

Opinion No. 176.

State Senators—Vacancies—Constitutional Law—County Commissioners.

HELD: When a vacancy, caused by death, occurs in either house of the legislature it is mandatory that the county commissioners fill the office by appointment.

December 11, 1939.

Mr. Bert W. Kronmiller
County Attorney
Hardin, Montana

Dear Mr. Kronmiller:

The death of State Senator Harry T. Mann of Big Horn county has resulted in a vacancy of that office. State Senator Mann was elected at the general election in November, 1936, and his term would normally expire on the first Monday in January, 1941. The regular sessions of the Montana legislature are held for not more than sixty days of each year succeeding a general election. Unless the governor calls the legislature into extraordinary session the state senators elected in 1936 would have no further duties to perform for the balance of their terms.

Section 45 of Article V of the Constitution of Montana provides: "When vacancies, caused by death, occur in either house of the legislative assembly, such vacancies shall be filled by appointment by the board of county commissioners of the county from which such occurs." There is no question as to the power of the county commissioners to appoint a successor to the late Senator Mann, but the question presented is whether it is mandatory upon the county commissioners to make such an appointment.

Section 29 of Article II of the Montana Constitution lays down the rule for construction of constitutional provisions, "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." No express words appear elsewhere relieving the mandate imposed by this section.

The law abhors vacancies in public offices (46 C. J. 971) and it is therefore the duty of the appointing authority to fill the vacancy as promptly as is consistent with the selection of a qualified successor.