Opinion No. 292.

Elections—Primary Ballot—Write in Votes—Right of Electors.

HELD: An elector has the right to write in for chief justice of the supreme court the name of a person who is a candidate for associate justice and such vote must be counted.

June 23, 1938.

Hon. Sam W. Mitchell
Secretary of State
The Capitol

Dear Mr. Mitchell:

You have asked for my opinion on the question whether a voter may write in, on the primary ballot for Chief Justice, the name of any of the candidates for Associate Justice and, if so written in, whether the vote may be counted.

While the law does not expressly prohibit the holding of two compatible offices by the same person, the offices of chief justice and associate justice of the supreme court are obviously so incompatible that one person would not be legally permitted to hold both offices; therefore, if a person should be nominated for both offices he could not accept the nomination for both. Does it follow that when a person is a candidate for one office, the voters themselves may not nominate him for another incompatible office?

When a person files his petition for nomination for associate justice, or any office, he must declare that he will accept the nomination and will not withdraw (Sections 812.3 and 641, R. C. M. 1935). Obviously he could not, in good faith, file a petition for two incompatible offices and declare in each one that he would not withdraw in the event he should be nominated. Should a candidate for associate justice receive the highest number of votes, and be nominated as such, he would therefore be required to accept the nomination and he would not be permitted to withdraw and accept the nomination for chief justice in the event he also received enough "write in" votes to nominate him for that office. Should he not be nominated as associate justice, the office for which he has filed, there would be nothing to prevent him from accepting the nomination for chief justice unless the "write in" votes for him, as chief justice, may not be counted.

We are unable to find any specific provision in the statutes which would authorize the judges of an election to refuse to count "write in" votes for an office, when the person whose name is written in is a candidate and has filed his petition for nomination for another office. Nor are we able to find any statutory reason for holding that such authority exists by necessary implication. In the absence of clear, express or implied, authority, the will of the voter should not be thwarted by judges of election. If any presumption exists, it should be in favor of the right of the voter to nominate the persons of his choice for the offices to be filled. A failure to afford this right might be considered a serious interference with the freedom of the exercise of the right of franchise guaranteed by the Montana Constitution (Article III, Section 5). Every voter should be left free to vote for candidates of his own choice by giving him the opportunity to write in or insert the names of such candidates (9 R. C. L., Elections—1054, Section 70).

Since we find nothing expressly, or by necessary implication, in the law which would prevent a candidate for associate justice from accepting the nomination for chief justice, in case he failed of nomination as associate justice, and since we think, under the spirit of the primary law, every voter should be permitted to express his will in making nominations and every presumption should be indulged in favor of the legality of his choice, we are of the opinion that a voter may write in, on the primary ballot for chief justice, the name of any of the candidates for associate justice of the supreme court, and, if such name is written in and the ballot is properly marked, the vote must be counted.