

Opinion No. 57.

**Consolidated Offices, deputies of—
Sheriff—County Surveyor**

- Held: 1. In counties of the seventh and eighth classes, irrespective of population, where the office of sheriff is consolidated with another office, the sheriff may, if he deems it necessary, appoint an undersheriff without the consent of the board of county commissioners.
2. In such counties, however, the sheriff must have the approval of the county commissioners before appointing any deputy or deputies other than undersheriff.

May 21, 1943.

Mr. Arthur C. Erickson
County Attorney
Sheridan County
Plentywood, Montana

Dear Mr. Erickson:

You have requested my opinion on the following question:

"Where the office of sheriff and county surveyor have been consolidated under a single officer in a seventh class county having a population of more than 2,000, has the board of county commissioners the authority to determine the number of deputies of said officer and to disapprove the appointment of any deputy or undersheriff?"

This office has held that a sheriff in a county of the seventh class having a population of more than 2,000 may appoint one undersheriff and one deputy without the authority or consent of the board of county commissioners. Opinion Number 15, Volume 20, Report and Official Opinions of the Attorney General. This opinion was confined to the situation where the office of sheriff had not been consolidated with any other office and it is next necessary to consider the effect of the consolidation of the office of sheriff and county surveyor on the authority to appoint an undersheriff and deputies.

The authority to consolidate county offices is derived from Article XVI, Section 5, of the Montana Constitution. This section provides in part:

" . . . the board of county commissioners of any county may, in its discretion, consolidate any two or more of the within named officers, and combine the powers and the duties of the said offices consolidated . . . "

The legislature in pursuance of the authority granted by Article XVI, Section 5, of the Montana Constitution, enacted sections 4749.1 to 4749.7, Revised Codes of Montana, 1935, providing for the consolidation of county offices.

Section 4749.7 was amended by Chapter 107, Laws of 1937, and again amended by Chapter 104, Laws of 1941. Section 4749.7 as amended provides in part:

" . . . that where county offices are consolidated as hereinbefore described, that the officer of the consolidated offices shall have any deputies they may appoint who shall be approved by the board of county commissioners; and provided further, that the board of county commissioners shall determine the number of deputies, stenographers, and clerks the said officers may appoint."

It is important to note that in the foregoing section the word "deputies" is used and not the word "undersheriff."

Section 4775, Revised Codes of Montana, 1935, distinguishes between an under-sheriff and a deputy sheriff and as Chapter 104, Laws of 1941, does not mention under-sheriff, either in the title or body of the act, it must be construed as not including such office.

While the under-sheriff is a deputy sheriff under our statutes, he is also more than a regular deputy sheriff; he is the one person who must assume and execute all duties and responsibilities imposed upon the sheriff whenever a vacancy occurs in the office of sheriff. The under-sheriff must act until a sheriff is elected or appointed and qualifies for the office. Section 4776, Revised Codes of Montana, 1935.

The word "sheriff" is derived from the word "shriev" or "shrievalty." The office of sheriff and under-sheriff are of ancient origin, originating in England and Scotland. In England and Scotland the sheriff was the principal executive officer in his shire and also exercised judicial duties. He also collected the taxes and revenues and traveled his circuit hearing cases. His under-sheriff heard all minor matters and his deputy was a lawyer who advised him as to the law; it is to be observed that, from the earliest times, the office of under-sheriff was a distinct and separate office from that of deputy.

In the United States, in adopting the office of sheriff and under-sheriff, there has been a consistent distinction in all legislation with reference to the office of under-sheriff distinguished from deputy sheriff. The legislative intent has always been that there shall be no hiatus in the office of sheriff and that when a vacancy occurs in the office of sheriff there shall be an under-sheriff to assume the duties until a new sheriff is elected or appointed. There can be no let down or lapse of law enforcement, especially in war times. If there were no under-sheriff to assume the duties of a sheriff there would be no law enforcement until the election or appointment of a sheriff. One's imagination would need little urging to picture what a catastrophe might place during such time. I do not believe the legislature ever intended to allow any such break down of our executive department of government.

It is therefore my opinion:

1. In counties of the seventh and eighth classes irrespective of population, where the office of sheriff is consolidated with another office, the sheriff may, if he deems it necessary, appoint an under-sheriff without the consent of the board of county commissioners.

2. In such counties, however, the sheriff must have the approval of the county commissioners before appointing any deputy or deputies other than under-sheriff.

Sincerely yours,
R. V. BOTTOMLY
Attorney General