

Opinion No. 288.**Elections—Primary—Vacancy—
Method of Nominating.**

HELD: 1. Candidates for the office of Chief Justice of the Supreme Court, to fill vacancy caused by death of incumbent prior to primary nominating election, must be nominated at ensuing primary election by having names written in or pasted on the ballot.

2. The Governor has the authority to fill the vacancy, caused by death of Chief Justice, by appointment, such appointee to hold office until a successor is elected at next general election, and qualifies therefor.

June 15, 1938.

Honorable Sam W. Mitchell
Secretary of State
The Capitol Building

Dear Mr. Mitchell:

Because of the vacancy of the office of Chief Justice of the Supreme Court

of the State of Montana and the necessity for the election of a chief justice at the ensuing general election, your office is advised to proceed and act in the following manner:

The vacancy existing shall be filled by appointment by the Governor and the appointee shall hold office until the next general election and until his successor is elected and qualified. (Section 34, Article VIII of the Constitution.) The court in discussing the constitutional provision, cited *supra*, said:

"However this may be, 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." (State *ex rel.* Patterson *v.* Lentz, 50 Mont. 322, 340.)

If the vacancy occurs after the primary and before the general election, the Governor is authorized and empowered to certify to the secretary of state the names of persons qualified for such office equal in number to twice the number to be elected at the general election, and the names of the persons so nominated shall thereupon be printed on the official ballot in the same manner as though regularly nominated at the judicial primary election. (Section 812.11.) In the instant case Section 812.11 can have no application for the reason that the vacancy has arisen prior to the primary nominating election and no authority exists authorizing the Governor to make such nominations and recourse must be had to the laws pertaining to elections, both primary and general. (Section 812.15.)

Unless a candidate has been a successful candidate in the primary, he cannot have his name placed on the judicial ballot at the general election. (Section 812.9.)

Section 615, which authorizes a candidate to have his name placed upon the ballot through petition, has no application herein for the reason that the candidates for chief justice must be nominated at the primary election or else their names cannot appear upon the general election ballot. It follows that the candidates, not being able to have their names placed on the ballot by petition or through nomination of

the Governor, and being required to be nominated in the primary, must of necessity find some other provision in the statutes enabling them to otherwise present their candidacies. The necessary provision is found in Chapter 203 of the Laws of 1937, which is as follows:

"Ballots other than those printed by the respective county clerks according to the provisions of this chapter must not be cast or counted in any election. Any elector may write or paste on his ballot the name of any person for whom he desires to vote for any office, and must mark the same as provided in Section 696, and such vote must be counted the same as if printed upon the ballot and marked by the voter, and any voter may take with him into the polling place any printed or written memorandum or paper to assist him in marking or preparing his ballot except as otherwise provided in this chapter."

The electorate having the right to nominate two candidates for chief justice at the primary election by voting for said candidates through stickers, it follows that the necessary implication remains that space to place said stickers upon the ballot must be provided. The public policy and intent of the law, as enumerated by our supreme court in the case of *State ex rel. Patterson v. Lentz*, is that the people should be permitted to express their choice for this office in the ensuing primary and general elections.

Therefore, it is my opinion that the office of secretary of state should, by a proper amendment to the certificate heretofore issued, advise the county clerks and recorders of the respective counties that nominations are to be made for Chief Justice of the Supreme Court of the State of Montana, and that space for two candidates should be provided upon the ballot so that names may be written, or pasted, thereon.