

Election for County Attorney, Qualification of Person Elected.

Mere irregularities in holding an election which do not affect the result of the election cannot vitiate it.

The qualifications of a person to fill the office of county attorney are the same as those of a district judge except that the county attorney only need be twenty-one years of age and it is not necessary for him to possess the qualifications at the time the election is held, provided he possess them and is able to qualify at the date he is required under the law to qualify and enter upon the discharge of his duties.

Helena, Montana, November 20, 1906.

H. C. Schultz, Esq., County Attorney, Thompson, Montana

Dear Sir:—I am in receipt of your favor of the 12th inst., making request for an official opinion from this office on a number of questions arising as a result of the recent election held in your county for the position of county attorney. Briefly stated, the facts appear to be about as follows:

You were the regular republican nominee for the office of county attorney of Sanders County; John Meaney was the regular democratic nominee for the same office, and A. S. Ainsworth was an independent candidate for the same position, his nomination having been made by petition and printed upon the official ballot under the designation "Independent Party." It further appears that the democratic candidate, John Meaney, has been and now is a Justice of the Peace and that he never has been and is not likely to be admitted to the bar prior to the first Monday in January, 1907, and that he was elected over you by a plurality of seven votes.

Under this state of facts you present a number of questions for decision by this department, the first three of which relate to alleged irregularities in the election and are here set forth and answered collectively.

1. "In the precinct of Plains the number of ballots cast exceeded the number of names on the poll list by two, and the judges failed to follow Sec 1401 of the Political Code to discover the error and make the correction, and after counting the ballots and unfolding them, said judges made a comparison of the check list with the poll list and found two names of alleged voters checked which did not appear on the poll list and then added those names to the poll list to make the check list, poll list and number of ballots agree. Is this such a defect or informality as to affect the legality of the election that precinct?"

2. The official ballot contained the names of candidates for county offices under the designation "Independent Party" but no convention made nominations under such party designation. The candidates thereunder were nominated by certificates, which certificates contained the names of more than one candidate for each office to be filled and did not contain the signatures of not less in number than five per cent of the number of votes cast for the same office at the next preceding election in Missoula County, but did contain such five per cent of the number of votes cast in the portion of Missoula County which is now Sanders County.

The nomination of A. S. Ainsworth for the office of county attorney was made individually by certificate containing five per cent of the votes cast for the successful candidate for the office of county attorney two years ago in that portion of Missoula County which is now Sanders County, and said Ainsworth's name appeared under the party designation "Independent Party", as above stated.

(a) Is "Independent Party" a proper or legal designation for individual nominations or independent candidates or nominations made by certificate?

(b) Does the fact that some nominations made under the party designation "Independent Party" were illegally made, according to Sec. 1314 of the Political Code, affect all nominations appearing under that party designation?

(c) If Ainsworth's nomination was not legal by not having been made by a sufficient number of electors or rendered illegal by reason of his name appearing under a false party designation, or in a column with illegally nominated candidates, would that affect the legality of the election as to the office of county attorney?

(d) May one and the same person legally nominate by separate certificate more than one person?

The questions above set forth can be disposed of merely by a statement of the familiar principle of law that more irregularities which do not affect the result of the election cannot vitiate it. (See cases cited under note 2, Sec. 1401). This principle applies to the discrepancy in the number of ballots cast as compared to the number of names on the poll list, for it is apparent that the excess of two votes could not by any possibility have changed the final result.

The same principle applies to the alleged irregularities in the nominations of independent candidates and to the designation "Independent Party" on the ballot. As I understand it yourself and Mr. Meaney each

received a higher number of votes than Mr. Ainsworth, but neither of you received any votes under the designation "Independent Party" therefore, any irregularity with regard to the independent candidates or their nominations or designation on the ballot could not, by any possibility, have changed the result so far as you are concerned. The provisions of Sec. 1314 of the Political Code are intended to be mandatory and prohibitory, and prevent any certificate of nomination containing the name of more than one candidate for each office to be filed, and also, to prevent one elector from signing a nomination certificate for more than one person for the same office, but it does not appear from the facts presented that Mr. Ainsworth or any other individual was, by certificate, nominated for more than one office. And even though this were true, it is an irregularity which could not change the result and, therefore, should not invalidate the election.

The two remaining questions not thus disposed of may be stated as follows:

1 Does section 19, of article 8, of the constitution impose the requirements as to eligibility to the office of county attorney, as of the time of the election of such officer or the time of his qualifying after his election?

2. In case of the failure of a person elected to the office of county attorney to qualify within the time required by law, is there a vacancy in the office or does the present incumbent hold over?

I.

It will be noted that section 7, of article 9, of the constitution provides that "no person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States and who shall not have resided in the State at least one year next before his election or appointment." This section clearly imposes the qualifications of citizenship and residence as of the time of the election, and this office has so held in an opinion rendered to yourself on March 1, 1906.

It will be further observed that the additional provision imposed by section 19 of article 8, that the county attorney's qualifications shall be the same as are required for a district judge, etc., does not expressly provide that such qualification shall exist at the time of the election, as in the section last above cited. The principle of law is that unless the constitution or statute expressly so provides, the qualifications as to eligibility to office have reference to the time of assuming the office and not to the time of election to the office. This was held in the case of *State v. Munay*, 28 Wis 96, which was cited in the former opinion given you, and also in the later decision of *State v. Trumpf*, 50 Wis 103, also cited in said opinion.

In these cases it was held that in the absence of a constitutional or statutory requirement to the contrary, the disqualifications relate to the holding of the office and not to the election thereto. In the former of these cases the court said: "By giving this effect to the disqualification which the relator was under when he was elected, but which was removed before the commencement of the term of the office to which he was elected, we give force and effect to another fundamental principle of a free

government equally as important as that which we have discussed, which is the will of the majority, constitutionality expressed, must be obeyed. (*Italics in opinion as reported.*)

II.

Upon the second question, it must be borne in mind that you are not an elected officer but were appointed to the office first by the legislature and later by the board of county commissioners. Sec. 5 of Art. XVI of the Constitution, provides in part, "Vacancies in all county, township and precinct offices, except that of county commissioner, shall be filled by appointment by the board of county commissioners, and the appointee shall hold office until the next general election." Therefore the constitutional provisions relating to holding over by duly elected officers until their successors have been elected and qualified can have no application in your case. As to Mr. Meany, it seems clear to me, that his election must be declared, for Sec. 13 of Art. 9 of the Constitution provides, that the "Person or persons who shall receive the highest number of legal votes shall be declared elected." The law creating Sanders County cannot vary the constitution on the subject.

Sec. 1101, Political Code, enumerates the events upon the happening of anyone of which a vacancy is created in an office, and one of these is failure to qualify. (Subdiv. 9; see also the case of *Adams v. Doyle*, 73 Pac. 582.)

The case of *State ex rel Chenowith v. Acton*, 31 Mont. 37, is not applicable, for the reason that the supreme court in that case expressly declared there was no vacancy because a tie vote does not create a vacancy within the definition of that term as contained in section 1101, *supra*. In that case the court emphasized the distinction which I have heretofore pointed out as to your tenure of office, to-wit: that you were appointed and not elected and uses this language: "It is significant that section 5 of article 16 *supra*, provides that an elective officer shall hold until his successor is elected and qualified, while one appointed to fill a vacancy holds only until the next general election."

The court then goes on further to state, that "The constitution recognizes that vacancies will inevitably occur and provides how they shall be filled. What are vacancies within the meaning of the constitutional words, is not clear. It was, of course, not necessary to provide expressly that vacancies may occur through the processes of nature. It was contemplated that vacancies might occur because of misconduct or malfeasance in office. For such causes all officers not liable to impeachment shall be subject to removal in such manner as may be provided by law. (Constitution Article V, Section 13.) But whatever may or may not be vacancies, it is plain that there was none in the office of county superintendent of schools for Teton County when the county commissioners attempted to appoint the defendant to succeed the relator."

Not only does section 1101 provide that failure to qualify creates a vacancy, but the constitution itself expressly recognizes the happening of this contingency as creating a vacancy as section 14 of article 7 provides that "in case of the failure to qualify" the lieutenant governor

shall exercise the functions of the governor. This provision removes any possibility of doubt that a vacancy occurs in an office whenever there is a failure to qualify by a person who shall have been declared elected to an office by reason of having the highest number of legal votes.

My conclusion, therefore, is that Mr. Meany, having received the highest number of legal votes, must, under the constitution, be declared elected to the office of county attorney, and that in the event of his failure to qualify for the office there will be a vacancy which must be filled by appointment by the board of county commissioners under section 34 of article 8 of the constitution.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.