**New Counties, Power of Legislative Assembly to Create by Special Act. Legislative Assembly, Authority of to Create New Counties by Special Act of. Constitutionality, of Special Act of the Legislative Assembly Creating New Counties.**

The legislature having determined, by the enactment of Chapter 112, Laws of 1911, that the creation of new counties was a matter to which a general law could be made applicable, and the fact that three counties have been created under the provisions of the Act, the creation of new counties cannot now be regarded as a proper subject for special legislation.

A special act attempting to create a new county would be unconstitutional.

January 28th, 1913.

Hon. Charles S. Muffly,
Chairman Committee on Counties, Towns and Municipal Corporations,
Helena, Montana.

Dear Sir:

In response to your oral request, I herewith submit to you my opinion upon the question presented by you, to-wit:

> "Whether the Legislature has power to create a county in this state by special act."

I have investigated the matter as fully as the shortness of time would permit, and regret very much that I have not been able to consider the matter as fully as the importance of the subject demands.

The provisions of the constitution which bears upon this question is Sec. 26 of Art V, which reads as follows:

> "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

For granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys or public grounds; locating or changing county seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates or constables; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions, or giving effect to informal or invalid deeds; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; chartering or licensing ferries or bridges or toll roads, chartering banks, insurance companies and loan and trust companies; remitting fines, penalties and forfeitures; creating, increasing or decreasing fees, percentages or allowance of public officers; changing the law of descent; granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever; for the punishment of crimes; changing the names of persons or places; for the assessment or collection of taxes; affecting estates of deceased persons, minors or others under legal disabilities; extending the time for the collection of taxes; refunding money paid into the state treasury; relinquishing or extinguishing in whole or in part the indebtedness, liability or obligation of any corporation or person to this state, or to any municipal corporation therein, exempting property from taxation; restoring to citizenship persons convicted of infamous crimes; authorizing the creation, extension or impairing of liens; creating offices, or prescribing the powers or duties of officers in counties, cities, township or school districts; or authorizing the adoption or legitimation of children. In all other cases where a general law can be made applicable, no special law shall be enacted."

You will observe from a reading of the above section of the constitution that two provisions thereof bear more or less directly upon the proposed legislation, to-wit: creation of counties. The Legislature is forbidden to pass any local or special law,

"regulating county affairs,"

and in the last sentence of the above section the constitution commands that

"In all other cases where a general law can be made applicable, no special law shall be enacted."

There can be no dispute but that the creation of a county by special act of the Legislature is a special and a local law within the meaning of the above section of the constitution.

See Holliday v. Sweet Grass County, 19 Mont. 364; 48 Pac. 553.

Sackett v. Thomas, 25 Mont. 235; 64 Pac. 504.

State ex rel. Geiger v. Long, 43 Mont. 401.

Heretofore, however, the Legislature, by various special acts, has created several counties in the state.

In Holliday v. Sweet Grass County, Mr. Justice Buck, speaking of the power of the Legislature in this regard, declared the opinion of the court that

"Creating a new county by special act is not forbidden by the State Constitution."

Holliday v. Sweet Grass County, 19 Mont. 364; 48 Pac. 553.

This view of the case was reaffirmed by the court in the case of Sackett v. Thomas, where the court held that the Legislature had no power to change the name of Deer Lodge County to Daly County. In the course of the opinion, Mr. Chief Justice Brantly, speaking for the court, said:

"True, the constitution recognizes the power of the Legislature to create new counties, to change those already established, and to alter their boundaries (Constitution, Art. VI, Sec. 4; Id. Art. XVI, Secs. 1, 3), and this power has been heretofore exercised in many instances. It has been recognized and affirmed by this court, as in Holliday v. Sweet Grass County, 19 Mont. 364; 49 Pac. 553, where a special act creating the defendant county was upheld; and this power to create necessarily implies the power to destroy, so that, in the exercise of it, the Legislature may abolish a county organization, and incorporate its territory within another county. It may also at the same time exercise any other power incidental to a complete exercise of the principal one; but this power does not necessarily carry with it the right to interfere by special enactment in the internal affairs of the county, even though a majority of the people do not object. The whole spirit of the constitution is opposed to this species of interference, and, for the reasons already stated, it seems clear to us that the prohibition in question was designed to prevent just such interference as has been attempted in the present instance. The power to create counties and give them names, or to dstroy them is unquestioned; but after they are created they may not be disturbed by special or local legislation, except incidentally, in the exercise of the creative power, or in cases where a general law cannot be made applicable."

Sackett v. Thomas, 25 Mont. 236 at 240-241.

This view was reannounced by the court in State ex rel. Geiger v. Long, reported in the 43 Mont. at 401.

In the case last cited, Mr. Justice Holloway, concurring in the opinion of the court, said:

"I concur in the result reached by Mr. Justice Smith, but again I am forced to acquiesce in a doctrine to which I do not subscribe, solely upon the ground of **stare decisis.**

"Since our constitution was adopted, thirteen new counties have been created, every one by a special act of the Legis-

lature; property rights to the extent of millions of dollars have been acquired; and to reverse the former decisions of this court and hold at this late day that every such act is unconstitutional and void would result in such chaos that it ought not to be done under the circumstances presented by this record, and under the conditions which now prevail.

In Holliday v. Sweet Grass County, mentioned above, this court without any apparent consideration of the question—which does not appear to have been urged—and without the citation of any authority or the advancement of any argument, said: 'Creating a new county by a special act is not forbidden by the State Constitution.' The authority of that decision was recognized in State ex rel. Sackett v. Thomas. I believe that the ipse dixit in the Holliday case is erroneous. That the framers of our constitution intended that counties should be created, their boundaries changed, and county seats located, changed, and removed only by general laws of uniform operation is, to my mind, quite plain. To speak of a county without a county seat would be a contradiction of terms. Every county must have a county seat. (Art. XIX, Sec. 6, Montana Constitution.) Whenever, then, a county is created, it has a county seat—not a provisional county seat, not a temporary county seat—but a county seat for every purpose. A provisional county seat is the purest creation of the imagination. Our constitution speaks only of a county seat, and, if prior to the last election Libby was the county seat of Lincoln County, it was as much a county seat as Helena, Butte or any other seat of government; and when it was designated as the county seat in the act creating Lincoln County, the county seat of that new county was in fact located. The county could not have been created without the location of the county seat at some designated place. And because the constitution forbids the location of a county seat by a special act of legislation, it impliedly forbids the creation of a new county by that species of legislation. The Twelfth Legislative Assembly, recognizing this spirit and purpose of our constitution, passed a general law for the creation of new counties and another general law for the location of county seats. By creating a phantom, and designating it a 'provisional county seat,' such court was able to draw a marked distinction between such creation and a county seat; but the creation is a fiction, the distinction unwarranted, and the effect of such decisions is to ignore a plain provision of the constitution."

State ex rel. Geiger v. Long, 43 Mont. 401, at 413-414.

In the opinion on rehearing of the case last cited, the court held that the Legislature could not by special act provide for an election to determine the location of the county seat.

See Opinion on Rehearing of State ex rel. Geiger v. Long, 43 Mont. 415.

You will observe that Mr. Justice Holloway in his concurring opinion questions the soundness of the rule heretofore laid down by the Supreme Court in Holliday v. Sweet Grass County ,and Sackett v. Thomas. In spite of this fact, however, if the circumstances confronting the present Legislature were the same as those which confronted the Eleventh Legislature when it created Lincoln County. I should not hesitate to say that Holliday v. Sweet Grass County, and Sackett v. Thomas were binding, at least upon this department, and that, in my opinion, the Legislature has authority to create a county by special act. The circumstances, however, that face the Thirteenth Legislative Assembly are quite different from the circumstances under which the cases of Holliday v. Sweet Grass County, and State ex rel. Geiger v. Long, arose. At the time those cases arose there was no general law providing for the creation of new counties. I am of the opinion that an act creating a county is not forbidden by the provisions of the constitution forbidding special laws "regulating county affairs." I am of the opinion that the prohibition against "regulating county affairs" has reference to acts which attempt to regulate the affairs of counties already created.

Pell v. Newark, 40 N. J. Law, 71, at 77.

The other provision of the constitution forbidding special legislation "in all other cases where a general law can be made applicable" bears more directly upon the question. In so far as this provision of the constitution is concerned, the circumstances are now entirely different than they were when the cases of Holliday v. Sweet Grass County, and State ex rel. Geiger v. Long arose. At the time these cases arose the Legislature had passed no general act, and their failure to do so was, in effect, a legislative determination that the matter of creating counties was not one of the "cases where a general law can be made applicable," and, at that time, the court might have been well justified in adopting the legislative conclusion that a general law could not be made applicable. The authorities are uniform in holding that the Legislature has a sound discretion in deciding whether or not a general law can be made applicable.

36 Cyc. 991-992.

See Note by Mr. A. C. Freeman in 93 Am. St. Repts. 106 to 113.

Black on Constitutional Law, Sec. 104, p. 277.

Some courts go to the extent of holding that the legislative determination that a general law cannot be made applicable is conclusive upon the courts.

See authorities cited in Freeman's Note, 93 Am. St. Repts. 107 to 109.

36 Cyc. 992.

Johnson v. Mocapee, 32 Pac. (Okla.) 336.

Chickasaw Cotton Oil Co. v. Lyon & Tyner, 114 Pac. (Okla.) 333.

People v. Wilcox, 86 N. E. (Ill.) 672.

City of Mount Vernon v. Ebens Brick Co. 68 No. E. (Ill.) 208.

State v. Hitchcock, I Kan. 178, 81 Am. Dec. 503.
Rambell v. Larabee, 67 Kan. 634, 73 Pac. 915.
St. Louis, etc., Ry. Co. v. State, 134 S. W. (Ark.) 970.
Gentile v. The State, 29 Ind. 409.
Mode v. Beasley, 143 Ind. 306, 42 N. E. 727.
St. Louis v. Shields, 62 Mo. 247.

But this interpretation of the constitutional provision has not proved entirely satisfactory even in the states in which it has been adopted. In Eicholtz v. Martin, 53 Kan. 486, 36 Pac. 1064, the Supreme Court of Kansas declared that if the question were a new one it would incline to the view that the courts should determine in each case whether or not the constitutional provision had been violated. Mr. Justice Johnson remarking, in the course of his opinion, that

> "From the multiplicity of special acts recently enacted it appears that the constitutional limitation has little force."

And in a case recently before the Supreme Court of Indiana, that court observed:

> "The evils resulting from local and special legislation were flagrant and constituted the initial cause of the convening of the constitutional convention of 1851. That convention adopted the present constitution, which embodies and emphasizes the principle that, so far as practical, laws shall be general and the wisdom of this policy has become, and is becoming, constantly more conspicuous. Local and special laws are forbidden in a number of specified instances, and then it is comprehensively provided that in all other cases where a general law can be made applicable the law shall be general and of uniform operation throughout the state."

Armstrong v. State, 84 N. E. 3, 15 L. R. A., New series.

Nor has the rule been found satisfactory in Illinois.

See Johnson v. Joliet & Chicago Railroad Co., 23 Ill. 124, at 129-130.

And in both Kansas and Missouri, constitutional amendments have been adopted by the people which overturn the rule adopted by the courts and expressly declare that whether or not a general law could have been made applicable in any case should be a judicial question to be determined by the courts without regard to any legislative assertion on the subject.

Anderson v. Board of Commissioners, 95 Pac. (Kan.) 583.
Henderson v. Loenig, 168 Mo. 356, 68 S. W. 72.

The correct rule is, in my opinion, stated by Mr. A. C. Freeman in his note in 93 Am. St. Repts., p. 110, where he says:

> "In our opinion the Legislature should have a reasonable discretion to determine when a general law will not meet the exigencies of a particular case, but it should not be the sole judge of the necessity of a special or local law. Judicial inquiry should not be excluded absolutely, and yet the courts should not interfere to set aside a statute, unless the legislative discretion has been clearly and palpably abused. To give the

> Legislature the exclusive right to determine the question of applicability of a general law is to subvert the theory of our government that the judiciary is to pass upon infractions of the organic law, and pronounce null and void legislative enactments contravening the constitution. Moreover, the constitutional inhibition is not likely to prove very effective if the Legislature is to be the sole arbiter of the necessity of a special or local statute. To be sure, it may be said that the Legislature is as good a judge of the necessities of the case as are the courts. But this argument applies with perhaps equal force in any instance when a judicial investigation into the constitutionality of a statute is made."

This rule is supported by numerous authorities cited in the above note in 93 Am. St. Repts., and also by the following additional authorities:

Black on Constitutional Law, Sec. 104, p. 277.
Openshaw v. Halfin, 24 Utah, 426, 68 Pac. 138.
Barfield v. Stevens Merc. Co., 67 S. E. (S. Car.) 158.
Stratman v. Commonwealth, 125 S. W. (Ky.) 1094.
Wolf v. Humboldt County, 105 Pac. (Nev.) 286.
State ex rel. Peck v. Riordan et al., 24 Wis. 484.

The case of Openshaw v. Halfin has been cited with approval by the supreme court of Montana in Hills v. Oleson, 43 Mont. 129.

Sec. 26, Art. V., above quoted, constitutes, in my opinion, the only guarantee to be found in our constitution against special or class legislation. I am, therefore, of the opinion that the question whether or not a general act can be made applicable in any particular case is a question which may be reviewed before the courts, and that if the court finds that a general act can be made applicable it will be the duty of the court to declare the special act unconstitutional and void.

In determining whether or not a general act can be made applicable to a particular subject the courts have given great weight to the fact that there is or has been a general act upon the subject, as will appear from the following excerpts from opinions.

The Constitution of Nevada, after enumerating a number of particular instances in which special laws shall not be enacted, provides further that

> "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state."

In Wolf v. Humboldt County, the Supreme Court of Nevada, in declaring a special act unconstitutional under the above provision, said:

> "That a general act can be passed covering the subject matter of the special act above quoted and relied on by counsel for appellant is not only clearly manifest, but the fact is that the Legislature of 1907 did pass such a general act."
> 105 Pac. 286 at 287.

In Kansas the constitution now provides:

"All laws of a general nature shall have a uniform operation throughout the state, and in all cases where a general law can be made applicable no special law shall be enacted."

In Anderson v. Board of County Commissioners, the Supreme Court of Kansas, in holding that a special act was unconstitutional under the above provisions, remarked:

"It requires no argument or discussion to demonstrate that the special act in question violates the constitution. To enact a general law on the subject giving to boards of county commissioners in every county in the state authority to build or remove bridges, appropriate funds and issue bonds to meet the expenses thereof under such restrictions and limitations upon their authority in the premises as the Legislature may deem wise and salutory would not require more than ordinary skill in the science of legislation.

"We are not concluded either way by the fact that the general law on the subject was in existence when the special act was passed. That fact, however, serves as an apt illustration of the adaptability of the general law upon the subject, and is an argument against the necessity for a special law."

95 Pac. 583 at 588.

In Barfield v. Stevens Merc. Co. the Supreme Court of South Carolina, in declaring a special act void for the reason that it violated the constitutional provisions "forbidding the enactment of a special law where a general law could be made applicable," said:

"That the general statute can be made applicable is demonstrated by the fact that Secs. 1552-1555, Civil Code, 1902, as amended by act February 24, 1906 (25 Stats. at Large, p. 140), are attempted to be made applicable throughout the state."

And because the general law above referred to was applicable, the court declared the special act to be in violation of the constitutional provision above set out.

Barfield v. Stevens Merc. Co. 67 S. E. 159.

The Constitution of Missouri, like our own, enumerates several subjects in regard to which the general assembly is forbidden to pass any local or special law, and then provides:

"In all other cases where a general law can be made applicable no local or special law shall be enacted."

Construing this provision of the constitution, the supreme court of that state said:

"Few of the provisions of our organic law are so eminently wise and salutory as this last quoted section of the constitution. It is of the highest interest to the state that its laws should be general and operate, as far as possible, equally in all sections of the state upon all subjects of legislation.

"This court has again and again defined what is a general and what is a special law, but in practical legislation it would be hard to define in one section a more pronounced example of which than is found in Sec. 3261 since the amendment of 1899.

"The original section as it stood prior to the addition of that proviso, was a general law which affected every justice of the peace within the state, whereas the proviso was drawn with the greatest labor to insure that it would apply to but one township in the state, to-wit: Sedalia Township."

And the court declared the proviso to be unconstitutional as in violation of the general clause of the constitution above quoted.

Hayes v. C. C. & H. M. & M. Co., 126 S. W. 1051 at 1056.

The Supreme Court of Wisconsin, in declaring a special act invalid by reason of the constitutional provision requiring the Legislature to "establish one system of town and county government which shall be as nearly uniform as practicable," said:

"Where the Legislature has established a system of county and town government substantially uniform throughout the state, it may be conceded that its action is final upon the matter. The courts in such a case would not attempt to review the action of the legislative body and decide whether or not it might not have perfected a system more nearly uniform. But when a law like the one before us breaks the uniformity of the system already in operation, it seems to us that it is a proper exercise of judicial power to declare that the act is void because it departs from the rule of uniformity which the constitution enjoins. In this case the uniformity of the system has been clearly violated. By the existing general statute the board of supervisors of Washington County consisted of three electors chosen from the supervisor districts of that county. By the act of 1868 the board is made to consist of eight members. Is it not idle to say that the act is as nearly uniform with the general system as practicable? It seems to us to be clearly a matter of judicial cognizance to determine whether the constitution has been violated in this particular."

State ex rel. Peck v. Riordan et al., 24 Wis. 484 at 491-492.

To the same effect see:

State ex rel. Keenan v. Supervisors, 25 Wis. 339.

State v. Auslinger, 71 S. W. (Mo.) 1041.

City of Pasadena v. Stinson, 27 Pac. (Cal.) 604.

In my opinion, the Legislature, by enacting Chapter 112 of the Laws of 1911, conclusively demonstrated that the creation of new counties was a matter to which a general law could be made applicable. The fact that three counties, Hill, Blaine and Big Horn, have been created under the act shows not only that the general law can be made applicable, but that it is applicable and is efficient. Other communities are at this time pursuing the method outlined in Chapter 112 of the Laws of 1911 to create new counties.

You are, therefore, advised that in my opinion the Legislature itself has shown that this is a subject to which a general law can be made applicable; that two years experience has shown that the general act is applicable, and that, therefore, it cannot now be regarded as a proper subject for special legislation.

My opinion, therefore, is that a special act attempting to create a county would be unconstitutional.

Very truly yours,

D. M. KELLY,
Attorney General.