

Opinion No. 216**Schools—Elections—Vacancies—
County Superintendents.**

HELD: Under the facts presented, there is strong doubt that the school election was legal, and any vacancies that now exist on the board by reason of the election not being held may be filled by the superintendent of schools.

May 23, 1933.

In your request for an opinion relative to the election, or attempted election in one of your school districts on April 1, 1933, you state that the fifteen days' notice required by statute preceding the election of school trustees in schools of the second and third classes was not given as required by Section 989, R. C. M. 1921.

You will note, by Section 989 referred to above, that the provisions other than the giving of the notice for controlling school elections in districts of the second and third classes is left very largely to the trustees of the district but you will note that in the last three lines of that section the polls shall be open for such length of time as the board of trustees may order but must be open from 2:00 p. m. to 6:00 p. m. The trustees might direct the polls to be open for a longer time than from 2:00 p. m. to 6:00 p. m., but they must be open at least for that period.

You state that the judges of election, who were all women, being intimidated by some taxpayer whom you do not name, closed the polls at 4:00 o'clock and did not canvass the votes until the next day.

The laws governing elections in school districts of the second and third classes are not very exact except as to the posting of notice of election and the time when the polls shall be open, but where the statute does make any provisions, governing such elections, such provisions must be followed. Since the notices were not posted the required time before the election and the polls were not open longer than 4:00 o'clock p. m.—only a few votes having been cast and no showing as to the number who were deprived of the right to vote between the hours of 4:00 and 6:00 o'clock p. m.—it necessarily follows

that there is strong doubt that the election was legal.

The decisions of our Supreme Court make a distinction between questions that arise before and during the election and questions that arise after the election, (*State v. Lentz*, 50 Mont. 322; *Thompson v. Chapin*, 64 Mont. 376; *Goodell v. Judith Basin County*, 70 Mont. 222, and cases cited) and will not deprive electors of their franchises if any reasonable conclusion can be arrived at in the particular election, but the facts given in your case, do not, in our opinion, justify the assumption that a legal election was held.

In view of the fact that no election was held in that district as provided by law, any vacancies that now exist on the board by reason of the election not being held may be filled by the superintendent of schools.

Any party who presumes to act in an official capacity, such as the trustees who assumed that they were elected at the election on April 1, and who may have performed some duties as trustee since such alleged election, will be regarded as de facto officers and anything that they have done within the scope of their duties as trustees may not be questioned by third parties. This would be different, of course, if they have assumed to do anything outside of the law.

We think it was your duty on being apprised of the interruption of the election by the unnamed party to have had him arrested and prosecuted as provided by Section 1083, R. C. M. 1921, and other statutes relating to such offenses.