

Opinion No. 48

**Board of County Commissioners—
Fair Commissioners, Appointment
of—"May".**

Held: Where no fair commission has ever been appointed, the board of county commissioners may appoint a county fair commission at a meeting other than the December meeting, since the words of Section 4545, Revised Codes of Montana, 1935—"the board . . . may, at their regular meeting in December in 1927, appoint . . ."—are permissive and directory only, and relate to the proper and ordinary conduct of business without requiring a mandatory construction. However, the direction of the legislature to the effect the board of county commissioners shall appoint members of the fair commission at the board's regular meeting in December must not be flaunted; and, therefore, original appointments of members of the fair commission, if made at any other time, should be planned so that members' terms will expire and new appointments be made at the time designated by the legislative assembly.

July 23, 1947

Mr. Richard A. Bodine
County Attorney
Park County
Livingston, Montana

Dear Mr. Bodine:

You have requested my opinion whether fair commissioners may be appointed only at the regular meeting of the board of county commissioners in December. You state there has never been a fair commission appointed in Park County.

Section 4545, Revised Codes of Montana, 1935, provides as follows:

"The board of county commissioners of each county of Montana may, at their regular meetings in December in 1927, appoint from the electors of their respective counties, five responsible persons to constitute a county fair commission, three of said members to be appointed for a term of two years, and two for a term of one year, and until their successors are appointed. At the regular meeting in December in each year thereafter, the said board of county commissioners of each county shall appoint members of the said county fair commission to succeed the members whose terms then expire, such appointments to be for a term of two years. Such persons shall be well qualified to perform the duties of organizing and successfully carrying on the county fair." (Emphasis mine).

Our Court has held "may" can mean "must" or "shall," depending upon the apparent legislative intent. (*Hansen v. City of Havre, et al.*, (1941) 112 Mont. 207, 217, 114 Pac. (2d) 1053, 135 A.L.R. 1278; *Dryer v. Director-General of Railroads*, (1923), 66 Mont. 298, 299, 300, 213 Pac. 210). On the other hand, our Court has held "may" to have a permissive or directory meaning as well.

"We are reluctant to contravene or construe away terms of a statute which in themselves are mandatory upon their face, except where the intent and purpose of the legislature are plain and unambiguous and clearly signify a contrary construction; the synonymous terms 'must' and 'shall,' in that connection, being generally interpreted as mandatory, and the term 'may' being generally construed as permissive or directory only. (59 C. J., sec. 635 (5), p. 1079 et seq.; 25 R.C.L. sec. 14, p. 766 et seq.; *Endlich on the Interpretation of Statutes*, sec. 431, p. 607 et seq.) However, the term 'may' has frequently been held by this court to mean 'must.' (State ex rel. *Griffin v. Greene*, 104 Mont. 460, 469, 67 Pac. (2d) 995, 111 A.L.R. 770; *State v. Flag*, 75 Mont. 424, 427, 242 Pac. 1023; *Soliri v.*

Fasso, 56 Mont. 400, 185 Pac. 322; *Rule v. Burton*, 49 Mont. 342, 344, 141 Pac. 672, *State v. Dotson* 26 Mont. 305, 312, 67 Pac. 938; *First Nat. Bank v. Neill*, 13 Mont. 377, 382, 34 Pac. 180.) Likewise 'must' has been interpreted to mean 'may.' (State ex rel. *Jaumotte v. Zimmerman*, 105 Mont. 464, 73 Pac. (2d) 548; *Chicago etc. R. R. Co. v. Fallon County*, 95 Mont. 568, 28 Pac. (2d) 462; *Hoppin v. Long*, 74 Mont. 553, 576, 241 Pac. 636; *Stackpole v. Hallahan*, 16 Mont. 40, 59, 40 Pac. 80, 28 L.R.A. 502.) It is only fair to note that of the latter utterances the matters sought to have declared peremptory were mostly of form not going to the essence of the thing required. In other words, the court declared that, where the requirements of the statute were given merely with regard to the proper and orderly conduct of business a mandatory construction was not intended or required. (Emphasis mine).

Cursory examination of Section 4545, supra, could lead one to the conclusion the county commissioners' discretion regarding the appointment of fair commissioners existed only in December of 1927; but an examination of the history of the section indicates the legislative intention was ont to confine the board's discretion to that particular year. Section 4545 as it existed in the 1921 codes, read in part as follows:

"The board of county commissioners of every county in Montana may, at their regular meeting in December of each year, or thereafter, appoint****".

Chapter 30, Laws of 1927, amended Section 4545 of the 1921 codes so that the first sentence appears as it does at the present time, viz., with the 1927 date. Subsequently—in 1935—the legislature again considered Section 4545 and amended it by removing a portion of it, but left intact the first sentence with its reference to the December meeting of 1927. By this latter act, the legislative assembly indicated its view that the appointive power still remained despite the reference to the 1927 meeting.

I am, therefore, of the opinion the board of county commissioners may appoint a county fair commission at a meeting other than the December meeting, since the words of Section 4545, Revised Codes of Montana, 1935—"the board . . . may, at their regular meeting in December in 1927, appoint . . ."—are permissive and directory only, and relate to the proper and ordinary conduct of business without requiring a mandatory construction.

Despite the language used in the citations quoted above, and the opinion reached herein, the direction of the legislature to the effect the board of county commissioners shall appoint members of the fair commission at the board's regular meeting in December must not be flaunted; and, therefore, I caution that original appointments of members of the fair commission, if made at this time, be planned so that members' terms will expire and new appointments be made at the time designated by the legislative assembly.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General