

**Opinion No. 349.****Officers—Vacancies—Sheriff.**

HELD: 1. Where the sheriff was holding office by appointment before the general election, and no special election was called to fill the vacancy, a second vacancy exists after the general election and it is the duty of the county commissioners to fill that vacancy by appointment for the remainder of the term.

2. The sheriff elect takes office the first Monday in January, 1939.

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November 14, 1938.

Mr. Horace Judson  
County Attorney  
Cut Bank, Montana

My dear Mr. Judson:

You advise me that at the general election held in November, 1934, J. W. Stewart was elected to the office of sheriff of Glacier County. At the election held in November, 1936, Fred Stone was elected but never qualified. Mr. Stewart continued to hold the office until the time of his death, which was on November 4, 1938. On November 5, 1938, Ray E. Johnson was appointed and qualified as such official. At the general election on November 8, 1938, A. E. Armstrong was elected sheriff under the general call. The question has now arisen as to whether or not Mr. Armstrong is entitled to take over the office of sheriff upon the

receipt of his certificate of election and upon his qualifying in the manner required by law, or whether Mr. Johnson should remain in office until the first Monday in January, 1939.

Section 5, Article XVI of the Montana Constitution provides:

"There shall be elected in each county the following county officers:

"One county clerk, who shall be clerk of the board of county commissioners and ex-officio recorder; one sheriff; one treasurer, who shall be collector of the taxes, provided, that no person shall hold the office of county treasurer for more than two (2) consecutive terms; one county superintendent of schools; one county surveyor; one assessor, one coroner; one public administrator. Persons elected to the different offices named in this section shall hold their respective offices for the term of two (2) years, and until their successors are elected and qualified. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election;" \* \* \*

Sections 4728 and 4734 provide:

"All elective county and township officers, except county commissioners, must be elected at the general election to be held every second year thereafter, and must take office on the first Monday of January next succeeding their election, except county treasurer, whose term begins on the first Monday of March next succeeding his election, and hold office for two years.

"All vacancies in county and township offices, except county commissioner, are filled by appointment made by the county commissioners. Appointees hold until the vacancies are filled by election."

Mr. Armstrong at the last general election was elected for a fixed and definite tenure or term, which commences on the first Monday in January, 1939, and thereafter with a contingent occupancy, that is until his successor is elected and qualified.

State ex rel Dunne v. Smith, 53 Mont. 341.

The constitutional provision, *supra*, distinguishes between a sheriff who is appointed, and one elected. Here the elected sheriff will hold office from the first Monday in January, 1939, and for a fixed and definite period of time, and until such time thereafter as his successor is elected and qualified. Mr. Johnson having been appointed sheriff November 5, 1938, could only hold the office until November 8, 1938, which was the date of the general election. The fact that section 4734 provides that the appointee shall hold the office until the same is filled by an election, and the office not having been filled by an election on November 8, 1938, does not extend the appointee's tenure beyond that date. The intent of the statute has been fully complied with, because the office could have been filled by the electorate at the general election. Failure to exercise the rights of election provided for by law cannot work a forfeiture of the constitutional inhibition.

A fair interpretation of the law convinces me that in this instance a short term for the office of sheriff exists between the date of the general election, and the first Monday in January, 1939; and the people had the right to elect a sheriff for that period. Having failed to do so, the county commissioners must now appoint a sheriff for the remainder of the term. Section 4734 could not act to extend the tenure of Mr. Johnson's appointment beyond the date of the general election. To do so would be in violation of Article XVI, Section 5, of the Constitution.

State ex rel Rowe v. Kehoe, 49 Mont. 582.

Therefore it is my opinion that Mr. Johnson's tenure of appointment ended November 8, 1938; no one having been elected at the general election for the short term, that is for the period between November 8, 1938, and the first Monday in January, 1939, makes it necessary for the county commissioners to appoint a sheriff for the balance of the period. Mr. Armstrong will assume the office of sheriff on the first Monday in January, 1939.