

**Opinion No. 218.****Elections—Special Elections—Vacancy  
—County Treasurer—Candidates,  
Nomination of.**

Held: An election held to fill a vacancy in the office of county treasurer is a special election and candidates for the election may be nominated either under the provisions of Section 612, Revised Codes of Montana, 1935, or under the provisions of Section 615, Revised Codes of Montana, 1935. Candidates for a special election cannot be nominated under the provisions of the general primary law, Chapter 65, Volume 1, Revised Codes of Montana, 1935.

June 9, 1944.

Mr. Frank J. Roe  
County Attorney  
Silver Bow County  
Butte, Montana

Dear Mr. Roe:

You have requested my opinion concerning the method to be followed in filling the vacancy in the office of county treasurer. You advise me that a vacancy occurred after the last general election by the death of the person elected and an appointment was made to fill the vacancy until the next general election.

Section 5 of Article XVI of the Constitution of Montana, as amended, provides in part:

“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 office until the next general election . . ."

Under the above provisions the appointee holds office until the general election November 7, 1944, at which time the unexpired term will be filled by election.

The election to fill the vacancy will be a special election as 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."

In the case of *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162, the Court held:

"In the consideration of this case, the court reached the conclusion that inasmuch as an election to fill a vacancy is a special election, though to be held at the same time as the general election, and inasmuch as the statute (Rev. Codes, sec. 455) mandatorily requires notice of it to be given by publication and posting at the voting places, and these prerequisites had been entirely omitted by the board of commissioners, the election, if held, would be wholly invalid. As was stated by this court in *State ex rel. Breen v. Toole*, 32 Mont. 4, 79 Pac. 403, we do not question the propriety of the rule that previous notice by the proper authority is not necessary to render a general election valid. The law fixes the time for holding these elections and also names the officers to be elected. Of these facts the people may be conclusively presumed to take notice; but they cannot be presumed to know generally that a vacancy has occurred which they may fill at the date of the general election, though they are presumed to know the date when the general election takes place. Hence, to say that formal notice by the board of commissioners as required by the statute is unnecessary is tantamount to holding that such information as the one or more candidates may choose to impart to the electors is sufficient to meet all legal requirements . . ."

"An election to fill a vacancy is a special election, although held on the same day as a general election." (20 C. J. Sec. 3, Pages 56-57.)

(See also *State v. King County*, Superior Ct. 71 Wash. 484, 128 Pac. 1054, Annotated Cases 1914 C. 591; *State v. Howe* 59 Wash. 492, 110 Pac. 386, 50 LRANS 336.)

A proclamation ordering a special election must be made by the county commissioners and Sections 535 and 536, Revised Codes of Montana, 1935, state the procedure to be followed. (See *State ex rel. Dunn v. Smith*, 53 Mont. 341, 163 Pac. 784.)

The method of nomination of candidates for a special election is not clearly stated by our statutes.

By the enactment of the direct primary law, Chapter 63, Volume 1, Revised Codes of Montana, 1935, the legislature provided that candidates for public office shall be nominated by the direct vote of the people in a primary election.

However, Section 632, Revised Codes of Montana, 1935, provides:

"On the third Tuesday of July preceding any general election (not including special elections to fill vacancies, . . .) 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 . . ."

It would appear from the foregoing that the primary election law has no application to special elections and our court so held in *State ex rel. Reibold v. Duncan*, 55 Mont. 380, 177 Pac. 250. In that case the court considered the general primary law and its application to special elections and said:

"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."

The Supreme Court in the *Reibold* case considered the methods of nomination of candidates for special elections and held such nominations could be made by a convention as provided in Section 612, Revised Codes of Montana, 1935, or by certificate of nomina-

tion as provided in Section 615, Revised Codes of Montana, 1935.

It is therefore my opinion that an election held to fill a vacancy in the office of county treasurer is a special election and candidates for the election may be nominated either under the provisions of Section 612, Revised Codes of Montana, 1935, or under the provisions of Section 615, Revised Codes of Montana, 1935. From the statutes and decisions, candidates for a special election may not be nominated under the provisions of the general primary law, Chapter 65, Volume 1, Revised Codes of Montana, 1935.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General