

Registration Law, Interpretation Of.

Helena, February 14, 1912.

To the County Clerks of Montana:

At the recent meeting of the State Association of County Clerks at Missoula, January 24th to 26th, 1912, certain features of the Registration Law (Chapter 113, Laws of 1911) were discussed by your body and construction thereof made by my Assistant W. S. Towner. At your meeting you submitted several questions and requested that a formal written opinion be given, and a copy mailed to each county clerk in the state, in answer to these questions. Before answering the questions in the order in which they were submitted by your committee, I give you herewith a general outline of all of the opinions that have heretofore been rendered by this department in construction of this law.

Inquiries have come to the attorney general relative to the elections to which the provisions of the act apply, that is, to what elections do the provisions of the registration law as it now exists apply. It is clear from the provisions of the act that it applies only to general elections, primary nominating elections, general municipal elections, general school elections, and special county elections. Prior to the enactment of this law no registration was required of electors voting at school district elections, except in school districts of the first class, but as stated in the title of the act its object is to "provide for the creation of election precincts and for the registration of electors in county, city, towns and school districts" and throughout each of its sections reference is made to the three classes of elections—that is, county or general city and school districts. There is no question but that it was the intention of the legislature to provide that the electors, or voters, at every election therein specified must be registered in the manner provided by the act. In fact, Section 35 of the act provides:

"No person shall be entitled to vote at any election mentioned in this act unless his name shall on the day of election appear in the copy of the official register or check list furnished by the county clerk to the judges of the election at the precinct at which he offers to vote."

Therefore, voters in all school districts, irrespective of the class of

such district, are required to register in order to vote at school elections. The provisions of the act also apply to special county elections wherein propositions are submitted to a vote of the electors of the county. Section 33 of the act provides as follows:

“At any special election held for any purpose in any county, copy of the official register and check list which were printed or written before and used at the preceding general election must be used and no new registration need be made.”

It was the apparent intention of the legislature then that in case of a special election in any county that the registry list used at the last preceding general election should be used. Section 33 is a re-enactment of Sec. 491 of the Rev. Codes of 1907, which section was identical in language.

Although this particular question has not been passed upon by the supreme court of this state, there is serious doubt, as to the constitutionality of this section. It has been declared unconstitutional by a district court of the state, Judge Cheadle of the Tenth judicial district having so declared in an action before him in Meagher county, involving a special election at which electors of Meagher county were called upon to vote on a proposed issue of bonds for court house purposes. In so far as this section tends to deprive qualified electors of the right to exercise their elective franchise at such election, it is probably unconstitutional, and the attorney general has advised that in such cases, not only should those whose names appear on the official register and check list used at the last preceding general election in the county be permitted to vote, but also, those electors who have registered under the new registration law, for the reason, that if opportunity is afforded all the qualified electors of the county to vote, there would be little question as to the validity of the election, but in the event that a considerable number of qualified electors of the county were deprived of the right to participate in the election by reason of a strict compliance with the provisions of Sec. 33 of this act, it would raise a grave question as to the validity of such special election.

Numerous inquiries have been made as to whether this law applies to special elections held in school districts, for the purpose of voting an issue of bonds to be used in the construction of school houses. The provisions of this act do not apply to special school district elections.

An election held for the purpose of voting bonds is a special election. It is true that the question as to the issuance of such bonds is submitted to the electors of the district but the law relative to such elections, expressly provides that the election shall be held in the manner prescribed for the election of school trustees, **except that no registration will be required**, and prior to the enactment of Chapter 113, in school districts of the first class, where registration for general school elections was required, no registration for bond elections was necessary.

Another class of special elections to which the provisions of this act do apply, are elections held under the provisions of Chapter 112, Laws of 1911, known as the county division act, but special provision is made in that act, that all electors resident within the proposed new

county are entitled to vote, and the presence of their names upon the registration list of the county is contemplated. However, there are two registration lists contemplated by that act; (1) the registration list used at the last preceding general election, and (2) the registration list to be made in accordance with general law. The act provides:

"All qualified electors resident within the proposed new county who are qualified electors of the county or counties from which territory is taken to form such proposed new county, and who have resided within the limits of the proposed county for a period of more than six months last preceding the day of election and who were on the official registration list at the last general election or who are entitled to be registered for said special election under the provisions of this act shall be entitled to vote at said election."

In a special election of this character all qualified electors resident within the proposed new county are entitled to vote at the election and are entitled to be registered, but those of the qualified electors whose names appear upon the official registration list used at the last preceding general election would not be required to re-register, but would be entitled to vote upon such prior registration. However, as to those electors who have become entitled to be registered subsequent to the last general election, they are required to be registered under the provisions of Chapter 113, Laws of 1911, and at such election the registration list used at the last preceding general election and in addition the new registration list now being formed would be used.

Inquiries have been made as to the right of women to vote at school elections and in the event of their offering to vote, whether or not it is necessary that they be registered in the same manner as male electors. Sec. 857, Revised Codes, defines the qualifications of electors in a school district and provides further that women of required age and who have resided in the state and in the district the required length of time, may vote. The Great Register mentioned in the act must contain the name of every elector within the county and this necessarily includes the names of women voting at school elections. By the provisions of Sec. 14 of the act the county clerk is required to enter the name of the applicant in the Great Register and a similar entry is thereupon made by the county clerk in the precinct register for county and state elections; the city register for municipal elections; and the school district register for school district elections. Women being ineligible to vote at other elections than school district elections, the county clerk should not enter the name of such woman in any other than the Great Register, and the school district register. It is true that no exception is made in the law as to women, but in view of the fact that the only election at which women are entitled to vote is the school district election, it could serve no useful purpose for the county clerk to enter her name upon the county precinct or municipal precinct register, but he should confine the entry to the Great Register and the school district precinct register. It is a legal maxim that "the law neither does, nor requires idle acts," and it certainly would be an idle act for the registry agent to enter the names of women upon a precinct regis-

ter to be used at an election at which such women would not be entitled to vote, and as a matter of administration such additional and useless entries should not be made.

The elector must appear personally before the registry agent, except, that an elector who resides more than ten miles distant from the court house may appear before a justice of the peace or notary public of the county and make the necessary affidavit entitling him to be registered, witnessed by two electors and the name is then entered by the county clerk upon the Great Register, as in the case of an elector appearing personally. This phase of the registration law has been passed upon by the attorney general's department and in that instance an opinion was given to the effect that the meaning of this section is, that all electors residing within a radius of ten miles of the court house must appear personally before the county clerk to be registered and even though the elector residing within such radius of ten miles would be required to travel more than the ten miles in order to appear at the court house, it would still be his duty under the law to appear personally, the opinion being therein expressed that the legislature in making the enactment did not contemplate the distance to be traveled, but rather, arbitrarily fixed a given radius within which such elector should appear in person. However, in instances of this kind, the same section affords ample protection to the elector by the following provision:

"If said elector is unable for any reason to conveniently register as aforesaid, he may register without charge, before a notary public, etc.

Another question often submitted relates to the procedure to be followed by the county clerk in registering an elector of foreign birth, who has become naturalized through the naturalization of his parent. It is a well defined rule of law that the minor child of an alien, though born out of the United States, if dwelling in the United States at the time of naturalization of the parent, becomes a citizen by virtue of such naturalization and it is therefore not necessary for an elector of this class to procure separate papers for himself, but evidence of the naturalization of the father is evidence of naturalization of the son, provided, that proper proof is made to the county clerk, or registry agent, identifying the applicant as the son of the naturalized person referred to in the papers presented. As a general rule naturalization cannot be proven by parol, but where the applicant presents a duly exemplified copy of the record of naturalization of his parent, he may prove by him own oath that it was issued to his parent, that he is the child of such parent and was a minor child, within the United States(at the time of the naturalization of the parent. The evidence of naturalization of the parent then would be accepted by the county clerk as evidence of the naturalization of the son.

I am informed, the county clerks have had some trouble in dealing with the question of the exhibition of naturalization papers by the applicant for registration, at the time of such application. There is no authority contained in any of the provisions of the law entitling the county clerk and recorder to demand as a condition precedent to

registering an applicant, that he shall exhibit to him documentary evidence of his right as an elector. It is true that Sec. 22 of the act relates to the exhibition of naturalization papers by the applicant. This section provides that where an applicant for registration is a naturalized citizen, he must produce his citizenship papers at the time of registering if he has them, but if his certificate of naturalization, or certified copy thereof, is lost or destroyed, or beyond the reach of the applicant at the time of his application for registration, the county clerk on that account may not refuse to enter his name upon the register, but he is required to register such applicant and to have him make the additional affidavit provided for in said section 22. So, where the applicant is not in possession of his evidence of naturalization at the time he applies for registration, upon making the additional affidavit provided for in that section, he may demand that his name be entered upon the registration list. In other words, the county clerk is not authorized to demand as a condition precedent, that the applicant shall exhibit documentary evidence of his right as an elector.

As to clerical errors committed by the county clerk in the entering of names upon the registration list, what, if any, right has he to correct them? Under the provisions of this act it is the duty of the county clerk as such registry agent to enter the names of electors, offering to register, in the Great Register and at the same time and in the presence of the applicant to enter the name in the proper precinct, municipal register or school district register and if a clerical error is made by such clerk in entering the names, there can be no question but that he may correct such clerical error, in order that the entry in the precinct, municipal and school registers shall correspond in every detail with the entry in the Great Register. Clerical errors may be corrected at any time. They are apparent from the entry itself.

Attention has been called in several instances, to the conflict between sections 7 and 18 of the act relative to the time during which the registration books must be closed prior to an election. The rule of construction in case of conflicting sections is, that the provisions of the section last in numerical order must prevail unless such construction is inconsistent with the meaning of such chapter or article. In this Act the provisions of Section 18 should be followed where those provisions conflict with the provisions of any prior section. Section 18 is the last in numerical order.

During the time that the books are closed for any election mentioned in the act, no new registrations can be made. Any elector not residing within, nor an elector of, the particular precinct or district wherein such election is being held, may register even though the books be closed for that particular district. They are only closed in so far as the particular election is concerned.

As to the check lists to be furnished the judges of election by the provisions of Section 23 of the Act, it is made the duty of the county clerk during the time intervening between the closing of the registration and the day of election to carefully copy from the official register into suitable books, two for each election precinct within his district,

the names of the electors registered for such election precinct, and by the provisions of Sec. 25 of the Act, prior to any school district or town election, the clerk must forward to the city or town clerks or the clerk of the school board two copies of the precinct register for each precinct. And by the provisions of Sec. 26 of the Act, at the conclusion of the election it is made the duty of the judges of the election to deliver to the county clerk one copy of the official precinct register, and to seal the other copy and return the same with the election returns. From these several provisions it is clear that the original Great Register and the original precinct, school district and municipal register must remain at all times in the office of the county clerk but that the county clerk shall prepare certified copies thereof for use of the judges at the respective precincts and that the judges, under the provisions of Sec. 26 of the Act shall upon each of said copies check the name of the elector voting at such election, one of which copies is returned to the county clerk and by him used in re-checking and re-listing the electors of the respective precincts or districts and the other book checked in the same manner is to be sealed and returned with the election returns, and each of the copies so furnished by the county clerk to the judges of the election are in fact the check list provided for such election and no further copy thereof or check list is required to be furnished.

The questions propounded by your committee and my construction of the law in answer thereto are as follows:

1. "Must the elector vote in the precinct of his residence?"

By the provisions of Section 14 the county clerk in registering an elector must enter his name in the separate precinct register of the particular precinct in which the elector resides. A copy of that precinct register is supplied to the judges of the election and the elector must necessarily appear in the precinct of his residence and the precinct in which his name is registered, to vote.

2. "May the county clerk register electors at other hours than between the hours of 9 a. m. and 5 p. m. on legal days?"

The county clerk and recorder does not cease to be county clerk and recorder at five o'clock P. M. and in my opinion the hours mentioned in Sec. 7 of the Act in question simply relate to the hours within which the county clerk is required to register electors and is not a limitation upon his right to register electors at other hours, should he deem it for the best interest of his county and in accordance with the requirements of his office so to do. And it is my opinion that if the county clerk for the convenience of the electors of the county sees fit to open his office, say for a given number of hours in the evening, as was suggested by some of your number at Missoula, it would be entirely within his power and discretion so to do and any registrations made by him during those extra hours would be as valid as any made between the hours of 9 A. M. and 5 P. M. However, this construction must not be understood as giving a county clerk authority to register electors after the time prescribed in the law for the closing of the registration books for any given election. The time of closing provided for is a limitation upon his power and right to register electors.

3. "If an affidavit is made before a justice of the peace or notary public before the 30 days prior to any given general election and the affidavits are not received by the county clerk until after the 30 days prior to such general election, may such entries be made by the county clerk?"

Section 15 of the Act provides that the elector under certain conditions therein specified may register before a notary public and Sec. 16 provides that the county clerk upon receipt of the affidavits made out in proper form from any justice of the peace or notary public shall forthwith enter upon the Great Register the facts contained in such affidavit, etc. It is my opinion that if the elector makes the proper affidavit before a notary public or justice of the peace before the time provided by law for the closing of the registration books and such affidavit is promptly forwarded by the justice of the peace or notary public to the county clerk, that the county clerk may properly file such affidavits and enter the names of such electors upon the Great Register when received by him, even though it is within the time provided by the law for the closing of the Great Register. The intention of the law, in my opinion is, that no application for registration must be made by the elector, after the time specified in the law for the closing of the Great Register, but where the application has been duly made prior to the time, the final entry by the clerk may be made at such times as the business of his department will warrant.

4. "Must the entry in the precinct, municipal and school district register be made in the presence of the elector?"

The provisions of Section 14 are plain in this regard and are that the county clerk must make the required entries in the Great Register and shall immediately and in the presence of the elector enter the name in the separate precinct registers, etc. This provision is undoubtedly made to avoid mistakes and errors in transferring the name from the Great Register to the various precinct registers.

5. "What is a free holder within the meaning of the provisions of Section 15 of the Act?"

We have heretofore held that a free holder within the meaning of this Act is the owner of a free hold estate. A free hold estate is an estate of inheritance or for life. It is necessary then that the witness to the affidavit of the elector must be the owner of an estate of inheritance or an estate for life. An estate of inheritance is one that descends upon the death of the owner to his heirs. In this connection, however, we have expressed the opinion that a person who has filed upon a homestead under the land laws of the United States and has done everything that is necessary and by law required of him to be done prior to the issuance of a patent, that such person is a free holder within the meaning of this law even though a patent has not been formally issued by the government.

6. "Can a notary public of a county other than the county of residence of the elector take the affidavit provided for in Section 15?"

Section 15 provides that the elector under certain conditions therein

specified may register before a notary public or a justice of the peace of the county in which he resides. We have heretofore expressed our opinion that the affidavit must be made in the county of residence of the elector. By general law, however, a notary public is not confined to the county of his residence but may take acknowledgments and oaths in any county in the state, and it, therefore, follows that a notary resident of a county other than the residence of the elector may take the affidavit of such elector provided the affidavit is taken within the county of the residence of the elector.

7. "Does a notary public receive pay for registering women?"

Section 16 of the Act contains the provision for the pay of the notary and the justice of the peace and it provides that he shall not charge the elector anything but that he is entitled to receive from the county 25c for each elector registered by him, "whose affidavit has been duly filed with the county clerk, who has voted in the precinct where he registered at the next ensuing election." This does not limit the notary public or justice of the peace to those electors who voted at the general election but provides explicitly that if the elector votes at the next ensuing election the notary or justice of the peace shall be entitled to his per capita fee. But the section further provides as to the time of auditing of the bills by the county commissioners that they shall be audited after each general election. If then the notary takes the affidavit of a woman elector under the provisions of Sec. 15 and such woman votes at the general school election following the date of registration, such notary would be entitled to the fee for registering such woman, as other electors.

8. "Must women register every two years?"

By the provisions of the law the county clerk every two years must make a new "Great Register" and into this register he must enter the names of those electors previously registered who have voted at the preceding general election together with the names of those electors who may register subsequent thereto. Women not being eligible to vote at the general election referred to would not be entitled to have their name transferred to the Great Register prepared by the county clerk after each general election and for that reason women are required to register every two years.

9. "By the provisions of Sec. 18 the county clerk is required to close books of registration prior to the election therein specified and in red ink write on the line below where the last elector registered "closed on account of election to be held on _____." Is the county clerk to write such notice or may he use a stamp for that purpose?"

In my opinion the county clerk may use a stamp if he deems it necessary or more suitable or convenient in the performance of his duties.

10. "May electors of this state who are employed in government positions at Washington, D. C., make affidavit as to their qualifications and have their names entered upon the Great Register?"

In my opinion this cannot be done. The provisions of Section 15 of the Act require that the affidavit shall be taken in the county of residence and be witnessed by two free holders of the county.

11. "Must the county clerk and recorder enter the name of the elector in full upon the Great Register?"

The Act in question provides that the entry in the Great Register must show the name in full of the elector. This is for the purpose of identification but the duty of the county clerk ceases when he has asked the elector his name in full and the answer of the elector must necessarily be binding upon the clerk.

12. "Sec. 29 of the Act provides that the clerk for making and preparing the two copies of the precinct register shall receive 2c for each and every name entered thereon. Will the clerk receive 2c per name for both copies or 2c per name for each copy?"

In my opinion the 2c is for each and every name irrespective of the number of times the same is required to be entered and that necessarily the clerk will receive 2c per name for both copies and not 2c per name for each copy.

13. "Does the registration act apply to special city elections?"

We have heretofore discussed this feature and have given as our opinion that the law does not apply to special city elections.

14. "When do the registration books close for special county elections?"

Sec. 33 of the Act provides for the registration list to be used at any special county election but we have heretofore intimated that this section is invalid but there is no special time mentioned in the act for the closing of the books of registration prior to any special election and I would suggest that they be closed a reasonable time and in all probability the provisions of the law for the closing of the books prior to a general county election, to-wit: thirty days, may be considered as a reasonable time for the closing of the books prior to a special county election.

These conclude, I believe, the questions propounded by your committee at Missoula, but before closing this communication I desire to call the attention of the clerks to the provisions of Sec. 18 of the Act wherein the following appears relative to the notice to be published by the county clerk, viz: "and must also state that electors may register for the ensuing election by appearing before the city clerk at his office, etc." Although the word "city" appears in the original bill and in the bill as engrossed, undoubtedly from the context of the Act the word "city" should be substituted by the word "county," for no where in the law is the "city clerk" authorized to register electors, and I would suggest to the county clerks in getting up their notices of the closing of the registration book to insert therein the words "county clerk" and not the words "city clerk."

There are numerous duties in the Act prescribed for the judges of election and in notifying the various judges of election of their appoint-

ment as such judges, attention should be by you called to the various provisions of the law relative to their duty.

Yours very truly,

ALBERT J. GALEN,

Attorney General.

W. S. TOWNER, Assistant Attorney General.