School Districts, Elections in. Trustees, Elections for. Elections for School Trustees.

The provisions of Sec. 502, Chap. 76, Laws of 1913, providing that no persons except those nominated at a bona fide public meeting, held ten days previous to the day of election, can be voted for or elected as trustees, in districts of the first class, is unconstitutional as a derogation of the provisions of Sec. 5, Art. III of the Constitution of Montana, guaranteeing that elections shall be free and open.

March 2nd, 1914.

Hon. H. A. Davee,
Superintendent Public Instruction,
Helena, Montana.

Dear Sir:

I am in receipt of your communication under date of the 17th instant, submitting for my opinion the question of the validity of paragraph 3 a of Sec. 502, Chap. 76, Laws of the Thirteenth Legislative Assembly—the portion of the law in question reading as follows:

> "In districts of the first class no person shall be voted for or elected as trustee unless he has been nominated therefor by a bona fide public meeting. * * * The nomination and election of any person shall be void unless he was nominated at a meeting as above provided, at which at least twenty qualified electors were present and his nomination certified and filed as aforesaid, and the board of trustees, acting as a canvassing board, shall not count any votes cast for any person unless he has been so nominated, and a certificate thereof filed as herein required."

Three questions are naturally raised by a consideration of this subject:

1. Has the legislature by such an act the right to deprive the electors of a school district of the right to vote for any person they may see fit, provided he is otherwise qualified for the office?

2. Has it the right to deprive the person so voted for of the office, in the event he receives a majority of the votes cast for the office at that election?

3. Is such provision an attempt to add a qualification for holding office?

The first question impresses me as being an important one, and if answered in the negative to be conclusive. Sec. 10 of Art. XI of the Constitution of Montana—

> "The legislative assembly shall provide that all elections for school district officers shall be separate from those elections at which state or county officers are voted for"—

Implies that school district officers in this state are to be elected, and that such offices are therefore elective offices. Art. IX of the Constitution, treating of the rights of suffrage and the qualifications necessary to hold office, contains the following provisions:

"Section 1. All elections by the people shall be by ballot.

"Section 2. Every male person of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are or hereafter may be elective by the people. * * *

"Section 11. Any person qualified to vote at general elections and for state officers in this state shall be eligible to any office therein, except as otherwise provided in this constitution. * * *"

Art. III of the Constitution of Montana, being a "bill of rights," provides in Sec. 5 of said article:

"All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

There can be no doubt or question but that the intent of the act in question was to limit the right of electors at school elections to a vote for candidates nominated in a particular way. The result is that individual electors are deprived of right to express their individual preference for trustee by writing in the names of the persons for whom they wish to vote. It is, therefore, a violation of Sec. 5 of Art. III, above quoted, for an election cannot be said to be free and open when the elector is limited to voting for some certain candidate.

In the case of State ex rel. Holiday v. Leary, 43 Montana, 157, the supreme court of our state used the following language:

"Any statute which denies to the elector of the state, or any portion of it, the right to nominate candidates for public office, is in violation of Secs. 5 and 26 of our bill of rights, and void."

One of the grounds upon which the court based its opinion in this case was that a petition for the nomination of a district judge made up and signed, as it was provided by the law in question, would ignore altogether the vote of a county which had come into the judicial district since the preceding election; in effect taking away from the electors of such a county the right to nominate a judge. While the facts in the two cases are not altogether similar, the court has in a way indicated what its interpretation of our bill of rights is. Other courts than our own have passed upon the precise question under consideration. In the case of Sanner v. Palton, 155 Ill. 553, 40 N. E. 290, the court having under consideration the question of whether certain votes cast for the plaintiff, whose nomination was not printed upon the ballot but merely written in by his friends, should be counted, held that such votes were legal and should be counted, and that the legislature could not take away from the electors the right to indicate their choice in this manner. A like question was passed upon by the Supreme Court of Missouri, which used the following language:

"The law cannot infringe upon the right of voters to select their public servants at such elections, or to be so inter-

preted as to limit the range of choice for constitutional officers to persons nominated in the modes prescribed by it."

Bowers v. Smith, 17 S. W. 761

And McCrary on Elections, in touching upon this topic, has to say:

"The statutes of most states expressly permit the voter to cast his ballot for the persons of his choice for office, whether the name of the persons he desires to vote for appears upon the printed ballot or not. Statutes which deny the voter this privilege are in conflict with the constitutional provision guaranteeing the right of suffrage to every citizen possessing the requisite qaulifications, and are void. * * * Legislatures cannot restrict the elector in his choice of candidates, nor prohibit him from voting for any other than those whose names appear on the official ballot."

McCrary on Elections, 4th Ed., Sec. 700.

One case, that of Chamberlin v. Wood, 15 S. Dakota, 216, seems to hold a view opposite to that expressed by the quotations above. This case was, however, by a divided court, and apparently in conflict with a former decision of the same court, and I cannot agree with the proposition therein expressed that the electors are free to choose because they have the right to nominate in the regular way. It is to be noted that Sec. 542, Revised Codes of Montana, 1907, expressly gives to electors the right to express an individual choice by inserting names other than those printed upon the ballot, the language being as follows:

"Any elector may write or paste on his ballot the name of any person for whom he desires to vote for any office, and must mark the same as provided in Sec. 552, and such vote must be counted the same as if printed upon the ballot and marked by the voter."

In view of the above constitutional provisions, and the interpretation given to similar provisions by courts of responsible authority, I am of the opinion that the provisions of Subdiv. 3 a, Sec. 502, Chap. 76, of the Laws of the Thirteenth Legislative Assembly are in conflict with the constitution of this state, as depriving the electors of right to express their free choice for the office of school trustee.

Yours very truly,

D. M. KELLY,
Attorney General.