

Opinion No. 143**Appointments—County Attorneys—County Commissioners—Power to
Appoint When Tie Vote—Elections—Tie Vote—Vacancies.**

- Held:**
- 1. When an election to fill the office of County Attorney results in a tie vote, the Commissioners of the County are vested with the power to fill that office by appointment.**
 - 2. When an election to fill the office of County Attorney results in a tie vote, the Commissioners of the County are vested with the power to fill that office by appointment of any eligible person; which would include the power to appoint one of the named candidates for the office.**
 - 3. When an election to fill the office of County Attorney results in a tie vote, the Commissioners of the County are vested with the power to fill that office by the appointment of any eligible person upon the expiration of the term of the incumbent.**

December 27th, 1950.

Mr. Percy L. Goyins, Chairman
Board of County Commissioners
Judith Basin County
Stanford, Montana

Dear Mr. Goyins:

You have requested my opinion on the following questions:

1. When an election to fill the office of County Attorney results in a tie vote, are the Commissioners of the County vested with the power to fill the office by appointment?
2. If the County Commissioners do have the power to fill such an office by appointment, can they appoint one of the named candidates for the office?
3. If the County Commissioners do have the power to fill such an office by appointment, when should this appointment be made?

Article VIII of the Montana Constitution provides for the judicial department of the State. In that article provision is made for the election of Supreme Court Justices, Clerk of the Supreme Court, Judges of

the District Courts, Clerks of the District Courts, County Attorneys and Justices of the peace. (Sections 8, 9, 12, 14, 19 and 20).

The Constitution specifically provides that each of these offices shall be held for a definite term of years. The term of office of the Justices of the Supreme Court and Clerk of the Supreme Court shall be six years; that of the Judges of the District Courts and Clerks of the District Courts shall be four years; and that of the County Attorneys and Justices of the Peace shall be two years. The Constitution further provides that the first Chief Justice elected shall hold office only until 1892; one of the first Associate Justices until 1894 and the other Associate Justice until 1896, "and each shall hold until his successor is elected and qualified"; that the District Judges, Clerks of the District Courts and County Attorneys **first elected** shall hold office only until the general election in 1892, "and until their successors are elected and qualified."

Article VIII, Section 19 provides for the election of County Attorneys as follows:

"There shall be elected at the general election in each County of the State one County Attorney, whose qualifications shall be the same as are required for a Judge of the District Court, except that he must be over 21 years of age, but need not be twenty-five years of age, and **whose term of office shall be two years, except that the County Attorneys first elected shall hold their offices until the general election in the year one thousand eight hundred and ninety-two (1892), and until their successors are elected and qualified.** He shall have a salary to be fixed by law, one-half of which shall be paid by the State and the other half by the County for which he is elected, and he shall perform such duties as may be required by law." (Emphasis supplied.)

one-half of which shall be paid by the State and the other half by the County for which he is elected, and he shall perform such duties as may be required by law." (Emphasis supplied.)

Article VIII, Section 34 provides for the filling of vacancies of any of the above-mentioned positions as follows:

"Vacancies in the office of Justice of the Supreme Court, or judge of the District Court, or Clerk of the Supreme Court, shall be filled by appointment, by the Governor of the State, **and vacancies in the offices of County Attorney, Clerk of the District Court, and Justices of the Peace, shall be filled by appointment, by the Board of County Commissioners of the County where such vacancy occurs.** A person appointed to fill any such vacancy shall hold his office until the next general election and until his successor is elected and qualified. A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected." (Emphasis supplied.)

From this Constitutional provision it follows that when a vacancy occurs in the office of County Attorney the Board of County Commis-

sioners of that County shall have the authority to fill such office by appointment. The question then arises as to the interpretation of the word vacancy. Section 59-602 Revised Codes of Montana, 1947, reads:

"Vacancies, how they occur. An office becomes vacant on the happening of either of the following events before the expiration of the term of the incumbent:

1. The death of the incumbent.
2. His insanity, found upon a commission of lunacy issued to determine the fact.
3. His resignation.
4. His removal from office.
5. His ceasing to be a resident of the State, or, if the office be local, of the district, city, County, town, or township, for which he was chose nor appointed, or within which the duties of his office are required to be discharged.
6. His absence from the State, without the permission of the Legislative Assembly, beyond the period allowed by law.
7. His ceasing to discharge the duty of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the State by permission of the Legislative Assembly.
8. His conviction of a felony, or of any offense involving moral turpitude, or a violation of his official duties.
9. His refusal or neglect to file his official oath or bond within the time prescribed.
10. The decision of a competent tribunal declaring void his election or appointment."

It will be noted that no provision is made for a vacancy occurring upon the failure to elect by reason of a tie vote. However Section 23-1902, Revised Codes of Montana, 1947, reads:

"Proceedings on tie vote. In case any two or more persons have an equal and highest number of votes for either Governor, Lieutenant-Governor, Secretary of State, Attorney General, State Auditor, State Treasurer, Clerk of the Supreme Court, Superintendent of Public Instruction, or any other State executive officer, the Legislative Assembly, at its next regular session, must forthwith, by joint ballot of the two houses, elect one of such persons to fill such office; and **in case of a tie vote for Clerk of the District court; County Attorney, or for any County officer except County Commissioner, and for any township, officer, the board of County Commissioners must appoint some eligible person, as in case of other vacancies in such offices;** and in case of a tie vote for County Commissioner, the District Judge of the County must appoint an eligible person to fill the office, as in other cases of vacancy." (Emphasis supplied.)

The Montana Supreme Court, in the case of *Chenoweth v. Acton*, 31 Mont. 37, 77 Pac. 299, held this section invalid, insofar as it relates to officers named in Article XVI, Section 5 of the Montana Constitution, which section provides in part, as follows:

"There shall be elected in each County the following County officers. . . .:

One County Clerk who shall be Clerk of the Board of County Commissioners and ex-officio recorder; one sheriff; one treasurer, who shall be collector of the taxes, provided, that the County Treasurer, shall not be eligible to his office for the succeeding term; one County Superintendent of Schools; one County Surveyor; one Assessor; one Coroner; one Public Administrator. 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. Vacancies in all County, township and precinct offices, except that of County Commissioners, shall be filled by appointment by the Board of County Commissioners, and the appointee shall hold his office until the next general election; . . ."

No mention is made herein concerning County Attorneys, Justices of the Peace, or Clerks of the District Court. The Montana Supreme Court has recognized that this section refers only to the offices of Sheriff, Treasurer, County Clerk, Assessor, Auditor, Superintendent of Common Schools, County Surveyor, Coroner, and Public Administrator. And that the offices of Clerk of the District Court, County Attorney, and Justice of the Peace, being enumerated in the Constitution as judicial offices, are to be excluded from the enumeration of the offices referred to in this section. (*State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 586, 144 Pac. 162.)

In the *Chenoweth* case there was a tie vote in an election for School Superintendent of a County, and the court found that such vote did not render the office vacant. Relying upon Article XVI, Section 5, *supra*, the court said:

"By the terms of the Constitution, they shall hold their offices for the term of two years, and until their successors are elected and qualified. Under this section, it is clear that the relator in this case was entitled to hold her office for the term of two years, and it is equally clear that she is entitled to hold it until her successor is elected and qualified."

"Under the provision of the Constitution which we are considering, the right of a duly elected and qualified officer to hold his office until his successor is elected and qualified is as much a part of his term as are the two years specifically mentioned." (Cases omitted.) (At the time this case was decided, the Constitution provided that the term of office for County Superintendent was two years. In 1937, this section was amended and the term of County Superintendent is now four years.)

In the case of *State ex rel Jones v. Foster*, 39 Mont. 583, 104 Pac. 860, decided in 1909, three years after the *Chenoweth* case, the Supreme Court of Montana was faced with a similar problem involving the office of Clerk of the District Court. In that case there was a great deal of confusion in the original vote counting. Upon appeal to the Supreme Court, it was found and adjudged that each candidate had received the same number of votes and hence that neither had been elected. The County Commissioners, having concluded that the office had become vacant by reason of the tie vote and upon the expiration of the term for which the incumbent Foster had been elected, appointed the relator to serve as clerk until the next election, the appointment to take effect immediately. The relator having duly qualified as required by law, attempted to assume office but was prevented from so doing by the incumbent Foster. In the subsequent trial of the case the Montana Supreme Court held that a vacancy had occurred by operation of law, upon the expiration of the term of the then incumbent, which vacancy the Board of County Commissioners were authorized to fill by appointment in accordance with Section 457, Revised Codes of Montana, 1907 (now Section 23-1902, *supra*).

In distinguishing the *Chenoweth* case from its decision in *State ex rel. Jones v. Foster*, *supra*, the Court found that the terms of the Supreme Court Justices, Clerk of the Supreme Court, Judges and Clerks of the District Courts, County Attorneys and Justices of the Peace are fixed and definite. It reasoned that the phrase "except that the . . . (District Judges, Clerks of the Districts Courts, County Attorneys) first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two (1892), and until their successors are elected and qualified," is an exception which applies only to those officers first elected. And that after these officials first elected have been replaced by duly elected and qualified successors, those successors then hold office only for the definite term prescribed by law, and not "until their successors are elected and qualified." However, the Court goes on to approve the *Chenoweth* case insofar as it concerns other County offices, except County Commissioners whose terms are the subject of a special provision, and except of course County Attorneys, District Judges and Clerks of the District Courts. The court said:

"There is thus manifested by the convention the intention that the term of the officers of the State and County Governments shall continue until the election of their successors by the people at general elections, as held in *State ex rel Chenoweth v. Acton*, *supra*; whereas, those of judicial officers shall end at the expiration of a definitely fixed period."

and further:

"There are no other provisions than those cited above pertinent to the subject now under consideration. Hence the provisions fixing the terms of judicial officers must be held to be exclusive with the

result that vacancies occur by operation of law upon the expiration of the terms designated; and this is so, even if the people have failed to elect their successors."

In construing Section 420, Revised Codes of Montana, 1907 (now Section 59-602, *supra*) the Court finds that section inapplicable to the question before it. The court reasoned that this Section refers only to vacancies occurring "before the expiration of the term," and does not contemplate a vacancy which may occur for any other cause. The court found further that if it could be construed to include all causes by reason of which vacancies occur, it would impliedly exclude vacancies occurring upon the expiration of the term when there has been a failure by the people to elect a successor, with the result that the incumbent, who should go out, would hold over notwithstanding, the implied prohibition in the Constitution."

The decision of the Court in *State ex rel Jones v. Foster*, *supra*, was recognized and affirmed by *State ex rel Patterson v. Lentz*, 50 Mont. 336, 146 Pac. 932 as follows:

"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 (now Section 59-602, *supra*) **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 appointment power may act (Const. Sec. 7, Art. VII); . . ." (Emphasis supplied.)

That decision is cited with approval in *Marcellus v. Wright, et al.*, 61 Mont. 274, 284, 202 Pac. 381 and again in *Jardine et al v. Ford, Governor*, 120 Mont. 507, 188 Pac. (2nd) 422.

In answer to your first question it is therefore my opinion that when an election to fill the office of County Attorney results in a tie vote, the Commissioners of the County are vested with the power to fill that office by appointment.

In answer to your second query, it will be noted that Section 23-1902, *supra*, reads in part "the Board of County Commissioners must appoint some eligible person." In view of the explicit language in this

statute it is my opinion that when a vacancy exists in the office of County Attorney by reason of a tie vote, the Board of County Commissioners of the County in which the vacancy exists, can appoint any eligible person to fill that office and that the power to appoint will include those individuals who were named candidates for the office.

In answer to your third query with regard to the time of which such an appointment should be made, I call your attention to Article VIII, Section 34 of the Montana Constitution, set out above, which states that "vacancies" shall be filled by appointment. Webster defines vacancy as: "time of freedom from occupation", "the State or fact of being free from occupation", "state of being empty or void", and "not filled or occupied by an incumbent, possessor or officer". The problem of when a vacancy occurs has been repeatedly recognized by the Montana Supreme Court. In *State ex rel Jones v. Foster*, supra, the Court said "vacancies occur by operation of law upon the expiration of the terms designated." In *State ex rel Patterson v. Lentz*, supra, the Court stated "an office . . . is vacant . . . when the term attached to the particular office has expired. . . ." This language of the Court is cited with approval in *Marcellus v. Wright*, supra, and again in *Jardine et al v. Ford*, Governor, supra.

These authorities indicate that an office becomes vacant when it is no longer occupied or held by anyone entitled to hold it; that when the term of an incumbent County Attorney has expired and the voters have failed to elect his successor, no one is entitled to occupy the office and that office is then vacant.

It is therefor my opinion that when an election to fill the office of County Attorney results in a tie vote a vacancy will occur in that office by operation of law at the normal expiration of the term and the commissioners of the County are authorized to fill that office by appointment when the vacancy occurs.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.