

Opinion No. 628**Elections—Vacancy—County Commissioners—Appointee, Term of Office
—County Central Committee.**

HELD: 1. The term of a county commissioner, appointed to fill a vacancy, expires at the time of the next election and a person duly elected may qualify and serve the remainder of the term.

2. When one person receives the highest number of votes cast for a certain office on a certain ticket at a primary election such person is nominated, and if he fails to accept the nomination his action constitutes a vacancy which may be filled by the county central committee.

October 10, 1934.

You advise that a county commissioner has been appointed and that it is your opinion that a commissioner should be elected to fill his term from the date of the election until the first Monday of next January. We agree with your conclusion.

The Constitution of the State of Montana, Article XVI, Section 4, as amended by Laws of 1929, page 497, provides: "When a vacancy occurs in the Board of County Commissioners the Judge or Judges of the Judicial District in which the vacancy occurs, shall appoint someone residing in such Commissioner Districts where the vacancy occurs, to fill the office until the next general election when a Commissioner shall be elected to fill the unexpired term." Therefore, the term of the appointed commissioner expires at the time of the general election and a person duly elected for that short period of about two months may qualify and serve in such office.

The second question propounded by you is as follows: Where the names of candidates were written in on the pri-

mary ballot as candidates for county commissioner for this short term and one of such persons received the highest number of votes and failed to qualify as a nominee, does a vacancy exist which may be filled by the political party county central committee?

Prior to 1929 this situation was governed by Sections 620, 621, 647 and 662, R. C. M., 1921. The earlier cases, such as *Stackpole v. Hallahan*, 16 Mont. 40, held that vacancies could be filled by the parties without a technical interpretation of what constituted a vacancy. Sections 647 and 662, *supra*, formerly permitted county committees to fill vacancies caused by death or removal from the electoral districts, **but not otherwise**. By Chapter 34 of the Session Laws of 1929, and again by Chapter 6 of the Session Laws of 1933, Section 662, *supra*, was amended so that committees were authorized to fill vacancies among candidates "where such vacancy is caused by death or removal from the electoral district **or otherwise**."

The rule is established in this State that a county central committee cannot make an original nomination. (*State ex rel. Smith v. Duncan*, 55 Mont. 376.)

When the legislature changed the law in 1929 and in 1933 to permit the filling of vacancies in party tickets by party committees, which vacancies were caused not only by death or resignation by reason of removal from the electoral district but, as in those laws provided, "or otherwise," it appears to me that the legislature intended to cover a case where the person receiving the highest number of votes failed to accept the nomination, and that the question of a vacancy in the nomination is not dependent upon the question of whether or not, prior to the election, he had filed as a nominee.

In the famous case of *Marbury v. Madison*, 1 Cranch at page 161, Mr. Chief Justice Marshall said: "The appointment is the sole act of the President; the acceptance is the sole act of the officer and, in plain common sense, posterior to the appointment."

In an opinion written by Mr. Chief Justice Brantly, speaking for the Court, it is said: "Giving to Section 3234, *supra*, the force and effect which the legislature evidently intended it should

have, we think it should be construed to mean that the failure of a person elected or appointed to an office to qualify within the time prescribed creates a vacancy in the office which may be filled by the appointing power." (*State ex rel. Bennetts v. Duncan*, 47 Mont. 447.) The quotation is approved in the case of *State ex rel. Wallace v. Callow*, 78 Mont. 308, at page 327.

Section 640, R. C. M., 1921, as amended by Chapter 125 of the Session Laws of 1927, expressly provides that a person may be nominated by having his name written in on the primary ballot. In order to accept such nomination he must pay the filing fee and file a written acceptance of the nomination within ten days. From this statute it is plain that the nomination is complete when he receives the highest number of votes and that his acceptance is not a part of the nomination. The authority of political committees to fill vacancies under these conditions is valid. (*State ex rel. Sayer v. Junkin*, 128 N. W. 630.)

This office has previously held that a candidate **who has filed** for a nomination and has been nominated cannot resign and thereby create a vacancy, this by reason of the fact that he agrees when he files that he will not resign. (Opinion No. 610, this volume.)

I would conclude that, when one person receives the highest number of votes cast for a certain office on a certain ticket at a primary election, such person is nominated and that, if he fails to accept such nomination, such action constitutes a vacancy which may be filled by the county central committee.