

**New Counties, Election of Officers in. Election, of Officers in New County. Senator, When Elected. Vacancy, When Exists.**

A vacancy in the office of state senator exists on the creation of a new county, and such vacancy can be filled only after the issuance of a writ of election by the governor. No authority in law exists for electing a state senator at the special election for the creation of a new county.

June 8, 1914.

Hon. Herbert H. Hoar,  
Savage, Montana.

Dear Sir:

Some doubt seems to exist as to whether the persons selected at the special election at which the county was created to the office of state senator, clerk of the district court, and county commissioners, hold office beyond the first Monday in January, 1915. No request has been filed here, either by you or any other county official for an opinion, but in view of the fact that the question will undoubtedly reach your office, I thought it not inadvisable to call your attention to the law as viewed by this department, for similar questions arise in every county that has been created since the last general election.

Section 4 of Chapter 133, Laws of 1913, relating to the creation of new counties, after providing for the election of county officers at the special election at which the new county is created, contains this paragraph:

"All the officers elected at said election, or appointed under this Act, shall hold their offices until the time provided by general law for the election and qualification of such officers in this state and until their successors are elected and qualified and for the purpose of determining the term of office of such officers,

the years said officers are to hold office, are to be computed respectively from and including the first Monday after the first day of January following the last preceeding general election."

Whatever question may exist as to whether this provision has application to the office of state senator, that being a state office, there can be no doubt of its application to county officers, and the clerk of the district court is a county officer.

Sec. 2957, R. C., Sec. 18, Art. XVIII, State Const.

The Constitution further provides that the clerk of the court shall be elected at the same time and for the same term as the district judge,—

Sec. 18, Art. XVIII, State Const.,

but district judges are not elected until the general election in 1916. Hence the clerk of the court elected at the special election creating the county, holds office until the first Monday in January, 1917.

County Commissioners are likewise county officers, and under the provisions of Section 4, Art. XVI of the State Constitution, they should at the first election be elected, one for two years, one for four years, and one for six years. I am informed that in that county the term for which commissioners were elected, was not designated, hence it will be impossible, without another election to determine which one was elected for the two-year, four-year, or six-year term. I am, therefore, of the opinion that an election should be held this fall for county commissioners, for under the act itself, had a commissioner been elected for a two-year term, his term would expire on the first Monday of January, 1915, and unless the terms were designated, it will require another election to determine which commissioner was elected for the two-year term.

The state senator is a state officer, and so are the representatives, but the term of the representative elected, if one was elected, would under the act itself, expire on the first Monday in January, 1915, and his successor would therefore, have to be elected at the coming general election. Hence, it is immaterial, so far as this election is concerned, whether the representative was properly elected or not at the election creating the county. The term of the state senator, however, being for four years, presents a different question, and it is unnecessary here to consider whether it was the intent of the legislature that the senator elected at the special election creating the county, should hold for the full term or whether any senator at all should be elected at that election, for the reason that the provisions of the state constitution, being paramount, forbid any such construction being placed upon the act relating to the creation of new counties. The office of state senator in that county was created at the time the county was created and by reason of the creation of the county. It became vacant as soon as created, for an office newly created "becomes ipso facto vacant in its creation."

State vs. Mayor, 41 Mont. 377-383.

Section 45, Article V of the state constitution provides:

"Where vacancies occur in either house, the Governor  
\* \* \* shall issue writs of election to fill the same."

This provision of the constitution is mandatory and prohibitory.  
Sec. 29, Art. 3, Const., State vs. Weston, 29 Mont. 129.

No such writ of election was issued, hence, the election of a state senator was as a matter of law void. It is further to be noticed that no such writ of election could be issued, for the office did not exist until the county was created, and the county was not created until the result of the election was declared. Hence it is my judgment that a state senator should be elected at the general election this fall. It is well, however, to note the fact that under the constitution:

"Each house shall be judge of the elections, returns and qualifications of its members."

Sec. 9, Art. V. State Constitution.

State vs. Kinney. 9 Mont. 232.

Hence, while as a matter of law, a senator should be elected this fall, yet it is still within the power of the senate, if it so desired, to seat the one who was elected at the special election, but if the county failed to elect and the senate refused to seat the one elected at such special election, then the county would be without representation in the senate. Hence, I believe it is the duty of the county officials to hold an election for state senator.

Yours very truly,

D. M. KELLY,  
Attorney General.