

Opinion No. 320.**Elections—State Senator—Vacancies, How Filled—Tenure of Appointee—Nominations to Fill Vacancies—Special Election—Constitutional Law.**

HELD: The tenure of office of appointee to fill vacancy caused by the death of the state senator does not extend beyond the next general election. A special election must be held to fill the vacancy.

August 11, 1938.

Mr. J. H. Higgins
County Attorney
White Sulphur Springs, Montana

Dear Mr. Higgins:

You have requested my opinion on the method to be pursued in filling the vacancy in the office of State Senator, caused by the death of the Honorable Orville Harris of Meagher County, whose term of office does not expire until 1940.

Section 45, Article V of the Montana Constitution, provides:

"When vacancies, caused by death, occur in either house of the legislative assembly, such vacancies shall be filled by appointment by the board of county commissioners of the county from which such vacancy occurs. All vacancies occurring from any other cause shall be filled by election upon proclamation of the governor."

This section of the constitution was adopted by vote of the people on November 8, 1932. The death of Honorable Sam Teagarden of Fergus County, in December, 1930, occasioned the submission of this amendment to the constitution. It had previously been held by the Supreme Court that the Governor did not have power to fill such a vacancy by appointment. (State ex rel. Cutts v. Hart, 56 Mont. 571, 574, 185 Pac. 769.) Since Mr. Teagarden's death occurred in December, immediately prior to the meeting of the legislature, there was no time to hold a special election. To avoid such a situation, where a county would not be officially represented in the legislative assembly, the Twenty-second Legislative Assembly (being the one in which Mr. Teagarden would have served, had

he lived) proposed the above amendment which was subsequently approved by vote of the people.

We have narrated the history of this amendment for the reason that constitutions are to be construed in the light of previous history and surrounding circumstances. (State ex rel. McGowan et al. v. Sedgwick, 46 Mont. 187, 127 Pac. 94; People ex rel. Kennedy v. Gies, 25 Mich. 83.) It will be noted that the tenure of one appointed by the county commissioners is not specifically fixed. The legislature, in phrasing the amendment which it proposed, was concerned with the filling of the vacancy until an election could be had.

A similar question was presented to our Supreme Court in State ex rel. McGowan et al. v. Sedgwick, supra. The question there was the tenure of one appointed to fill the vacancy caused by the resignation of a county commissioner. It was held that the rule that persons appointed to fill vacancies in state, district and county offices shall hold until the next general election, applied as well to county commissioners. After reviewing the various constitutional provisions, the court, speaking by Mr. Justice Holloway, said (p. 190):

"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. There is not any reason apparent or suggested why an exception in his favor should be made, and that there is not any express exception is conceded."

Following the language used in that case, 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), we think that Section 45 of Article V should be read with Section 5, Article XVI, and with Section 34, Article VIII, particularly the last sentence thereof, which necessarily implies that appointive officers hold office only until the next general election; otherwise there could never be a person elected to fill a vacancy if an appointment had been made. We see no reason why there should be an exception to the general rule in the case of state senator. Certainly, in the absence of an express exception, none should be implied contrary to the general policy of our Constitution and government unless such implication is unavoidable.

The views expressed in the Sedgwick case were reaffirmed, in *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162; Chief Justice Brantly, speaking for the court said (p. 587):

"After further consideration of the subject we are satisfied that the conclusion reached was correct and that it is determinative of this case,"

and again in *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932.

We conclude, therefore, that no appointment that the county commissioners may make to fill a vacancy in the office of state senator would be effective after the next general election, and that the vacancy should be filled at the next general election by a vote of the people.

The question remains as to nominations and elections. Since the date for holding primaries has passed, nominations cannot be made by the political parties. There being no vacancy among candidates (Mr. Harris having been a hold-over senator and not a candidate), the county central committees of the parties may not make nominations (Section 662, R. C. M. 1935). There remains, however, the method of nomination by petition, as provided for by Section 615 Id. (*State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932.) As to when such certificates must be filed with the county clerk, see Opinion No. 626, Vol. 15, Opinions of the Attorney General, 430.

By proclamation the Governor should order a special election to fill the vacancy in the office of state senator of Meagher County (Section 533 Id.). Since there is ample time, such election may be held at the same time as the general election, in order to save expense.