

**Elections—Primary Elections—Acceptance of Nomination
—Canvass—Nomination.**

It is the duty of the county clerk and the two justices called by him to his assistance to canvass the returns of primary nominating elections within three days after the election and to notify the nominees forthwith of their nomination. When this has been done, a person whose name was written on the ballot, and thereby received the nomination, must accept the nomination within ten days after the election. Under the circumstances mentioned in the opinion such candidate was not precluded from accepting the nomination because his acceptance was not filed within said ten-day period.

William C. Davis, Esq.,
County Clerk and Recorder,
White Sulphur Springs, Montana.

August 1, 1930.

My dear Mr. Davis:

You state that the returns of the primary nominating election held on July 15th were not canvassed until July 24th and that notices of

nomination were sent out on July 25th. It appears that a person was nominated for an office by the electors writing his name upon the ballot at the primary nominating election.

In our telephone conversation you stated that this nominee desires to accept the nomination but that, owing to the fact that the notice of his nomination was not mailed out of your office until the 25th day of July, he did not receive the notice within the 10-day period following the election allowed by Section 640 R.C.M. 1921, as amended by Chapter 125, Laws of 1927, for the filing of acceptances of nominations.

You also state that the law provides that the canvass of primary returns may be made within ten days after the primary election and also provides that nominees may accept the nominations if within ten days after the primary election they file their acceptances in your office and make payment of the required fee. You inquire if you may permit the filing of the acceptance of nomination by this candidate, the said 10-day period having expired.

In the first place you are in error in believing that the law permits the canvass of primary nominating election returns to be made at any time within ten days after the date of the election. Section 790, R.C.M. 1921 directs that the canvass of **general election** returns shall be made within ten days after the close of the election, but this provision applies only to the canvassing of returns of general elections. The law relating to the canvassing of returns of a primary nominating election is found in Section 654, R.C.M. 1921, and this provides that the returns shall be canvassed within three days after the close of the primary nominating election. This is a special statute and applies to primary nominating elections only, and it has nothing to do with general elections nor does Section 790 have anything to do with primary nominating elections, said last-mentioned section applying only to general elections.

It is apparent that the person who was nominated by the electors writing his name on the ballot in the primary nominating election did not accept the nomination within ten days after the election because of the failure of the county clerk to discharge his duty, under Section 654, at the time required by said section. By providing that the canvass of these returns shall be made within three days after the close of the primary nominating election and the forthwith notification of the nominees of their nomination, the time allowed by law for the acceptance of nominations by persons whose names have been written on the ballot by the electors, to-wit, ten days from the date of election, is ample, and the situation under consideration would not have arisen had the returns been canvassed and the notifications mailed within the time required by law.

The law presupposes that before a person is required to accept or decline a nomination, such nomination shall first have been officially ascertained to have been made, and that the nominee will have been officially informed of his nomination in ample time within the 10-day period to permit of his acceptance within that period. After such nomination has been officially ascertained by a canvass of the returns,

made at the time provided by law, and notification has been given the nominee at the time provided by law, said nominee must then accept, within the 10-day period following the close of the election, the said nomination or his right to accept is thereafter barred. In this case the nominee did not have an opportunity to accept the nomination within such period because he had not received any official notification of his nomination in time to permit of such acceptance within that period. In fact, it might be that he did not even have unofficial notice of his nomination, but whether this is so or not he could not accept the nomination prior to the time that the county canvassing board has found that such nomination had been made or prior to an official notification of his nomination. It is the nomination that has been found by the board to have been made, of which the nominee has been given official notice, that he is required to accept within ten days after the close of the primary nominating election if he desires his name printed on the ballot, not a possible or probable nomination or one ascertained from unofficial sources by himself or his friends.

As the statutory forfeiture of the right to accept the nomination is based upon the conditions that the nomination shall first have been officially ascertained to have been made by the canvass of the election returns and the nominee shall first have been officially notified of such nomination, and as these conditions were, in this case, not performed in the time required by law nor within sufficient time prior to the expiration of the 10-day period, to permit the nominee to accept his nomination within that period, it appears to me that the nominee's failure to accept the nomination within the 10-day period is ascribed entirely to the fault of the officers charged with the duty of making the canvass and giving the notification and that the failure to accept the nomination within the 10-day period cannot be deemed to amount to a voluntary or a negligent act of omission on the part of the nominee. The purpose of the law is to permit the nominee to accept the nomination if he desires to do so, presupposing, of course, all of the statutory precedent steps have been taken. In this particular case if it was held that the nominee is barred the purpose of the act would be defeated as his failure to accept the nomination comes not from any omission on his part, but is due solely to the failure of other officers to comply with the law.

A holding that this nominee is barred, under the existing circumstances above set forth, from accepting the nomination after the 10-day period had elapsed would have to be predicated upon a few words selected from a part of a statute without taking into consideration the other parts bearing upon the same subject and which explain and modify, and show the intent and purpose of the words so selected. When the whole law upon the subject is read it seems to me, as above stated, that the 10-day period of limitation for filing acceptances of nominations applies only when all antecedent steps required to be taken by the canvassing board and the clerk have been taken either at the time specified in the statute or within such time as will permit the nominee to accept the nomination within the 10-day period after he has received the notification of his nomination. To hold otherwise would entail serious

consequences. Canvassing boards can be compelled by mandamus to do their duty when they fail to canvass the returns, but what would such action avail a nominee who has been nominated by the electors writing his name on the ballot, if, by virtue of the 10-day period aforesaid he is barred from accepting the nomination, when, after that period has expired, in response to the writ, the board finds he has been nominated? The board may likewise be compelled by like writ to re-canvass the returns which likely would take place after the 10-day period has expired, but what would such action avail a nominee who, upon such re-canvass, was found to be nominated, if he is barred by the 10-day provision above referred to, from accepting the nomination? As courts will not do an idle thing they would refuse to issue the writs because a compliance with them and a finding of nomination would avail the nominee no relief; so the result of such a holding would be that the willful or negligent act of the canvassing board or clerk could not only defeat the will of the electors and deprive the nominee of his legal right to accept the nomination but it would also close the courts to them for redress to which, by law, they are entitled.

It is therefore my opinion that the nominee, under the circumstances above set forth, should be permitted to accept the nomination, even though more than ten days have elapsed after the date of the election, by filing his written declaration of acceptance in the office of the county clerk. Of course, he must pay the same fee that he would have been required to pay had he filed his petition for nomination for the same office.

Very truly yours,
L. A. FOOT,
Attorney General.