

VOLUME 32

Opinion No. 19

**COUNTY COMMISSIONERS; Duty to fill vacancies — Legislature;
Vacancies, Appointments to fill, Term of appointment—Section
43-215, Revised Codes of Montana, 1947.**

HELD: A person appointed by the county commissioners to fill any vacancy in a state legislative office holds such office until the end of the term of the originally elected member.

September 6, 1968

Honorable Frank Murray
Secretary of State
Capitol Building
Helena, Montana 59601

Dear Mr. Murray:

You have requested my opinion as to whether under section 43-215, R.C.M. 1947, an appointment by the Board of County Commissioners to fill a vacancy in the legislative assembly is final and exclusive for the unexpired term of the originally elected member of the legislature, and whether you may refuse to accept a nominating petition for the office before the expiration of the term.

The phrase "the vacancy shall be filled by the appointment by the board of county commissioners" in section 43-215, R.C.M. 1947, was taken verbatim from the repealed section 45 of Article V, Montana Constitution. The Supreme Court in **State ex rel. Greene v. Anderson**, 113 Mont. 582, 129 P. 2d 874, construed these words of the old constitutional provision as follows:

The legislature and people did not choose to confine the provision to interim vacancies, nor to limit it in any way; and we have no authority to add any limitations or exceptions which may seem to us desirable; having specifically and completely dealt with the contingency of legislative vacancies arising by death, and having chosen to have such vacancies filled exclusively and finally by appointment, they have left nothing to be done by legislative enactment or judicial interpretation.

Section 45 of Article V, was repealed by Chapter 273, Laws of 1965, and adopted at the general election of November 8, 1966. That section was replaced by section 43-215, R.C.M. 1947. The only difference in the two provisions is that the present statute provides for appointment by the county commissioners in case of **any** legislative vacancy. The old constitutional provision gave the power of appointment only in cases involving vacancies created by death. The words "the vacancy shall be filled by appointment . . ." have not been changed and should receive the same interpretation as was given

them in the **Anderson** case, *supra*. In that case a county clerk was restrained from accepting nominating petitions for the vacancy of a deceased senator.

There are sections of the Montana Constitution, specifically Article VII, Section 34, and Article XVII, Section 5, which provide for appointments to fill vacancies in certain other county offices and that these appointments should last until the next general election. However, these sections apply only to the offices specifically listed and not to legislative vacancies.

Therefore it is my opinion that an appointment made by the county commissioners to fill a legislative vacancy pursuant to the provisions of section 43-215, R.C.M. 1947, is final and exclusive for the unexpired term of the originally elected member of the legislature. Insofar as Opinion No. 142 of Volume 16 and Opinion No. 320 of Volume 17, of **Opinions of the Attorney General** are inconsistent with this opinion, they are overruled. Those opinions were written before the Montana Supreme Court decided the **Anderson** case, cited above.

Very truly yours,

FORREST H. ANDERSON
Attorney General

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