

**Opinion No. 139****Vacancies — Nomination — Election  
Special Election — Ballot — Special  
Ballot — Sheriff**

- Held:** 1. The vacancy to be filled in the county office shall be filled by a special election to be proclaimed by the proclamation of the board of county commissioners, which shall contain the matters required by the statute and given publicity by publishing in a newspaper, and also by posting at the polling places.
2. Such a special election may be held on the same date

as a general election.

3. A special ballot shall be used for such a special election.

4. Candidates may be nominated by political parties, as provided by Section 612, Revised Codes of Montana, 1935; or as an independent candidate as provided by the terms of Section 615, Revised Codes of Montana, 1935.

September 13, 1948

Mr. Paul J. Murphy  
County Attorney  
Judith Basin County  
Stanford, Montana

Dear Mr. Murphy:

You inform me that the sheriff of your county who was elected for a four-year term, has resigned, and the board of county commissioners have appointed a new sheriff to fill the vacancy.

You inquire first as to the length of time the new sheriff may hold the office of sheriff, under such appointment.

This question is answered by the provisions of Section 5 of Article XVI of our State Constitution, as amended by Chapter 93, Laws of 1937, which became effective by the Governor's proclamation of December 2nd, 1938, see page 727, Laws of 1939. The applicable provision is as follows:

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

"The policy of our law, thus expressed not only in the constitution but by statute, is that an appointee to an elective office 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."

State ex rel. McGowan v. Sedgwick, 26 Mont. 187; 127 Pac. 94. Bailey v. Knight, 169 Pac (2d) 843, 844.

Thus, it is apparent that the appointee holds the office under such appointment only until the next general election, i. e., in this case, until midnight of November 2, 1948.

However, I call to your attention Section 4776, Revised Codes of Montana, 1935, which provides in part, as follows:

"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."

This provision of our law was enacted so that there would never be an interregnum in the office of sheriff, in order to prevent the consequent suspension of the public business.

The person elected will assume office as soon as he is elected and qualifies, and he shall hold office for the remainder of the original four-year term, that being the expiration of the resigning sheriff's term. (Bailey v. Knight, 168 Pac. (2d) 843, 845).

Your second question raises the question as to how a candidate to fill the unexpired term of the sheriff may have his name placed on a ballot, after the primary nominating election. As you have stated, the primary nominating election is not now available.

A vacancy in the office of sheriff will occur upon the expiration, under the constitution, of the appointee's term, that is, at midnight of November 2, 1948, and such vacancy should be filled by a special election, as provided by Section 532, Revised Codes of Montana, 1935; a proclamation of such special election must be given by the board of county commissioners as provided by Section 536, Revised Codes of Montana, 1935, that is, a statement of the time of the special election, and the office or offices to be filled.

Quoting from State v. Kehoe, 49 Mont., 582, 590, 144 Pac. 162, the Supreme Court stated:

"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) (now Sec. 536, R. C. M., 1935) mandatorily requires posting notice for 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 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. . . . The rule announced in *People ex rel. McKime v. Weller*, supra, that the provisions of the statute relating to special elections are mandatory, is sound, and serves best to prevent fraud and imposition which are not only possible but made easy under the other rule." (Emphasis supplied).

Your question as to how candidates may be placed on a ballot at such special election is answered by the Supreme Court in the case of *State ex rel. Reibold v. Duncan*, 55 Mont. 380; 177 Pac. 250, therein the Court states:

"We do not agree with counsel that the primary election law was designed to furnish the exclusive means by which all candidates for public office shall be nominated, and that the failure of that Act to provide for nomination of candidates to be voted for at special elections was a mere oversight. The references in sections 2 and 7 indicate clearly that the subject was not overlooked, but for some sufficient reason it was evidently considered that the provisions of the direct primary law are inapplicable to the nomination of candidates to be voted for at special elections, and that subject was reserved for control by existing laws or future legislation.

No subsequent enactments dealing with the matter have been passed, and the authority to make such nominations must be sought in prior statutes.

"The nomination of a candidate to be voted for at this special election might be made pursuant to the provision of section 621 (now Sec. 612) or section 524 (now Sec. 615) Revised Codes, and since the certificate tendered by this plaintiff complies in all respects with the requirements of section 524, the county clerk was not justified in refusing to file it."

In a recent decision of our Supreme Court, decided March 30, 1945, the Court reaffirmed the decision in the *Duncan* case, supra, in the following language:

"This court in the *Duncan* case concluded by holding that what are now sections 612 and 615 were the statutes applicable to nominations of candidates to be voted upon at a special election to fill a vacancy. It is contended that this decision was merely dictum and not a binding precedent. That which is within the issue, fully argued by counsel and deliberately considered by the court in its opinion, is not dictum. (*Helena Power Transmission Co. v. Spratt*, 37 Mont. 60, 94 Pac. 631; *Montana Horse Products Co. v. Great Northern Ry. Co.*, 91 Mont. 194, 7 Pac. (2d) 919; *First Nat. Bank of Kalispell v. Perrine*, 97 Mont. 262, 33 Pac. (2d) 997). Nor does the decision lose its value as a precedent because the case might have been decided on some other ground. (21 C.J.S., Courts, sec. 190, p. 314 et seq.; 14 Am Jur., Courts, Sec. 83, pp. 297, 298.) It was not regarded by the court as dictum for in the later case of *State ex rel. Mills v. Stewart*, 74 Mont. 453, 210 Pac. 465, 470, the court said: The court has held in the case of *State ex rel. Reibold v. Duncan*, supra, that the initiative law has no application to special elections, and that it was not designed to furnish the exclusive means by which all candidates for public office shall be nominated.' Likewise it is contended that the *Duncan* case was wrong and we are now asked to overrule it. That case has now

stood for twenty-seven years. Many sessions of the legislative assembly have been held since the decision was rendered. The legislature has seen fit to make no change in the law on this subject until in 1945 which change we will hereafter allude to further."

The last paragraph of said decision is as follows:

"Hence it follows that the nominees to be placed upon the ballot at the special election to be held pursuant to the call of the Governor on June 5, 1945, must be chosen pursuant to section 612 as amended by Chapter 26, Laws of 1945; or by Section 615, and not by a special primary nominating election."

Bottomly, Attorney General v. Ford, Governor, et al, 117 Mont. 160, 167; 157 Pac. (2d) 108.

Therefore, from the foregoing quoted constitutional and statutory provisions, and the decisions of our Supreme Court, it is my opinion: That the vacancy to be filled in the county office shall be filled by a special election to be proclaimed by the proclamation of the board of county commissioners, which shall contain the matters required by the statute and given publicity by publishing in a newspaper, and also by posting at the polling places.

That such a special election may be held on the same date as a general election. That a special ballot shall be used for such a special election. See opinion of former Attorneys General, Volume 12, page 363; Volume 15, No. 626, page 430; Volume 19, No. 482, page 828.

You will note that since 1928, when Attorney General L. A. Foot held, in Volume 12, at pages 363 and 364, that, "It is further my opinion that the names of the candidates should be printed upon a separate ballot in the same manner as though the election was held at a separate time from the general election," this office has consistently followed that procedure and precedent. The legislature has met many times since and has not seen fit to change the law, which is persuasive in showing they approve such interpretation.

It is further my opinion that candidates may be nominated by political parties, as provided by Section 612, Revised Codes of Montana, 1935; or as an independent candidate as provided by the terms of Section 615, Revised Codes of Montana, 1935.

Any and all opinions heretofore rendered by the Attorney General of Montana, conflicting with the holding in this opinion are in that respect hereby overruled and superseded.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General