

**New Counties—Counties—Senate—Contests—Office — Lake County.**

Under the facts stated in the opinion, the question of which of two contestants is entitled to a seat in the state senate as the senator from Lake county is one for the senate to decide.

Senate Committee on Privileges and Elections.      January 14, 1925.  
Senate Chamber, State Capitol Building.  
Helena, Montana.

Gentlemen :

You have submitted to me Senate Resolution No. 1 relating to the contest now pending before the senate over the seat of the senator from Lake county and have requested my opinion relative thereto.

The situation which calls up this contest is briefly as follows :

Lake county was created at a special election held for that purpose on April 30th, 1923, at which election county officers, including a state senator, were elected. The senator elected, Hon. J. H. Lyle, appeared, presented his credentials and was seated by the senate at the extraordinary session of the eighteenth assembly in January, 1924.

At the primary election of August 26, 1924, Senator Lyle was a candidate, although under protest, for the nomination of his party and was successful. At the general election of November 4, 1924, the nominee of

the opposing party. Hon. Ralph Tower, received the largest number of votes cast and was duly declared elected by the county canvassing board and a certificate of election issued to him.

Senator Lyle now contends, as he did prior to the primary and general election, that he was elected for a full term of four years at the special election of April 30th, 1923, and that his term does not expire until January, 1927, and his successor elected and qualified; therefore, that the election of a senator from Lake county in November, 1924, is a nullity there being no vacancy existing. The law, section 4395, R. C. M. 1921, under which Lake county was created, is not at all clear. It is, insofar as it applies to the election of officers, as follows:

"All officers elected at said election (the election creating the new county), 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."

The last preceding general election prior to the creation of Lake county was the general election held in November, 1922. Therefore, the terms of the officers elected on April 30, 1923, in Lake county would, under the above quoted statute, be computed as commencing on the first Monday after the first day of January, 1923.

With all officers, whose terms are fixed by law at two years, interpretation of the statute presents no difficulty, but with those having terms of four or six years it offers a question which is most difficult to solve. It resolves itself into this: Did the legislature, when it used the words, "shall hold their offices until the time provided by general law for the election and qualification of such officers in this state," mean the next general election, or did it mean that each officer elected at the special election should hold his office for the full term fixed by general law for his office exactly as though he had been elected at the general election last preceding such special election? The question has been before this office in regard to the election of a clerk of the district court and the conclusion was that the clerk of the district court elected at such special election would hold his office until the next general election at which district judges were to be elected because the constitution provides that clerks of court shall be elected at the same time as district judges. (Vol. 5. Opinions of Attorney General, page 559.)

The opinion cited above also held that a state senator elected at the election creating a new county did not hold office for four years computed from the first Monday after the first day of January following the last preceding general election, reasoning as follows:

"The term of state senator, however, being for four years, presents a different question, and it is unnecessary here to con-

sider 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 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 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. III, Const., State v. 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 this fall. It is well, however, to note the fact that under the Constitution:

"Each house shall be judge of the election, 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."

In rendering the above opinion it appears that the attorney general was influenced by the provision of the constitution which he quoted, but it likewise appears that he overlooked the case of *State ex rel. Williams vs. Mayhew*, 21 Mont. 93, in which the supreme court of this state drew a distinction between vacancies in offices resulting from the creation of a new county and vacancies resulting from other causes and held that the legislature having the power to create new counties could, as an incident to the creation, provide for officers of the new county; that such action was not in conflict with sections 4 and 5, article XVI of the constitution, and the officers so provided were de jure and not de facto officers.

Sections 4 and 5, supra, provide how vacancies in the offices of county commissioner and other county officers shall be filled and I am unable to distinguish why, if the law does not violate the constitution in one instance, it should violate it in the other. Sections 4 and 5, article XVI are certainly of equal force and dignity with section 45, article V, and if the election of a senator under the law creating counties is unconstitutional then it must necessarily follow that the election of county commissioners and other county officers under the same law is unconstitutional. Section 4, article V of our constitution provides in part, "And when any additional senator shall be provided for by law, his class shall be determined by lot."

Section 53, R. C. M., 1921, provides that senators from odd numbered senatorial districts shall be elected in the year 1892 and every four years thereafter, while section 54, R. C. M., 1921, provides that in even numbered senatorial districts the senator shall be elected in 1894 and every four years thereafter. These provisions, however, do not aid in a solution of the question presented inasmuch as the class of the Lake county senatorial district has never been determined.

While it is true that Senator Lyle was seated by the senate at the extraordinary session of 1924, yet each member after being seated holds his office at the will and pleasure of the house to which he belongs, its authority in this respect being a continuing one running through the term for which he is elected. (State ex rel. Boulware vs. Porter, 55 Mont. 471.)

Since the constitution makes the senate the sole judge of the election of its members the courts will not entertain quo warranto proceedings to determine the right to office of a member of either house of the legislature. (State ex rel. Ford vs. Cutts, 53 Mont. 300.)

The question, therefore, before the senate in this contest is simply one of interpretation of the language used in section 4395, above quoted, and the decision of the senate on the question is in my opinion conclusive and not subject to review by the courts.

Very truly yours,

L. A. FOOT,  
Attorney General.