

Senator, When Elected in New County. Vacancy, Office of Senator When. Election of Senator, in New County When.

Under the law of this state, the creation of a new county creates a vacancy in the office of state senator which can only be legally filled by an election after proclamation as authorized by existing law.

August, 4, 1916.

Hon. S. V. Stewart, Governor,
Helena, Montana,

Dear Sir:—

I am in receipt of your letter of the 3rd instant from which I take the liberty of quoting as follows:

“At the regular election in 1914 the people of Valley County elected Hon. George W. Clay to the State Senatorship from that county for a four-year term. Later and before the adjournment of the Fifteenth session of the Legislature, Valley County was divided and the county of Phillips was created. Senator Clay resides in Malta, which is in the new county of Phillips and has resided there since its creation.

Phillips county held a special election and elected county officers when the county was created. In addition to other officers they elected a State Senator in the person of the Honorable Harry A. Vagg.

The question now arises as to the matter of the election of Senators in the two counties. Is there a vacancy in Valley County by reason of the residence of Senator Clay in Phillips county, and is there a vacancy in Phillips county by reason of the circumstances and facts of the special election held there?”

I am of the opinion both your queries must be answered in the affirmative. In Volume 4, Opinions Attorney General, page 332, this office held, with respect to the office of county commissioners, as follows:

“Upon the formation of a new county the county commissioners of any of the counties from which the new county is formed who reside within the limits of such new county cease to be commissioners of the old county unless they remove within the latter.

Vol. 11 Cyc. 353.

State vs. Walker, 17 Ohio, 135.

People vs. Morrell, 21 Wend (N. Y.) 563.

Under the provisions of our statute and the cases above cited it is clear that any member of the present board of county commissioners of Chouteau county, who may reside without the boundries of Chou-

teau county, in the event a portion of the present county is cut off and included within a new county, would cease to be a county commissioner of Chouteau county, unless he moved his residence within the boundaries of Chouteau county as so changed before the final creation of the new county."

The reasoning applicable to county commissioners, I think applies with equal force to all officers. In addition to the authorities cited in the opinion referred to, attention is called to the case of *People v. Morrell*, 21 Wend. (N. Y.), 563, wherein the same doctrine was applied to county judges. I beg leave also to call your attention to Article V, Section 3 of the Constitution, which provides as a necessary qualification that members of either house shall be residents of the county wherein they are elected.

It is my opinion, therefore, that Senator Clay lost his rights to hold the office of State Senator by reason of the fact that he failed to reside within the limits of the parent county.

Your second inquiry requires an affirmative answer, by reason of the fact that this office has twice held that under the circumstances described, a vacancy exists in the office of Senator requiring an election for such office at the next general election.

Volume 5, Opinions Attorney General, pages 332 and 559.

Yours very truly,

J. B. POINDEXTER,

Attorney General.