

Opinion No. 142.**Legislative Assembly—Senator—Appointment to Fill Vacancy—Term of Office—County Commissioners—Elections.**

HELD: A person appointed by the county commissioners to fill a vacancy caused by the death of a State Senator holds such office only until the next general election.

July 19, 1935.

Mr. Al Hansen
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We agree with your conclusion stated in your opinion of July 15, to the Board of County Commissioners, that a vacancy in the office of state senator, caused by death, may be filled by appointment by the county commissioners. (Article V, Section 45, Montana Constitution, as amended, Chapter 137, Laws of 1931, adopted general election 1932, page 552, Laws of 1933.)

We cannot agree with your opinion to the Board of County Commissioners that such appointee holds office for the remainder of the term. You have cited no authority in support thereof. Prior to the above mentioned amendment to said Article V, Section 45, vacancies occurring in either house could only be filled by a special election as no power of appointment to

fill such vacancy was vested in any authority by the Constitution except by the people at an election. In State ex rel. Cutts v. Hart, 56 Mont. 571, 185 Pac. 769, it was held that the governor had no power to fill such vacancy.

In State ex rel. McGowan et al. v. Sedgwick, 46 Mont. 187, 127 Pac. 94, our Supreme Court, after reviewing the various constitutional provisions, speaking by Justice Holloway, said on pages 189, 190:

"It will be seen that the only instance in which authority is given to one called upon to fill a vacancy to hold for the residue of the term is in case of a vacancy in the office of governor, and in that instance the lieutenant-governor becomes governor by right of succession, and not of appointment. In every instance of appointment to fill a vacancy in an elective office, unless an exception be made in the office of county commissioner, the Constitution specifically limits the tenure of the appointee to the next general election or until his successor is elected and qualified; and the phrase 'until his successor is elected and qualified' is literally construed by the Constitution itself in the concluding sentence of Section 34 of Article VIII: 'A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected'; for, if an appointee holds for the residue of the term, then there could never be 'a person elected to fill a vacancy' if an appointment had been made. That sentence is intelligible only upon the theory that the appointee holds only until the next general election or until the person elected for the residue of the term qualifies.

"While the policy of the law is not a controlling factor in determining the meaning of constitutional or statutory provisions, it is persuasive. A reference to the several provisions of the Constitution above discloses that in every instance of a vacancy in an elective office, where the vacancy is to be filled by appointment, the appointee shall hold only until the people who elected his predecessor have the first opportunity to fill the office with a person

of their own choice; and this rule is general, applies to every state, district and county office, unless an exception is made in favor of one appointed to a vacancy in the office of county commissioner."

And again on page 191:

"* * * and in view of the general policy expressed by the Constitution with respect to every other elective office, and the general policy of our government that as to officers who are elected 'the theory of our law is that officers shall be elected whenever it can be conveniently done, and that appointments to office will be tolerated only in exceptional cases' (Rice v. Stevens, 25 Kan. 302.)"

In State ex rel. Patterson v. Lentz, 50 Mont. 322, 146 Pac. 932, our Court, speaking by Chief Justice Brantly, said:

"The general policy of our government as indicated by these provisions is that elections 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."

In view of the foregoing and the general policy of the law, it is my opinion that a person appointed by the county commissioners to fill a vacancy caused by the death of a state senator, holds such office only until the next general election.

Note: See also Vol. 3, p. 334; Vol. 4, p. 20.