

Frank S. Morrison died suddenly and created a vacancy in the office. Since it is only twelve days until the General Election, is it possible to have a Special Election on the same day as the General Election, for the purpose of electing a Commissioner to fill this vacancy, or must the District Judges of this District appoint a County Commissioner to serve until the next General Election, which will be held in 1950?"

This opinion is given you in confirmation of oral opinion in telephone conversations previous to this date.

Election to office rather than appointment is the general public policy, *State v. Lentz*, 50 Mont. 322, 146 Pac. 932, and the law favors the requirement that all officers whenever possible shall be elected by the people, *Marcelus v. Wright*, 61 Mont. 274, 202 Pac. 381.

In the instant case, the time in which a special election to fill this vacancy may be held is short. However, in view of the public policy expressed by our Supreme Court in the cited cases, it is my opinion that every effort should be made to give the people an opportunity to fill this vacancy by election rather than have it filled by appointment.

Section 532, Revised Codes of Montana, 1935, provides:

"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. . . ."

Section 536, Revised Codes of Montana, 1935, provides:

"Whenever a special election is ordered by the board of county commissioners, they must issue an election proclamation, containing the statement provided for in subdivision one of Section 534, and must publish and post it in the same manner as proclamations issued by the governor."

Section 533, Revised Codes of Montana, 1935, provides as to issuance of proclamation by the Governor and publishing and posting the same:

" . . . at least ten days before such special election, the governor must

Opinion No. 145

County Commissioners—Special Election—Vacancy—Appointment.

Held: "That the Board of Commissioners should comply with the statutory directions to the fullest extent possible in order that the people may have the opportunity to express their choice to fill the vacancy, rather than have the same filled by appointment, and thus the public policy of this state will be carried out."

October 25, 1948

Mr. Bert W. Kronmiller
County Attorney
Big Horn County
Hardin, Montana

Dear Mr. Kronmiller:

You have requested opinion on the following facts:

"Frank S. Morrison was duly elected in November of 1947, for a six year term as County Commissioner of District No. 3 for Big Horn County, Montana. Last night,

issue an election proclamation, under his hand and the great seal of the State, and transmit copies thereof to the boards of commissioners of the counties in which such elections are to be held."

and Section 535, Revised Codes of Montana, 1935, provides:

"The board of county commissioners, upon the receipt of such proclamation may, in the case of general or special elections, cause a copy of the same to be published in some newspaper printed in the county, if any, and to be posted at each place of election, at least ten days before the election; and in case of special elections to fill a vacancy in the office of State Senator or member of the house of representatives, the board of county commissioners, upon receipt of such proclamation, may in their discretion, cause a copy of the same to be published or posted as hereinbefore provided, except that such publication or posting need not be made for a longer period than five days before such election." (Emphasis supplied.)

Section 534, provides the contents of the proclamation.

In the case of State ex rel. Rowe v. Kehoe, 40 Mont. 582, 592, 144 Pac. 162, our Supreme Court said:

"Taking the first part of Section 451 (now 532) together with sections 453 (now 534 and 455 (now 536), related as they evidently are by the subject matter with which they deal, viz., vacancies in public office, and bearing in mind that the several boards of commissioners are presumed to know what local officers are to be elected, we think it apparent that the legislature intended to confer upon them the power to call and provide for the holding of elections to fill vacancies in county offices." (Parenthesis supplied)

The difficulty confronting you at this time is the question of notice. However, in the case of State ex rel. Patterson v. Lentz, supra, speaking of the sufficiency of notice given in a special election, our Supreme Court said:

"After the election has been held, however, the rule as to the necessity of official proclamation and notice does not apply with the same rigor (Potter v. Furnish, 46 Mont. 391, 128 Pac. 542; State ex rel. Kehoe v. Stromme, 49 Mont. 25, 139 Pac. 1002); the validity of the result being determined by an ascertainment from the evidence whether the electors generally had notice and generally indicated their choice of candidates. In the first instance, there is involved only the right of the candidates to have their respective names submitted to the respective rights of the claimants to electors. In the second, while the respective rights of the claimants to serve the people are at issue, there is involved the fundamental right of the people to be served by a person chosen by themselves in preference to one put in office by the appointing power to meet a temporary emergency. The underlying principle is that, inasmuch as the people have the right to choose officers to serve them no informality in the election will suffice to defeat their will, as expressed by their votes, if in fact it appears that they had actual notice and did indicate their choice." (Emphasis supplied)

Taking all these matters into consideration, it is my opinion, as expressed to you on the phone on October 21, 1948, the day following the death of the incumbent, that the board of commissioners should immediately convene and order by proclamation a special election to fill the vacancy to be held at the same time as the general election, to-wit, November 2, and to give notice by posting in each precinct, ten days before November 2, and by publication in the local newspaper in its issue or issues prior to November 2.

There must be a special ballot containing the names of the candidates, but the same poll books for the general election may be used. The only way a candidate may qualify to have his name on the ballot is by petition as provided by Section 615, R.C.M., 1935. However, the electors have the right to write in the name of any person they desire, and space for this must be provided on the special ballot.

There is time for candidates to qualify under Section 615 R.C.M., 1935. However, in the event that no person files such petition, nevertheless a special ballot containing spaces for write-in votes, should be submitted to the electors at the same time as the general ballot is submitted on November 2.

The one important fact to the validity of a special election, in my opinion, is that of notice for the statutory time. If statutory notice, that is, as to time, is given, the fact of sufficiency insofar as publication or posting, is a matter to be determined when questioned, as in the Lentz case, *supra*.

Therefore, having the required ten days in which to give notice in the instant case, it is my opinion, that the board of commissioners should comply with the statutory directions to the fullest extent possible in order that the people may have the opportunity to express their choice to fill the vacancy, rather than have the same filled by appointment, and thus the public policy of this state will be carried out.

Very truly yours,
R. V. BOTTOMLY
Attorney General