Elections, Primary Nominating. Primary Election, Proceedings Where Law Cannot Apply. Public Office, Nominations for.

Whenever the provisions of the primary law relating to nominations for public office cannot be made to apply by reason of extraordinary conditions arising after the time for filing nominating petitions for the regular biennial primary nominating election, and before the ensuing general election, that always in such cases, the provisions of Section 521, 522, 523, 524 and

525, R. C. must be held to govern, also that political committees may fill vacancies as stated in the opinion.

October 2, 1914.

Hon. Paul Babcock,
County Attorney,
Plentywood, Montana.

Dear Sir:

I have your letter of the 19th instant, as follows:

"Sheridan county will on January 1, 1915, become a county of the Fifth Class, in accordance with a resolution passed by the Board of County Commissioners at the September meeting, being a resolution passed in accordance with the provisions of Sec. 2975 of the Revised Codes.

"Chapter 112 of the 1913 Session Laws, amending Sec. 1957, provides for a county auditor in counties of the fifth class.

"Sec. 3101 of the Revised Codes provides for the election of county auditors at the 1892 General Election, and quadrennially thereafter; this section, if strictly followed, would not permit of the election of a County Auditor, for Sheridan county until the general election held in November, 1916.

"Furthermore: As section 2975 of the Revised Codes provides 'That such classification shall not change the government of the county then in existence until the first Monday in January next succeeding,' it is my opinion that no county auditor can be elected at the November, 1914, general election for this county, and that any certificates of nomination for such office which may be filed should be disregarded by the clerk and recorder in making up the official ballot; and that the Board of County Commissioners should appoint a county auditor to qualify and assume the duties of the office on the first Monday of January, 1915.

"I am advised that at least one, and possibly more, candidates will file petitions for nomination as county auditor and request that the name be placed on the official ballot this fall for this office, and I would therefore be pleased to be advised by you as to your opinion in the matter. Furthermore, as the time is short, I would appreciate it if you would, upon reaching a decision, wire me as to the substance of the same."

You are advised that in as much as a general election will be held prior to the first Monday of next January, the office of county auditor may be filled by electing a person qualified to hold the office at such election. The serious proposition involved in the case is to define a method whereby candidates for the office of county auditor may have their names printed upon the official ballot to be used at the general election. There appears to be no provision of the law directly authorizing nominations to be made. The primary election has already been held, and manifestly none of the provisions of the primary law may be invoked. On the other hand, the primary law expressly forbids nominations to be made by the convention or primary meeting method.

Again Section 542, Revised Codes of Montana, 1907, which provides for independent and non-partisan nominations by petition, requires that such petition be signed by electors residing within the state and district or political division in and for which the officer is to be elected, and that the signatures must be not less than five per cent of the number of votes cast for the successful candidate for the same office at the next preceding election, and in as much as the office of county auditor is a newly created office, there has never been a candidate for that office voted for at any preceding election, and it is therefore, impossible to have a petition signed by the requisite per cent of signatures necessary to constitute a valid petition. Political committees under the primary law are permitted to fill vacancies only when caused by death or removal from the district, and not otherwise. It therefore appears that nominations may not be made under any of the provisions of the law referred to. The Supreme Court, in the case of State ex rel Holiday vs. O'Leary, 43 Mont. 157, has declared that 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 Sections 5 and 26 of our Bill of Rights, and void, and that it is not an answer to say that the elector may vote for the person of his choice by writing the name on the ballot.

In the case referred to the Non Partisan Judiciary Act was held to be unconstitutional. Among the reasons assigned, appear the following:

> "This Act prohibits the nomination of a candidate for judicial office in any manner ,except by petiton signed by electors of the municipality in numbers not less than five per cent of the vote cast for the successful candidate for the same office at the last preceding election. In every instance of a newly created municipality, there has not been a preceding election, or any successful candidate for the same office, and therefore, this Act prohibits the electors in such municipality from participating in the nomination of any candidate for that office. The same thing is true of a newly created judicial district. A candidate for nomination for district judge in such district will be confronted by conditions with which it is impossible to comply. He cannot be nominated, except by petition, and he cannot be nominated by petition, because he cannot determine, and neither can the secretary of state, the number of signatures necessary to secure his nomination, since there never was a preceding election for the same office in the same district."
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> State ex rel Holliday v. O'Leary, 43 Mont., 157.

In summing up, the court said:

> "The illustrations given only serve to show that Chapter 113, is so far deficient in its provisions that it cannot be made to operate uniformly throughout the state; and, if it cannot be made to operate in any portion of the state, then as to such portion, the electors are denied the right to participate in the nomination for judicial candidates, and 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 Sections 5 and 26 of our Bill of Rights, and void. (State ex rel Adair v. Drexel, 74 Neb. 776, 105 N. W. 174; State ex rel Ragan v. Junkin, 85 Neb. 1, 122, N. W. 473, 23 L. R. A. n. s., 839; People ex rel. Breckon v. Election Commissioners, 221 Ill., 9, 77 N. E. 321; Rouse v. Thompson, 228 Ill. 422, 81, N. E. 1114.)

"It is not an answer to say that the elector may vote for the person of his choice by writing the name on the ballot even though such person cannot be nominated for the office. It is in the infringement of the right of the electors to nominate candidates that this measure offends against the letter and spirit of our constitution."

In view of the guarantee of our Bill of Rights, and the decision of our Supreme Court in the O'Leary case, I am of the opinion that the electors of Sheridan county cannot be deprived of the right to nominate candidates for the office of county auditor, and I am of the opinion that this may be done under the following rule which must be held to apply, viz: whenever the provisions of the primary law relating to nominations for public office cannot be made to apply, by reason of extraordinary conditions arising after the time for filing nominating petitions for the regular biennial primary nominating election, and before the ensuing general election, that always in such cases, the provisions of Section 521, 522 and 523, Revised Codes of 1907, must be held to be in full force and effect; that in addition, political committees, properly constituted may fill vacancies according to the usual custom, without being subject to the restrictions imposed by the provisions of the primary law; also that independent and non-partisan candidates may have their names printed upon the official general election ballot, provided petitions are filed signed by at least five per cent of the registered electors of the electoral district.

This latter view, with reference to independent or non-partisan candidates, may upon first view seem to be in conflict with the decision of our Supreme Court in the O'Leary case, but it must be remembered that the main point decided in that case is that electors may not be deprived of the right to nominate candidates for public office.

Section 524, Revised Codes of Montana, 1907, clearly recognizes the right of persons to run for public office as independent and non-partisan candidates. It prescribes the conditions under which their names may be printed upon the official ballot. Where, however, it is impossible to comply literally with the terms of the law, I believe it to be sufficient if the spirit of the law be carried into effect. If, therefore, a petition be signed by five per cent of the registered elcetors, it cannot be gainsaid that such petition does not contain the equivalent of five per cent of the voters who voted for the successful candidate for the same office at the last preceding election.

Yours very truly,

D. M. KELLY,
Attorney General.