

**Incorporation of Town, Validity of Election for. Election,
Validity of for Incorporation of Town.**

Although Sec. 33, Chapter 113, Laws of 1911, is unconstitutional, the result of the election cannot now be challenged unless the party challenging can show that a different result would have been reached but for the fact that qualified electors were prevented from voting.

February 24th, 1913.

Hon. Vard Smith,
County Attorney,
Livingston, Montana.

Dear Sir:

I beg to acknowledge receipt of your communication under date of the 20th inst., wherein you submit the following question:

"Is an election for the incorporation of an unincorporated town void for the reason that some electors were not permitted to vote thereat on account of not being allowed to register therefor, where it does not appear that such failure to permit registration was caused by any bad faith on the part of the officers conducting the election and where it does not appear that the result of the election would have been otherwise had such persons been permitted to vote thereat, provided that such election is held in other respects in accordance with the law?"

There are many authorities supporting the view that such an irregularity does not render the election void unless it can be shown that a different result would have been reached were it not for the

irregularity complained of. Some of these authorities you refer to in your letter. I desire, however, to call your attention particularly to the case of Potter v. Furnish et al. decided by the Supreme Court of Montana on December 2nd, last, wherein this same question was before the supreme court of this state, and the court in disposing of it said:

"It is a rule of well nigh uniform recognition that, after an election has been held, a party will not be permitted to challenge it unless he can show that a different result would have been reached but for the conditions of which he complains."

128 Pac. 542.

You are therefore advised that although in my opinion Sec. 33 of Chap. 113 of the Laws of 1911, is unconstitutional, and should have been disregarded by the county clerk in making up his official register and check list, nevertheless the result of the election cannot now be challenged unless the party challenging it can show that a different result would have been reached but for the fact that qualified electors were thereby prevented from voting.

Very truly yours,

D. M. KELLY,
Attorney General.