

**Opinion No. 212.****County Treasurer—Term of Office—  
Elections—Vacancies in Office.**

Held: Under Section 5, Article XVI of the Constitution, as amended, an appointee to fill a vacancy in a county office holds office until the next general election. A county officer elected to fill a vacancy holds for the unexpired term under the provisions of Section 5, Article XVI of the Constitution, as amended. A person who has been appointed to fill out the unexpired term of a county treasurer is eligible to be a candidate for the office of county treasurer at the next general election, and the constitutional prohibition found in Section 5, Article XVI of the Constitution, as amended, providing a county treasurer shall not be eligible to his office for the succeeding term, applies only to county treasurers who were elected and not to those who were appointed to fill out an unexpired term. Under Section 5, Article XVI of the Constitution, as amended, the elected holder of a full term of the office of county treasurer may not be a candidate for the office until a full term of four years has elapsed.

May 20, 1944.

Mr. Oscar C. Hauge  
County Attorney  
Hill County  
Havre, Montana

Dear Mr. Hauge:

You have submitted the following for my consideration:

The county treasurer-elect, whose term was to commence the first Monday in March, 1943, failed to qualify and the vacancy was filled by appointment. You have asked the following questions:

1. How long is the appointee's and incumbent's term of office?

2. What will be the term of the person elected at the next general election?

3. May the present incumbent, who is an appointee, be a candidate at the election?

4. May the former holder of the last full term be a candidate for the office?

The answer to your first question is found in Article XVI, Section 5, of the Montana Constitution, as amended, which provides in part:

"Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment of the board of county commissioners, and the appointee shall hold his office until the next general election . . ."

Section 4728, Revised Codes of Montana, 1935, as amended by Chapter 134, Laws of 1939, also provides that "the appointee shall hold his office until the next general election."

The second question offers a more difficult problem. Article XVI, Section 5 of the Montana Constitution, as amended by the vote of the people at the general election held November 8, 1938, extended the term of the office of county treasurer from two to four years. The person elected and who failed to take office the first Monday in March, 1943, was elected for a four-year term. The appointee holds office until the next general election and the office of treasurer is not one to be regularly filled at the election. Thus, a special election to fill the office of county treasurer must be held.

Section 532, Revised Codes of Montana, 1935, provides in part:

"Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper officer or authority."

The legislative intent, as indicated by Section 532, is to consider the special election one to fill a vacancy and not an election to supply an officer for a full term.

In 43 American Jurisprudence 17, the text states:

"One settled rule is that where both the duration of the term of office and the time of its commencement or termination are fixed by Constitution or statute, a person elected or appointed to fill a vacancy in such office holds for the unexpired portion of the term . . ."

Uniformity of elections throughout the state is also a policy of the law. This is recognized in *State ex rel. Jones v. Foster*, 39 Mont. 583, 104 Pac. 860, where our Court had under consideration the constitutional provisions providing for district judges and clerks of court and said:

"The purpose of it was to so adjust the term of those first elected that thereafter the election would fall regularly upon presidential years, and be uniform throughout the state."

It would lead to confusion if county treasurers in the various counties were elected at different general elections and such would be the result if a four-year term were permitted at the coming general election in your county.

Our Supreme Court, in considering Section 5, Article XVI of the Montana Constitution, in *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162, stated:

"The provision in question 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. 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 the current term should be provided for by election.**" (Emphasis mine.) (See Opinion No. 496, Vol. 19, Report and Official Opinions of Attorney General; *State ex rel. Morgan v. Knight*, 76 Mont. 71, 245 Pac. 267.)

In the light of the recent decision of the Supreme Court hereinafter quoted in part, insofar as this opinion is in conflict with Opinion No. 462, page 786, Volume 19, Report and Official Opinions of the Attorney General, said Opinion No. 462 is hereby overruled and modified to conform herewith.

In *State ex rel. Green v. Anderson*, 113 Mont. 682, 690, 129 Pac. (2nd) 874, it is held:

"Furthermore, the expression 'vacancies shall be filled' without any limitation of the words, certainly means to fill them completely; and it was only because of other provisions indicating that there were two fractional vacancies to be filled, one by appointment until election, and a second then by election, that the decisions in *State ex rel. Patterson v. Lentz* and *State ex rel. McGowan v. Sedgwick* were proper."

Your third question concerning the eligibility of the appointee to be a candidate at the election is answered by Opinion 247, Volume 19, Report and Official Opinions of the Attorney General. It is held in Opinion No. 247 that a person who has been appointed to fill out the unexpired term or a county treasurer is eligible to be a candidate for the office of county treasurer at the next general election.

In your fourth question you ask if the holder of the preceding full term of the office of county treasurer is eligible to be a candidate at the election this fall.

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

"There shall be elected in each county the following officers . . . one treasurer who shall be collector of taxes, provided, that the treasurer shall not be eligible to his office for the succeeding term . . ."

The term of office of the county treasurer was extended to four years. In *State ex rel. O'Connell v. Duncan*, 108 Mont. 141, 88 Pac. (2nd) 73, our Supreme Court said of the amendment:

"Our conclusion is that on and after the 8th day of November, 1938, there was but one term of office provided for the county officers, referred to in the amendment to the Constitution then adopted, and that the four-year term immediately became effective and the two-year term ceased to exist at that time . . ."

Only two years have elapsed since the term of the last holder of a full term so he cannot legally be a candidate for the office.

It is therefore my opinion:

1. Under Section 5, Article XVI of the Constitution, as amended, an appointee to fill a vacancy in a county office holds office until the next general election.

2. A county officer elected to fill a vacancy holds for the unexpired term under the provisions of Section 5, Article XVI of the Constitution, as amended.

3. A person who has been appointed to fill out the unexpired term of a county treasurer is eligible to be a candidate for the office of county treasurer at the next general election, and the constitutional prohibition found in Section 5, Article XVI of the Constitution, as amended, providing that a county treasurer shall not be eligible to his office for the succeeding term, applies only to county treasurers who were elected and not to those who were appointed to fill out an unexpired term.

4. Under Section 5, Article XVI of the Constitution, as amended, the elected holder of a full term of office of county treasurer cannot be a candidate for the office until a full term of four years has elapsed.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General