

**Opinion No. 219.**

**Sheriffs—County Sheriffs—County Commissioners, Appointment of Sheriff—Election, Sheriff—Vacancy, Office of Sheriff—Appointment of Sheriff.**

**Held:** Based upon the holding of the Supreme Court in the case of *State ex rel. Dunne v. Smith*, 53 Mont. 341, 163 Pac. 784, it is my opinion:

1. During the interim between election day (the day upon which the appointee's term ends) and the first Monday in January (the day on which the new fixed term begins) the office of sheriff in Valley County is vacant.
2. It is the duty of the board of county commissioners of Valley County to appoint a sheriff to serve during the interim. His term of office will be from the day of appointment to the midnight preceding the first Monday in January, upon which date the duly elected sheriff will take office.

November 15, 1946.

Mr. Thomas R. Marron  
County Attorney  
Valley County  
Glasgow, Montana

Dear Mr. Marron:

You have requested my opinion on the following set of facts:

"A" was elected sheriff of Valley County at the general election in 1942. He served until after the general election in 1944 and then resigned his office. "B" was appointed by the board of county commissioners to serve as sheriff for the remainder of "A's" term. "B" was subsequently elected sheriff at the general election in 1946. In view of Section 5, Article XVI of the Montana Constitution, can "B" serve as sheriff, under his original appointment, from the date

of the general election until his elected term begins the first Monday in January, 1947?

Section 5 of Article XVI of the Montana Constitution, as amended by Chapter 93, Laws of 1937, provides in part:

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

Thus by the provisions of the above cited Article of the Constitution, the term of an appointee runs "until the next general election." There has been some difficulty in determining the exact meaning of the quoted phrase.

In the case of *Marsellus v. Wright*, 61 Mont. 274, 288, 202 Pas. 381, the court stated:

"The word 'until' is a restrictive word, and is of limitation, in its ordinary and usual sense; and this is the meaning which should now be ascribed to it. 'Its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist.' (State ex rel. *Rowe v. Kehoe*, 49 Mont. 582, 588, 144 Pac. 162.)"

From the above, it can be readily determined the term of the appointee expires election day. With the expiration of the term a vacancy occurs. In the case of State ex rel. *Grant v. Eaton*, Lieutenant Governor, 114 Mont. 199, 210, 133 Pac. (2d) 588, the court said:

"A vacancy in office for any of the causes enumerated in the Constitution or statute is usually regarded as occurring at the time of the happening of the event which is the cause of the vacancy, and no judicial determination that the vacancy has occurred is necessary.' (46 *Corpus Juris* 974.)"

In *LaBorde v. McGrath*, 116 Mont. 283, 149 Pac. (2d) 913, 917, the court said:

"The word 'vacancy' as applied to a public office, has no technical meaning, and it is not to be taken in a strict technical sense in every case. It may be said that an office is vacant

when it is empty and without an incumbent who has a right to exercise its function and take its fees or emoluments, even though the vacancy is not a corporal one . . ."

In *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 336, 146 Pac. 392, the court held:

"An office without an incumbent is vacant, whether it never had an incumbent or the vacancy has been caused by death of the incumbent or by the happening of any other one of the contingencies enumerated in Section 420 of the Revised Codes (Section 511, Revised Codes of Montana, 1935), or is the result of the failure of the electors to choose a successor to the incumbent, when the term attached to the particular office has expired, and the incumbent is not authorized to hold over until his successor has been elected and qualified. For, though the statute declares that a vacancy occurs upon the happening of any of the events therein enumerated, it is by no means exclusive, as is apparent from the decision in *State ex rel. Jones v. Foster*, 39 Mont. 583, 104 Pac. 860, wherein it was held that, since the Constitution fixes the term of the clerk of the district court at four years, a vacancy occurs, upon the expiration of four years, to be filled by appointment, if the people fail to elect a successor to the prior incumbent. As soon as a vacancy occurs, the appointing power may act (Const., sec. 7, Art. VII); but since, as we shall see later, the Constitution does not distinguish vacancies into different classes on account of the exigencies which occasion them, the term for which the appointment holds good is governed by the limitations upon the appointing power therein prescribed."

From the above, it is clear a vacancy existed in the office of sheriff in Valley County from the date of the general election until the date of the beginning of the new term of office on the first Monday in January, 1947.

The vacancy could have been filled by election of a sheriff for the interim. In the case of *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 190, 127 Pac. 94, the court stated:

"A reference to the several provisions of the Constitution discloses that in every instance of a vacancy in an elective office, where the vacancy is to be filled by appointment, the appointee shall hold only until the people who elected his predecessor have the first opportunity to fill the office with a person of their own choice; and this rule is general, applies to every state, district and county office, unless an exception is made in favor of one appointed to a vacancy in the office of county commissioner."

Again at page 191, the court said:

"... we think the language of Section 5, Article XVI above, should be read with the language quoted from Section 4 of the same Article, and the meaning expressed as follows: Vacancies in all county, township and precinct offices shall be filled by appointment, and the appointee shall hold his office until the next general election; vacancies in the office of county commissioner shall be filled by appointment by the district judge of the district in which the vacancy occurs; and vacancies in all other such offices shall be filled by appointment by the board of county commissioners."

Again at page 192, the court stated:

"Apparently the people of the state were unwilling to permit an appointee to hold beyond the next general election, that is, beyond the time when opportunity would be first presented to fill the vacancy by an election."

That the election would have been a proper means of filling the vacancy in the office of Sheriff for the short term is made clear in the case of *Bailey v. Knight*, \_\_\_\_\_ Mont. \_\_\_\_\_, 168 Pac. (2d) 843, 844:

"Both the McGowan (*supra*) and the Rowe (*State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162) cases in effect held that the term of office of one appointed to fill a vacancy is for a part of the term for which the person he succeeds was elected. Likewise after appointment when the remainder of the term is filled by election, it means for

the remainder of the term of the person originally elected and whose death or other disqualification caused the vacancy. Those cases also support the view that where the term of the one originally elected expires on the first Monday in January following the general election in November, it is proper to elect someone to fill that portion of the term from the general election until the first Monday in January."

Because no election for the interim term of sheriff was held, Section 4776, Revised Codes of Montana, 1935, applies. This section provides:

"Whenever a vacancy occurs in the office of sheriff, the under-sheriff must in all things execute the office of sheriff until a sheriff is elected or appointed and duly qualified. Any default, misfeasance, or malfeasance of such under-sheriff in the meantime, as well as before, is a breach of the condition of the bond given by the sheriff who appointed him, and also a breach of the conditions of the bond given by him to the sheriff."

Since no election was held to fill the interim which existed, it becomes necessary to determine what course of action shall be taken to provide Valley County with a sheriff. It is my opinion Section 5, Article XVI cited *supra* is without ambiguity as to the authority of the board of county commissioners to appoint an officer to fill a vacancy, and there is no question as to the duration of the appointee's term. The section clearly states "the appointee shall hold his office until the next general election." By Section 29, Article III of the Constitution, the provisions of the Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise.

However, the Supreme Court has seen fit not to accept the literal meaning of Section 5, Article XVI in the case of *State ex rel. Dunne v. Smith*, 53 Mont. 341, 163 Pac. 784. Briefly the facts of the case are as follows. "A" was the incumbent by previous election in the office of county assessor. He was re-elected at a general election and qualified for the new term. Shortly after qualifying he died. "B" was appointed for the remainder of his

old term, that is, the interim between the general election and the date the new term started. At the commencement of the new term, "C" was appointed county assessor to serve until the next general election. The court held the appointment of "C" was proper. "B" had been appointed only for the interim between the death of "A" and the beginning of his new term. The effect of the decision was to exclude from the province of Section 5, Article XVI those cases where the board of county commissioners make an appointment after a general election but before the beginning of a new term. In other words, Section 5 of Article XVI was held by this case to apply to those vacancies occurring after the fixed term has commenced, but before the holding of a general election. At page 344, the court stated:

"The solution of the matter lies, we think, in the correlation of the last with the other clauses of the section, in holding the vacancies referred to in that clause to be those occurring after the fixed term has commenced, but before a general election, and in realizing its meaning to be that no appointment shall hold good beyond the next succeeding general election, whether the interval between that event and the end of the fixed term be great or small. (State ex rel. Rowe v. Kehoe, 49 Mont. 582, 144 Pac. 162.)"

It is with reluctance I accept the interpretation placed by the court upon a clear and unambiguous portion of our Constitution. Unnecessary and undesirable as this judicial amendment to our fundamental law is, no court has seen fit to reverse the Dunne case, and it is therefore necessary for me to accept the consequences of the decision.

It would seem Section 423, Revised Codes of Montana, 1935, which provides:

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

and Section 4734, Revised Codes of Montana, 1935, which provides:

"All vacancies in county and township offices, except county commis-

sioner, are filled by appointment made by the county commissioners. Appointees hold until the vacancies are filled by election."

are contrary to Section 5, Article XVI of the Montana Constitution in that they seek to extend the term of office of an appointed official contrary to this constitutional provision.

Notice has been taken of Opinion No. 349, Volume 17, Report and Official Opinions of the Attorney General. To clarify the position of this office on the facts which are similar to those presented in your situation, we are writing a complete opinion.

It is therefore my opinion, based upon the holding of the Supreme Court in the case of State ex rel. Dunne v. Smith, 53 Mont. 341, 163 Pac. 784:

1. During the interim between election day (the day upon which the appointee's term ends) and the first Monday in January (the day on which the new fixed term begins) the office of sheriff in Valley County is vacant.

2. It is the duty of the board of county commissioners of Valley County to appoint a sheriff to serve during the interim. His term of office will be from the day of appointment to the midnight preceding the first Monday in January, upon which date the duly elected sheriff will take office.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General