

**New Counties, Election of State Senator in. State Senator.
Election of in New County. Vacancies, in Office.**

A vacancy exists in the office of state senator when a new county is created. It is filled by special election. The Constitution provides that the Governor shall issue a writ of election when a vacancy exists. No writ was issued. The Senate however, seated a member elected at a special election: Held, he was elected to office for the term of four years.

August 5, 1914.

Governor S. V. Stewart,
Helena, Montana.

Dear Sir:

I have your letter of even date as follows:

"I shall be glad to have you give me your opinion, at your early convenience, on the question whether the county of Big

Horn should be included in my forthcoming General Election Proclamation as one of those counties in which a state senator is to be elected at the November, 1914, election."

In reply thereto, I beg leave to advise that Big Horn county was created January 13, 1913, and the returns of the canvassing board disclose that G. F. Burla was proclaimed elected as senator. Article V, Section 2 of the constitution provides that senators shall be elected for the term of four years; and Article VI, Section 4, contains the provision that whenever new counties are created, each of said counties shall be entitled to one senator; and it is provided by legislative enactment (Sec. 14, Chap. 133, Laws 1913, p. 502), that: "The territory within the limits of any new county, until otherwise provided for by law, shall be entitled to representation in the State Senate by one State Senator." Chapter 112 of the Laws of the 12th Legislative Assembly is the law under which Big Horn county was created. It contains the following provision:

"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 preceding general election."

Upon the creation of Big Horn county, all offices provided for by law become ipso facto vacant.

State vs. Mayor of Butte, 41 Mont. 377.

The general rule is that where vacancies are filled by appointment, the appointees hold only until the next general election,

State vs. Sedgwick, 46 Mont. 187,

but upon the creation of Big Horn county, the vacancies existing were filled by the special election for officers, held pursuant to law contemporaneously with the election for the creation of the county, and whether the same rule applies to vacancies filled by special election, it is not necessary here to decide. Heretofore, in an opinion to Hon. Herbert Hoar, County Attorney of Richland County, under date of June 8, 1913, I held it to be advisable that a state senator should be elected in that county at the forthcoming general election, for the reason that under Article V, Section 45 of the Constitution, it is expressly provided that when vacancies occur in either house, the Governor shall issue writs of election to fill the same, and no such writ of election was issued. Nor was any writ of election issued to fill the vacancy existing, ipso facto, upon the creation of Big Horn county; but in the instant case we are confronted with a different state of facts, for here, the Senate Journal of the 13th Legislative Assembly, at page 64, discloses that on January 15th, being the tenth day of the session, it was

“Moved by Donlan that Senator-Elect G. F. Burla, of Big Horn county be sworn in. Motion carried. Senator Burla sworn in by president pro tem of the senate, C. S. Muffly.” Article V, Section 9 of the constitution provides that each house shall judge of the elections, returns and qualifications of its members. In the case of Senator Burla, the senate has already acted and determined upon his qualifications. Hence, under the provisions of Article V, Section 2, he was duly elected for a term of four years.

See *State vs. Kenney*, 9 Mont. 223.

It is however, a well-known rule of law that the acts of one legislature are not binding upon a future legislature, and it probably is within the power of the next session of the legislature to refuse to recognize Senator Burla as one of its duly elected members. However, in view of the proceedings already had, he is *prima facie* a member of that body,

State vs. Kenney, *supra*,
and as such will presumably hold over.

It is my opinion, therefore, that Big Horn county should not be included in your forthcoming general election proclamation as one of the counties in which a state senator is to be elected at the forthcoming general election.

Yours very truly,

D. M. KELLY,
Attorney General.