the opening of the polls on election day.

"It is further my opinion that the names of the candidates should be printed upon a separate ballot in the same manner as though the election was held at a separate time from the general election."

In arriving at this conclusion I am not unmindful of Section 619, R. C. M., 1921, as amended by Chapter 58, Laws of 1925. It is my opinion, however, that this section applies to other certificates of nomination and not to the exception in case of vacancy, as provided in Section 618, and that, therefore, the secretary of state should cer-

tify to the county clerk of each county within which any of the electors may by law vote for candidates, the name and description of each person nominated to fill vacancies, whenever such certificates of nomination have been filed with him. To hold otherwise would nullify the specific exception contained in Section 618.