

Bond Elections—City Bond Election—Elections—Registration—Closing of Registration—Water Bond Issue—Cities and Towns.

The provisions of sections 566, 567, 568, 571, 578, 582, 583 apply to city elections.

Chapter 47, laws of 1929, applies to bond elections of cities and towns.

Failure to observe the above statutory provisions renders election void.

Ray Nagle, Esq.,
City Attorney,
Helena, Montana.

September 24, 1930.

My dear Mr. Nagle:

You have submitted to this office for examination and approval the transcript of the city of Helena relating to its recent proposed water bond issue in the amount of \$200,000.00.

The election was held upon this matter in the city of Helena on the 7th day of July last. At this election 1,110 votes were cast, 573 for the proposition and 437 against it, giving a majority of 136 votes for the bond issue.

I regret that I am unable to approve the proceedings for the reason that the election was not conducted, in my opinion, as required by law. The defects were not merely formal defects but the disregard of certain statutory provisions which govern city elections, particularly city bond elections.

The petition calling the election was signed by 850 persons. This petition was checked by the city clerk with the assessment roll and the last list of registered electors and was certified to contain 846 qualified registered electors of the city of Helena who were taxpayers upon property in said city and whose names appeared on the assessment roll for the year next preceding, to-wit, the year, 1929. It was also certified that there were a total of 2,512 qualified registered electors, who were taxpayers, within the city of Helena. A similar certificate was prepared by A. J. Duncan, county clerk and recorder. The check was no doubt made from the registered electors and taxpayers as disclosed by the record of the clerk and recorder.

The petitions circulated numbered eighty-eight separate sheets. These separate sheets no doubt were intended to constitute one single petition. The signatures, however, are not certified to by anyone who circulated the petitions or who saw the persons sign the same.

The transcript contains a certificate by the deputy treasurer, who undertakes to certify that the signatures are genuine by reason of having compared them with the original signatures on the official registry books. This individual does not attempt, however, to qualify as a hand-

writing expert and it is doubtful if such a certificate should be accepted.

The election was called by ordinance no. 1142 at a meeting on June 9, 1930. The election, as before stated, was held on the 7th day of July. No attempt was made to close registration. A number of registration agents were appointed and a considerable number of persons registered, apparently upon the theory that it was necessary to register especially for this election. The total number registered was 1,464. However, the election was not confined to those who registered but anyone was permitted to vote who appeared at the polls and subscribed to the following form of oath:

"I do solemnly swear that I am a citizen of the United States, that I am 21 years of age, and have resided in the State of Montana for one year, in the City of Helena six months, immediately preceding the approaching election, that I am an actual resident of the.....Ward of said City and have resided in said Ward more than thirty days prior to July 7, 1930, and now reside at..... that I am a taxpayer of the City of Helena and have paid taxes upon property owned by and assessed to me on the assessment roll of the City of Helena, Montana, next preceding the election to be held July 7, 1930."

I am informed that the same affidavit was required of those who appeared to register.

Section 5278 provides that:

"* * * taxpayers only, as defined by section 544 of this code, shall be entitled to vote on questions concerning the construction, purchase, or securing of a water plant, water system, water supply, or sewerage system."

Section 544, referred to above, provides:

"The payment of a tax upon property by any person assessed therefor on a county or city assessment roll next preceding the election at which a question is to be submitted to the vote of the taxpayers of the state, or to the vote of the taxpayers of such county or city, or any subdivision thereof, constitutes such person a taxpayer at such election."

This section was adopted as a part of the political code of 1895 and was, no doubt, intended to carry out the provisions of section 12, article IX of the constitution, which provides:

"Upon all questions submitted to the vote of the taxpayers of the state, or any political division thereof, women who are taxpayers and possessed of the qualifications for the right of suffrage required of men by this constitution, shall equally with men have the right to vote."

It might be seriously questioned whether any person could be denied the right to vote who had not in fact paid his taxes.

In the case of *State ex rel. Woodward vs. Moulton, et al*, 57 Mont. 414 at 418, the supreme court quoted with approval the following:

“A ‘taxpayer’ is one who owns property within the municipality, and who pays a tax, or is subject to and liable for a tax.” (Citing cases.)

If this section requires the payment of taxes as a qualification to vote at an election confined to taxpayers it would be particularly inapplicable where the election was held after the completion of the assessment by the state and county boards of equalization which is usually done by the latter part of August or the first of September. Taxes are not due until the 30th of November and are rarely paid by anyone before that time, except in the case of personal property. A ‘taxpayer’ has been defined as a person chargeable with taxes; person owning property in state subject to taxation and on which he regularly pays taxes. (*Castilo vs. State Highway Commission of Missouri*, 279 S. W. 673, 675, 312 Mo. 244.)

“* * * ‘taxpayer’ being one who pays, or who is liable to pay, tax.” (*State on inf. Bellamy ex rel. Harris vs. Menegali*, 270 S. W. 101, 103, 307 Mo. 447.)

State vs. Moulton, 189 Pac. 59, 61, 57 Mont. 414.

Section 1253, which applies to cities and towns, provides:

“In all elections hereafter held for the issuance of bonds of any school district, town or city, only qualified registered electors who are taxpayers upon property therein, and whose names appear on the assessment roll for the year next preceding such election, shall be entitled to vote thereat.”

Chapter 47 of the session laws of 1929 amending chapter 98 of the eighteenth legislative assembly provides:

“That from and after the passage and approval of this Act, only such registered electors of the city, town, school district, or other municipal corporation whose names appear upon the last preceding assessment roll shall be entitled to vote upon any proposal to create or increase any indebtedness of city, town, school district or other municipal corporation, required by law to be submitted to a vote of the electors thereof.”

Nothing is said in this section in regard to paying taxes as a qualification to vote. It must be construed to amend section 544 if section 544 could be construed as requiring the actual payment of the taxes as a prerequisite to the right to vote. In my opinion, no elector can be deprived of the right to vote by reason of not having paid his taxes if he is assessed with a tax on the last completed assessment roll and is otherwise qualified as an elector.

How many voters were precluded from voting by reason of the requiring of the oath above referred to does not, of course, appear upon the record. It has been suggested that the number who appeared and offered to register or were refused the right to vote at the polls by

failure to meet this requirement would not affect the total vote. However, this office cannot go into this question; this by reason of the fact that it is not a judicial one and its findings would not be conclusive upon any court, and, second, it cannot determine how many failed to register and vote by reason of the fact that they knew of the provision of the oath they were required to take and could not meet the requirement.

Failure to Close Registration

The law requiring registration and closing of registration before any election, applies to all city elections by reason of the following provision of statute:

“Section 566. The county clerk shall close all registration for the full period of forty-five days prior to and before any election.”

By the same section he is required to publish notices of the closing of registration for full thirty days before the time the registration should be closed. This makes a total of seventy-five days that must expire before an election can be held where registration is necessary.

Under section 567,

“The county clerk shall, at least thirty days preceding any election, cause to be printed and posted a list of all electors entitled to be registered, as shown by the official register.”

Section 578 provides:

“No person shall be entitled to vote at any election mentioned in this act unless his name shall, on the day of the election, except at school elections in school districts of the second and third class, appear in the copy of the official precinct register furnished by the county clerk to the judges of election.”

See also: Sections 568, 571, 578, 582, 583. Title to chapter 113, laws 1911, and chapter 122, laws 1915, as indicating the general registration act was intended to apply to city elections.

Section 5009 provides:

“The council must provide by ordinance for the registration of electors in any city or town, and may prohibit any person from voting at any election unless he has been registered; **but such ordinance must not be in conflict with the general law providing for the registration of electors, and must not change the qualifications of electors except as in this title provided.**”

Section 5011 provides:

“That all city elections must be conducted according to the general laws of the state.”

Section 5279 provides:

“Such election (elections for bond purposes) must be conducted and canvassed and the returns made in the same manner as other city or town elections.”

Sections 5009 and 5279 were adopted as part of the 1895 codes.

No attempt was made to comply with section 2 of chapter 47 of the laws of 1929 which provides:

“The county clerk shall, immediately after the closing of the registration books of his county preceding such election, as provided by law, prepare lists of the registered electors of the city, town, school district, or other municipal corporation whose names appear upon the last preceding assessment roll, and shall prepare poll books therefor as provided by section 568, Revised Codes of Montana of 1921, and furnish copies thereof to the city, town, school district or municipal corporation within which such election is to be held for which he shall receive compensation as provided in section 571, Revised Codes of Montana of 1921. When the election is upon a proposal to create or increase the indebtedness of a city, town, school district or other municipal corporation, the county clerk shall deliver such lists to the clerk of the city, town, school district or other municipal corporation, holding such election, and it shall be his duty to post such lists in the manner provided in section 567.”

This chapter not only confirms other sections cited in regard to closing registration, but is the only means provided by law whereby authentic lists of names of electors, who are both registered and taxpayers, can be obtained for conducting a valid election. The poll books are made up from this list which the county clerk is required to furnish. These lists are required to be posted as provided by section 567 for a period of 30 days preceding the election in each election precinct.

The posting of these lists for 30 days preceding any election is to enable electors to check them for fraudulent registrations as well as to correct errors and omissions. They are of the utmost importance and cannot be dispensed with by election officers if a valid election is to be held. Courts generally have held similar requirements mandatory in order to validate an election, particularly in the case of a special election such as this.

25 Mont. 156;

63 Ore. 222, 127 Pac. 32;

240 Pac. 418, 431;

Marsden vs. Harlocker, 49 Ore. 90, 94, 85 Pac. 328, 102 Am. St.

Rep. 786;

Roberts vs. Murphy, 144 Ga. 177, 86 S. E. 545;

20 C. J. 97, sec. 82, notes 37, 38;

Hill vs. Hartzell (Ore.) 1927, 252 Pac. 552, 554.

The failure of the city to comply with these mandatory statutory provisions, in my opinion, is sufficient ground for this office to refuse to approve the bonds. It is only necessary in refusing approval that it reasonably appear that matters which might affect the validity of the bonds should they be contested in court, either before or after their issuance, appear. We do not undertake to say that the bonds if issued would be declared illegal by any court if contested, but only that their purchase with trust funds belonging to the public schools and other in-

stitutions cannot be approved by this office where their legality is subject to question.

The state board of land commissioners has authority to sell any bonds in which these funds are invested and any question regarding their legality would affect the purchase price of the bonds at such re-sale. In this case the state's bid was so low that it could not be scaled down by reason of questionable validity upon a re-sale.

I am returning the transcript herewith.

Very truly yours,

L. A. Foot,
Attorney General.