

County, Creation of. Election for Creation of New County, How Affected by Contemporaneous Act of Legislature. . New County, How Created.

Effect of creation of new county by election, and incorporation of same territory in county created by special law, considered.

January 17th, 1913.

Hon. John T. Slattery,
County Attorney,
Glasgow, Montana.

Dear Sir:

I received in due course your telegram dated the 15th inst., to the following effect:

"In November last county commissioners of Valley County granted petition for election to determine if portion of Valley County should be cut off as Sheridan County. Board fixed date of election for March 11th of this year. If Legislature should create new county by taking part of Valley County not included in proposed County of Sheridan and by so doing leave in old Valley County less assessed valuation than four or five millions, would such legislation have the effect of invalidating proceedings to create Sheridan County subsequent to the creation of the other county by the Legislature? Notice of a bill cut off portion of Valley County has been given in the senate."

In reply thereto I beg to advise you that after consideration of the matter I am of the opinion that if the legislature should create a new county by taking part of Valley County not included in the proposed County of Sheridan and by so doing leaving in old Valley county an assessed valuation of less than five millions of dollars, the effect of such an act, if valid, would render all proceedings subsequently taken to create the proposed County of Sheridan null and void. I assume that the proceedings already taken for the creation of Sheridan County have been taken under Chap. 112, Laws of 1911. In the first section of this act is found the prohibition that

"no new counties shall be established which shall reduce any county to an assessed valuation of less than five millions of dollars."

Sec. 1, Chap. 112, Laws of the Twelfth Session.

I am of the opinion that it is jurisdictional that the carving out of the new county should not reduce an old county to an assessed valuation of less than five millions of dollars, and that the question of the assessed valuation of the old county is to be determined as of the time of the establishment of the new county, to-wit: the date of the resolution to be passed by the board of county commissioners declaring the new county "duly formed and created as a county of this state."

Sec. 4, Chapter 112, Laws of Twelfth Session.

Up to this point the territory included within the limits of the proposed new county remains a part of the territory of the old county.

Up to this point all proceedings are for the purpose of creating a proposed new county. With the passage of the resolution the new territory becomes a new county. It therefore becomes established on the day on which the resolution is passed, and if at the time the resolution is passed the old county is so reduced in size that to create a new county would reduce the old one to an assessed valuation of

less than five millions of dollars the new county cannot be established for the reason that to do so was violating the provision above quoted; "that no new county shall be established which shall reduce any county to an assessed valuation of less than five millions of dollars."

It is true that in Sec. 3 of the act referred to, provisions are found relating to a proceeding by the board of county commissioners to determine whether the formation of the proposed new county will reduce any county from which territory is taken to an assessed valuation of less than five millions of dollars, etc., but this determination is not, in my opinion, conclusive. If by any acts occurring subsequent to such determination, but before the establishment of the new county the assessed valuation of the old county should be reduced to such an extent that the establishment of the new county would leave the old county with an assessed valuation of less than five millions of dollars, then all future proceedings are without authority of statute and are null and void. The proceeding to create a new county is a special proceeding and the jurisdictional facts authorizing same must exist at all times throughout the whole course of the proceeding. The want of jurisdiction to create a new county may be shown in any manner and at any time before the new county is actually established, and if this want of jurisdiction is made to appear all subsequent proceedings become void.

The above opinion is based upon the assumption that the act passed by the Legislature creating a new county is a valid and constitutional act. It has been for many years assumed in this state that the Legislature might, by special act, create a new county, although the question was never decided by the supreme court.

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.

The soundness of these views, however, has been recently questioned by one of the justices of the supreme court.

See opinion of Mr. Justice Holloway in State ex rel. Geiger v. Long, 43 Mont. 413.

The constitution provides:

"The Legislative Assembly shall not pass local or special laws in any of the following enumerated cases; that is to say * * * regulating county * * * affairs * * *. In all other cases where a general law can be made applicable no special law shall be enacted."

Sec. 26, Art. V, Constitution of Montana.

The Legislature of this state in the twelfth session passed a general law covering the subject of the creation of new counties.

Chap. 112, Laws of 1911.

Under this general law three new counties have been thus far created, to-wit: "Hill," "Blaine" and "Big Horn" Counties. In view of these facts I am of the opinion that an argument could be very well made that the creation of new counties is one of the cases "where a general law can be made applicable," and that, therefore, "no special law should be enacted."

Sec. 26, Art. 5, Constitution of Montana.

In view of the fact that we now have a general law upon this subject, namely, the creation of new counties, and that the general law has been found efficient, or at least workable, and that three counties situated in different parts of the state have been created under it, I doubt very much whether it can now be contended that the creation of new counties is now a case where a general law cannot be made applicable. However, the constitutionality of a special act creating counties is not at this time squarely before this department, and I prefer not to discuss the matter at length at this time.

Very truly yours,

D. M. KELLY,
Attorney General.