

ing the creation of the office. The term shall be for two years.

3. The method of nomination shall be by petition or names may be written in on the regular ballots.

September 2, 1938.

Mr. Harold K. Anderson
County Attorney
Helena, Montana

Dear Mr. Anderson:

Supplemental Opinion to Opinion No. 327, with reference to County Auditor and Elections.

Opinion No. 327 in error referred to Section 621 Revised Codes of Montana, 1935, which should have been Section 615, Revised Codes of Montana, 1935.

As this office views the situation, the County of Lewis and Clark, upon the designation by the County Commissioners at the regular September meeting, will be entitled to a county auditor. Under the Proclamation of the Governor, calling the general election for the year 1938, counties entitled to a county auditor shall elect such officer. The time for nominations for officers at primary elections is past.

Section 612, Revised Codes of Montana, 1935, provides for a convention being called to nominate candidates; a convention by the different political parties.

Section 621 provides that at such convention a committee may be delegated the power to fill vacancies, etc. In any event there has been no convention called for the purpose of making nominations; no committee appointed, and further, it has been held by our courts that the convention system referred to in Chapter 64 is applicable only to special elections and that the primary election law is applicable to general elections. (State ex rel. Reibold v. Duncan, 55 Mont. 380.) In the above mentioned case, the question involved was: "Did the adoption of the General Primary Law (Laws 1913, p. 570) operate to repeal in their entirety all prior existing laws which governed the nomination of candidates for public office?" And the court uses the following expression at page 381:

"It cannot be doubted that to the full extent to which the primary law

Opinion No. 331.

Counties — Classification — Offices and Officers—Elections—Auditor, Term of Office.

(Supplementing Opinion 327, Vol. 17)

HFLD: In counties of the Fourth Class under Section 4741, R. C. M. 1935, the Board of County Commissioners, proceeding under Section 4742, R. C. M. 1935, create and bring into existence the office of County Auditor.

2. The office of County Auditor shall be filled at the general election follow-

was intended to operate, all original nominations must be made by direct vote of the electors at the primary nominating election. In theory, this Act recognizes the right of the different groups of electors to maintain their respective party organizations, and to be represented at the polls by nominees of their own political faith. The dominating purpose of the Act is to assure to every elector an opportunity to participate directly in the selection of candidates for public office, afford the protection of public supervision of the election machinery, and secure the right of free expression of opinion by the application of the safeguards of the Australian ballot system. But no provision is made for a primary election to nominate candidates to be voted upon at special elections; on the contrary, the terms of the Act are made applicable to nominations to be voted on at general elections only. Section 2 declares: 'On the seventieth (70) day preceding any general election (not including special elections to fill vacancies, municipal elections in towns and cities, irrigation district and school elections) at which public officers in this state and in any district or county are to be elected, a primary nominating election shall be held in accordance with this law,' etc.

"Since the primary election under public control is the very essence of the Act, it must follow that, in failing to make provision for such election to nominate candidates to be voted upon at special elections, the lawmakers intended that the Act in its entirety should be construed as limited in its operations to the nominations of candidates to be voted for at general elections, and that every section should be read with this construction in mind. Under any other view we would find ourselves confronted with a repeal of all existing statutes governing nominations, and no provision whatever made for the nomination of candidates to be voted for at special elections."

Therefore, it is the opinion of this office, as stated in Opinion No. 327, that candidates for election of county auditor in your county must comply with Section 615, Revised Codes of Montana, 1935, or have their names written in. We can see that there may be a

discrepancy here also by reason of the fact that the number of signatures on the petition must not be less than five per cent (5%) of the number of votes cast for the successful candidate for the same office at the next preceding election. But in the case of your county there was no such office at the next preceding election. So, to comply with this provision, it is our opinion that the petition should contain signatures of at least five per cent (5%) of the number of votes cast for the office having had charge of the same nature of work; for instance, the Clerk and Recorder.