

No. 496

**ELECTIONS—SPECIAL ELECTIONS—VACANCIES—
COUNTY OFFICES**

Held: Under Section 5, Article XVI of the Constitution, as amended, in case of vacancies in county offices, a board of county commissioners has the power, and it is its duty to call and provide for the holding of special elections to fill them.

September 30, 1942.

Board of County Commissioners
Garfield County
Jordan, Montana

Gentlemen.

You have requested my opinion on the following facts:

You have had two appointments in the past two years—one in the sheriff's office caused by the death of the elected sheriff and one in the county clerk's office caused by the resignation of the elected county clerk. Both appointments made by you read that the appointees would fill the unexpired term of the elected officers—that is, until January 3, 1943. You inquire whether this is correct.

Section 5, Article XVI, of the Montana Constitution, as amended by the vote of the people at the general election held November 8, 1938, provides in part:

"Section 5. There shall be elected in each county the following county officers who shall possess the qualifications for suffrage prescribed by Section 2 of Article XVI of this Constitution and such other qualifications as may be prescribed by law:

"One county clerk who shall be clerk of the board of county commissioners and ex-officio recorder; one sheriff . . . Persons elected to the different offices named in this section shall hold their respective offices for the term of four (4) 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; . . ." (Emphasis Mine.)

An examination of the constitutional provision, *supra*, will show a distinction is contemplated between an officer who is elected and one who is appointed to fill a vacancy. The elected officer holds office from the first Monday in January next succeeding his or her election, pursuant to Section 4728, Revised Codes of Montana, 1935, as amended by Chapter 134, Laws of 1939, with the exception to the county treasurer. The officer elected holds office for a fixed and definite time, namely four years—and until such time thereafter as his successor is elected and qualified. The appointed officer can hold office only until the date of the next general election. Therefore, an appointment to fill a vacancy by a board of county commissioners till January 3, 1943, is in direct violation of Section 5, Article XVI, Montana Constitution, as amended.

The proper procedure to be followed by the board of county commissioners, when there has been an appointment to fill a vacancy until the next general election, has been stated by our Supreme Court in *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162:

"The provision in question (Section 5, Article XVI of the Constitution) does not declare that an election shall be held to fill the vacancy for the remainder of the term. It is silent on the subject. There is no other provision in the Constitution on the subject. In view of the express limitation of the appointing power, however, and the evident

purpose that appointment to office should be the exception and that the people should elect their own officers whenever convenient, it is clear that the convention intended that the remainder of our current term should be provided for by election . . .

“When all these provisions are read together, the conclusion seems necessary that the legislature intended that special elections to fill vacancies in county offices should be proclaimed and notice thereof given by the board of county commissioners . . . It is true, the legislation is crude and does not by the most appropriate expression confer this power; nevertheless we think it sufficiently confers the power within the rule that these boards have only such powers as are conferred upon them by the Constitution and statutes granting and defining their powers.”

What has been said by our court, above, concerning a vacancy in a sheriff's office also applies to the office of county clerk, for both offices are provided for by Section 5, Article XVI of the Constitution, as amended.

It is therefore my opinion that where an appointment to fill a vacancy in a county office is made under Section 5, Article XVI, as amended, the appointee holds office until the next general election. It is further my opinion the board of county commissioners has the power, and it is its duty to call and provide for the holding of a special election to fill the vacancy which exists between the general election and the first Monday in January next succeeding the election.

Sincerely yours,

R. V. BOTTOMLY
Attorney General