

## Opinion No. 165.

## Election—Coroner, County—Appointment, County Coroner.

**Held:** The term of office of the county coroner, elected at the general election in 1944, expires on the day before the first Monday in January, 1947, and that a county coroner should be elected at the general election in November, 1946, for a term of four years, the term to commence on the first Monday of January, 1947.

June 13, 1946

Mr. Oskar O. Lympus  
County Attorney  
Missoula County  
Missoula, Montana

Dear Mr. Lympus:

You have requested my opinion on the following facts:

"X" was elected to the office of county coroner in the year 1938, qualified for office and served until his death in 1939. "Y" was appointed by the county commissioners to serve as county coroner until the next general election.

In 1940, "Y" was elected at the general election. When the question arose whether her term of office extended to 1942 or 1944, the Attorney General ruled her term of office extended to 1944.

In 1944, "Y" was duly elected to the office of county coroner and is now serving. The question arises, in view of the recent Supreme Court decision, *Bailey v. Knight*, decided May 3, 1946, whether or not the term of the county coroner expires the day before the first Monday in January, 1947 or 1949.

In the case of *Bailey v. Knight*, 168 Pac. (2d) 843, decided May 3, 1946, the Supreme Court held a sheriff, elected in 1944, was elected for the unexpired term of the sheriff elected in 1942. In that case, a sheriff was elected in 1942. In 1943, he died and plaintiff was appointed by the board of county commissioners to fill the vacancy until the next general election. In 1944, plaintiff was elected to the office. The court held the plaintiff's

term of office expired on the expiration date of the term of the sheriff elected in 1942, in accordance with the constitutional mandate found in Section 34 of Article VIII of the Montana Constitution, "A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected." Inasmuch as Opinion No. 462, Volume 19, Report and Official Opinions of the Attorney General, is repugnant to the decision in the case of *Bailey v. Knight*, supra, said opinion No. 462 of Volume 19 is of no effect.

It follows the term of office of the county coroner elected in 1940 at the general election expired on the day before the first Monday in January, 1943, for the only term to be filled at that time, so far as the office of county coroner was concerned, was the unexpired term of the coroner elected at the general election in 1938. (*Bailey v. Knight*, supra.)

Under the rule announced in the above decision of our Supreme Court, a county coroner should have been elected at the general election in November 1942, to serve for a four year term commencing on the first Monday in January, 1943. Section 5 of Article XVI of the Montana Constitution, as amended by vote of the people at the general election in 1938, provides:

"There shall be elected in each county . . . one coroner; . . . 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 . . ."

This constitutional amendment requires the officers named in the section be elected in each county each and every fourth year beginning with the general election held on November 8, 1938, on which date the amendment went into effect, such officers to hold office for a regular term of four years.

"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 the four year term immediately became effective and the two-year term ceased to exist at that time . . ." (*State ex rel. O'Connell v. Duncan*,

108 Mont. 141, 150, 88 Pac. (2d) 73.)

"Of course this plan of election must be and it is uniform throughout the state so that at the general election held November 3, 1942 sheriffs were elected in each county of the state . . . for a regular term of four years and at the general election held on November 5, 1946 a sheriff is to be elected in each county . . . for a like term of four years . . . **Bailey and others elected by the people to fill unexpired terms in the offices named in section 5 of Article XVI of the Constitution are entitled to hold their respective offices to the end of such unexpired term, and 'until their successors are elected and qualified,' but this applies only to 'persons elected to the different offices named in this section' . . .**" (Emphasis mine.) (Language of Justice Adair in *Bailey v. Knight*, supra.)

By reason of the Attorney General's opinion, no election was held for said office of county coroner, and on and after the first Monday in January, 1943, the county coroner held the office by virtue of Section 423, Revised Codes of Montana, 1935:

"Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified."

Further, Section 5 of Article XVI, as amended, provides:

". . . 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 . . .**" (Emphasis mine.)

Section 423 is one usually found in the codes of the states, based upon the requirements of public policy, which demands that if, from any cause, the new incumbent of an office fails to qualify or if there has not been an election of any person, there should not be a vacancy in the office, and a consequent suspension of the public business. (State ex rel. Neill v. Page, 20 Mont. 238, 244, 50 Pac. 719; State ex rel. Rowe v. Kehoe, 49 Mont. 582, 144 Pac. 162.)

In view of the decision in *Bailey v.*

*Knight*, and State ex rel. O'Connell v. Duncan, supra, I can reach no other conclusion but that the election of the county coroner at the general election in 1944 was for a term of two years and not four years; that to maintain the uniformity of elections throughout the state and to comply with Section 5 of Article XVI of the Montana Constitution, as interpreted by our court in State ex rel. O'Connell v. Duncan, and *Bailey v. Knight*, supra, a county coroner must be elected at the general election in 1946 for a four year term. The constitutional amendment requires the officers named, including coroners, to be elected in each county each and every fourth year beginning with the general election in November, 1938. Section 29, Article III of the Constitution declares the "provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

It is therefore my opinion the term of office of the county coroner, elected at the general election in 1944, expires on the day before the first Monday in January, 1947, and that a county coroner should be elected at the general election in November, 1946, for a term of four years, the term to commence on the first Monday of January, 1947.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General,