No. 492

## ELECTIONS — OATH — BOND — MILITARY SERVICE — OFFICERS AND OFFICES, qualifications of

**Held:** 1. **If one elected to office in November, 1942, is unable to or prevented from filing oath and bond within the time prescribed by law because of his absence in military service of the United States, does not forfeit his rights to the office so as to cause a vacancy, but the authority having the appointing power for such office may appoint some suitable person under the provisions of Chapter 47, Laws of 1941.**

2. **That one elected to office may take and subscribe his oath before any officer outside of the State of Montana or the United States, who would under the laws of this State be authorized to administer an oath.**

3. **That the policy of the law as expressed by the Legislature in Chapter 47, Laws of 1941, is to preserve to those elected officials who have been inducted into the military forces, their rights to the offices to which they were elected and had title at the time of their military service.**

September 26, 1942.

Mr. Homer A. Hoover
County Attorney
McCone County
Circle, Montana

Dear Mr. Hoover:

You have advised that your county coroner has been inducted into the armed forces and has notified the county commissioners of this fact, and that upon his discharge from service will make application for reinstatement to the office of coroner for the unexpired term. The Coroner is a candidate for reelection and having no opposition will be elected to this office in November. You ask my opinion on the following questions:

1. If elected while on active duty outside the State, may he qualify by taking the oath and filing a bond as required by statute?
2. If he does qualify, must the commissioners proceed under the provisions of Chapter 47, Laws of 1941, and appoint an acting coroner for the term commencing in January, 1943, or until the return of the elected coroner?
3. If he does not qualify, is the office vacant?
4. If the office becomes vacant, must the commissioners appoint someone to hold the office for the full term, or until the next general election?

Chapter 47, Laws of 1941, provides for the reinstatement of elected officials who have been inducted in the land or naval forces of the United States, and who, in order to perform training or active duty, leave a position or office. Section 8 of the Act provides as follows:

> "It is specifically provided that the provisions of Section 414, Sections 5, 6, 7 of Section 511 and Section 4739 of the Revised Codes of Montana for 1935, shall not be, and the same are declared not to be, applicable insofar as they relate to absence or residence of any officer of the State or political subdivision thereof caused by the military service of such officer as set forth in Section 1 of this act. **It is specifically declared that the absence of such officer, caused by such military service, shall not create a vacancy in the office to which he was elected.**"

When a county or state elected official is inducted into the land or naval forces and notifies the proper officials of this fact, the official having the appointing power, must appoint some suitable person to fill the office during the official's absence and until his return and demand for reinstatement, not however, beyond the terms for which he was elected. Therefore, upon induction and notification of this fact by the coroner, it was the duty of the commissioners to appoint someone to fill the office for the unexpired term; that is, the unexpired present term, or, in case the coroner should return before this term has expired, until his demand for and reinstatement into the office.

However, under the facts existing here, a different situation arises. The elected official serving his present term which will expire in January, 1943, is reelected to the same position for another term commencing in January, 1943. His election occurs while he is in active service and absent from the state. I find no statute which would prohibit one from being elected to public office while absent from the state in military service. Two questions would then arise. First, must he qualify in the manner provided by law, and, second, if so, how may he do so if absent from the State in military service?

Section 432, Revised Codes of Montana, 1935, provides:

> "Whenever a different time is not prescribed by law, the oath of office must be taken, subscribed, and filed within thirty days after the officer has notice of his election or appointment, or before the expiration of fifteen days from the commencement of his term of office, when no such notice has been given."

No different time being prescribed for the filing of the oath by the Coroner, Section 432, supra, would apply.

Section 433, Revised Codes of Montana, 1935, provides:

> "Except when otherwise provided, the oath may be taken before any officer authorized to administer oaths."

And Section 436, Revised Codes of Montana, 1935, provides:

> "Every executive, state, and judicial officer may administer and certify oaths."

Section 10693, Revised Codes of Montana, provides:

> "Every court, every judge, or clerk of any court, every justice, and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations."

The oath, therefore, may be taken before any of the officers or persons mentioned in Sections 436 and 10693, Revised Codes of Montana, 1935. It may be noted that neither of these sections, nor any other provision of our code, limits the taking of the oath, before the officers mentioned, within the

confines of the state. It would, therefore, seem the oath may be taken before such officers of another state. At least under the provisions of the full faith and credit clause, Section 1 of Article IV of the Federal Constitution, an oath taken outside the state before one of the officers mentioned above having like authority, would be sufficient.

It is therefore my opinion, that if the officer elect qualifies as provided by law and as outlined in this opinion, the commissioners should proceed under Chapter 47, Laws of 1941 and appoint some suitable person to fill the office for the term commencing in January, 1943, to hold until the elected coroner is discharged from service and demands reinstatement, if such occurs prior to the end of the term for which he was elected.

What is the situation, should the coroner-elect not qualify as provided by law? In such event would the office become vacant?

Section 432, supra, provides the oath of office must be taken, subscribed and filed within thirty days after the officer has notice of his election or appointment or before the expiration of fifteen days from the commencement of his term of office when no notice has been given. Section 9 of Section 511, Revised Codes of Montana, 1935, provides an office becomes vacant upon the officer's "refusal or neglect to file his official oath or bond within the time prescribed by law."

The provisions of Sections 432 and 511, supra, have generally been held to be directory only. The failure of the officer to file the oath or give bond within the time prescribed does not ipso facto cause a vacancy. Our Supreme Court in the case of State ex rel. Wallace v. Callow, 78 Mont. 308, 322, 254 Pac. 187, in subscribing to the holding of the weight of authority, quoted with approval from Mechem on Public Officers, sections 265, 266, as follows:

> "'These provisions as to time, though often couched in most explicit language, are usually construed to be directory only and not mandatory; . . . a failure to give bond within the time prescribed does not, therefore, ipso facto work a forfeiture, . . . even though the statute expressly provides that upon a failure to give the bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment.'"

And the court concludes:

> "Following the great weight of authority and what we believe to be sound public policy, we hold that the statute is directory and not mandatory."

In the case of State v. Uotila and Certain Intoxicating Liquors, 71 Mont. 351, 355, 229 Pac. 727, the court, in considering Sections 432, Revised Codes of Montana, 1935, requiring all officers to take an oath before entering upon their duties, and Section 432, supra, said:

> "Neither of these sections makes the filing of the oath of office a condition precedent to the officer's entering upon the discharge of his duties of his office; . . ."

The authorities adhering to the above principle of law hold that while the failure to file the oath and bond does not ipso facto create a vacancy or divest the officer of his right to the office, it merely creates in the proper officials the right to declare a vacancy and make an appointment, and, until this action is taken, the officer-elect retains the title to the office. (See Mechem on Public Officers, supra, and cases therein cited.)

In the case of State v. Ruff, 4 Wash. 234, 29 Pac. 999, the Supreme Court of Washington considered the meaning of statutes similar to Sections 432 and 511, supra. After a review of the authorities pro and con, it stated the following:

> "Under some statutes the qualification is made a prerequisite to the holding of the office, and in fact that which bestows the office. Under such statutes, a failure to qualify within the time specified

would no doubt prevent a later assertion of any right thereto. But under our statute, **it is the election which gives the right to the office, and the qualification is only an incidental requirement for the protection of the public.** If the provisions for such qualification are not timely complied with, the public can protect itself by declaring a vacancy and filling the same by appointment, but until such acts have been done the force of the election has not been exhausted, and, upon a compliance with the incidental duty of qualification, is given full force."

And again this court says:

"The people, by their votes, determine their choice of officers, and they should not be robbed of the fruits of such choice for slight or insufficient reasons."

In interpreting any section or sections of the code all sections and legislative acts must be considered together as if one statute. (Section 5522, Revised Codes of Montana, 1935.) The intention of the legislature must be pursued, if possible. (Section 10520, Revised Codes of Montana, 1935; State ex rel. Boone v. Tullock, 72 Mont. 482, 487, 234 Pac. 277.)

Therefore, in construing the provisions of Sections 432 and 511, supra, we must also take into consideration the provisions of Chapter 47, Laws of 1941. When this is done, it may appear that because the legislature did not include within the provisions of Section 8 of Chapter 47, Section 9 of Section 511, it intended the provisions of Section 9 of Section 511 should be applied strictly and literally. However, there are other rules of construction which may be resorted to in order to arrive at the real intention of the legislature.

Our Supreme Court in the case of Fergus Motor Co. v. Sorenson, 73 Mont. 122, 126, 235 Pac. 422, said:

"Whenever it is possible for a court to construe a statue, the rule is that the intent of the legislature, is to be pursued, if possible. (See Sec. 10520, Revised Codes, 1921.) In order to arrive at the intent of the legislature, there are many rules which have been laid down as helpful. For instance, it has been said that the policy of a law is persuasive as to its meaning. (State ex rel. McGowan v. Sedgwick, 46 Mont. 187, 127 Pac. 94) . . . .

"It is permissible, if not actually necessary, whenever the language of a statute is of doubtful meaning, for the court 'to recur to the history of the times when it was passed and of the Act itself, in order to acertain the reason as well as the meaning of particular provisions in it.' (25 R. C. L. p. 1035; and see Sullivan v. City of Butte, 65 Mont. 495, 211 Pac. 301)."

A study of the provisions of Chapter 47, Laws of 1941, bearing in mind the "history of the times when it was passed", shows clearly that the intention of the legislature in enacting Chapter 47 was to preserve to elected officials the right to resume their offices upon the termination of their services in the military forces, rather than to deprive them of their offices because they entered the military service of their country to fight for the preservation of our form of government and the very offices which they were forced to leave for this purpose. This is clearly shown in the expression used by the legislature in Section 8 of the act, "It is specifically declared that the absence of such officer, caused by such military service, shall not create a vacancy in the office to which he was elected." No plainer language could be used to convey the intention of the legislature that no vacancy should be caused by the fact that the officer was in military service.

Even if we concede the force of Section 432, supra, in its requirement for qualification, yet if the objects and purposes of such requirement may be fully met by compliance with our other provisions of law, there is no necessity for a strict construction of Section 432.

If the officer elected, because of his absence in military service, is unable to qualify within the time prescribed by law, the proper authority, under the provisions of Chapter 47, Laws of 1941, is authorized to appoint some suitable person to hold the office during the absence of the officer elect. Under the decision of our Supreme Court in the case of Gullickson, Attorney General v. Sam W. Mitchell, as Secretary of State, recently decided, (126 Pac. (2nd) 1106), it was held the person so appointed is not the acting officer, but for all intents and purposes has title to the office and possesses all the authority and rights of an elected officer. It further holds the powers, authority and rights of the officer elected are merely suspended during his absence, with a right in him to be restored thereto by compliance with the provisions of the act. The officer appointed must therefore possess the qualifications required for the office and must qualify in the manner prescribed by law, that is, by taking, subscribing and filing the oath and the bond.

The courts generally hold provisions such as ours relative to qualification are directory, have given a liberal construction thereto.

The Supreme Court of Indiana in the case of State ex rel. Morley v. Johnson, et al., 100 Ind. 489, said:

> "The object of the statute is to compel a person chosen to office to qualify within the time prescribed, and if, without legal excuse, he fails to do so, he is in fault, and must lose the office. . . . If he is not in fault, then the lapse of time might not deprive him of the office, but it is incumbent upon him to explain the delay and exculpate himself from blame."

The Supreme Court of Ohio, in the case of State ex rel. Lease v. Turner, 111 Ohio St. 38, 144 N. E. 599, said:

> "The law does not look with favor upon declaring a forfeiture in an office to which one has been elected in a legal manner, and when the office has not been declared vacant, and no other rights or title have intervened, such irregularities as failure to give bond, or take the oath of office within a certain time, have not generally been held to be sufficient grounds for declaring a forfeiture of the office." (Citing many cases.)

It is therefore my opinion:

1. If one elected to office in November, 1942, is unable to or prevented from filing oath or bond within the time prescribed by law because of his being ordered or inducted into the military service of the United States, does not forfeit his rights to the office so as to cause a vacancy, but the authority having the appointing power may appoint some suitable person under the provisions of Chapter 47, Laws of 1941.
2. One elected to office may take and subscribe his oath before any officer outside the State of Montana or the United States, who would under the laws of this State be authorized to administer an oath.
3. The policy of the law as expressed by the legislature in Chapter 47, Laws of 1941, is to preserve to those elected officials who have been inducted into the military forces, their rights to the offices to which they were elected and had title at the time of their military service.

Sincerely yours,

R. V. BOTTOMLY
Attorney General