

Opinion No. 330.

**County Seat—Removal—Sufficiency of
Petition for Removal, How Test-
ed—When Petition to Be
Checked—Who May
Check Petition.**

HELD: The poll books of the last primary nominating election may not be used in testing petitions for removal of the county seat. Only the poll books of the last general election, meaning the biennial regular general election in November, may be used.

2. The board of county commissioners may check the sufficiency of the petition for removal of a county seat prior to the date of the hearing.

3. The board may employ help to assist them in checking the petition for removal of a county seat.

Mr. Frank M. Catlin
County Attorney
Wolf Point, Montana

Dear Mr. Catlin:

You have submitted the following:

"A petition was filed on July 30, 1938, with the county clerk of Roosevelt County, Montana, praying for the removal of the county seat of Roosevelt County, Montana, from its present location at Wolf Point, Roosevelt County, Montana, to the City of Poplar, Roosevelt County, Montana. Said petition will be presented to the board of county commissioners of Roosevelt County, Montana, for action thereon, at its regular meeting on Monday, October 3, 1938. * * *

"1. Are the poll books of the last primary election, held last July, the poll books to be used in comparing such petitions? This question being

based upon whether the primary election held in July is considered a general election.

"2. Can the board of county commissioners check the sufficiency of the petition filed, prior to the date of hearing, which is October 3, 1938?

"3. If the board can check said petition as to its sufficiency before October 3, 1938, may the board employ help to assist them in checking said petition, or must such services be performed by them personally as county commissioners?

"I might call your attention to the fact that, if no action may be taken by the board, or those assisting them, prior to October 3, 1938, it will be almost an impossible task to check said petition in sufficient time to have the matter passed upon at our November election."

Section 4370, R. C. M. 1935, provides:

"If the petition is signed by sixty-five per cent of the taxpayers of such county, the board of county commissioners must at the **next general election** submit the question of removal to the electors of the county; provided, that the term 'taxpayers' used in this section shall be demed to mean 'ad valorem taxpayers,' and that for the purpose of testing the sufficiency of any petition which may be presented to the county commissioners as provided in this section, the county commissioners shall compare such petition with the poll-books in the county clerk's office constituting the returns of the **last general election** held in their county, for the purpose of ascertaining whether such petition bears the names of sixty-five per cent of the taxpaying voters listed therein; * * *" (Emphasis ours.)

In order to answer your first question, it becomes necessary to determine what is meant by the words, "the last general election." It will be noted that the section above quoted mentions the "next," as well as the "last" general election. Section 531, R. C. M. 1935, reads:

"There must be held throughout the state, on the first Tuesday after the first Monday of November, in the year eighteen hundred and ninety-

four, and in every second year thereafter, an election to be known as **the general election.**" (Underscoring ours.)

Section 632, R. C. M. 1935, reads:

"On the third Tuesday of July preceding any **general election** (not including special elections to fill vacancies, municipal elections in towns and cities, irrigation district and school elections) at which public officers in this state and in any district or county are to be elected, a primary nominating election shall be held in accordance with this law in the several election precincts comprised within the territory for which such officers are to be elected at the ensuing election, which shall be known as **the primary nominating election**, for the purpose of choosing candidates by the political parties, * * *." (Underscoring ours.)

In *Arps et al., v. State Highway Commission et al.*, 90 Mont. 152, 300 Pac. 549, it is true the Supreme Court held that a certain election at which a law creating a state indebtedness in excess of \$100,000 was submitted to a vote of the people for their approval under Section 2, Article XIII of the Constitution, was a general election within the meaning of said section. The court said (p. 160):

"We think the 'general election' named means a state-wide election at which all the people entitled to vote may vote upon a question affecting them as a whole."

The court did not determine what was meant by the phrase "the general election" or "the next general election," but, on page 161, did say, "the general election, which, as ordinarily understood, refers to the election whereat the people by vote select their officers. (See *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162.)" (Emphasis by the court.) In other words, the court indicated that the phrase "the general election" refers to the election whereat the people, by vote, select their officers, not their candidates. In reading the *Kehoe* case, above cited, it is apparent that the court referred to the phrase "the next general election" as the November election. (p. 588.)

In view of Section 531, *supra*, which defines "the general election" and definitely fixes it in November in every even-numbered year, as well as the cases above cited, and the general and well understood meaning of the phrase, we are forced to the conclusion that the legislature in using the phrase "the last general election" in said Section 4370, meant the biennial regular general election held in November.

Section 34, Article VIII and Section 5, Article XVI of the Montana Constitution use the phrase "until the next general election" in fixing the tenure of certain persons appointed to fill vacancies in office. It has never been contended that these words as there used referred to the primary nominating election. On the contrary, they have generally been held to refer to the biennial regular election in November. See *State ex rel. Rowe v. Kehoe*, 49 Mont. 482, 144 Pac. 162; *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94 and *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932. These words cannot have any different meaning in Section 4370.

It will be noted also that this section (4370) has been carried in our Codes since 1895, where the phrase "last preceding general election" was used; whereas, our primary election law was not enacted until November, 1912. When the law was enacted, therefore, this phrase could not have referred to the primary nominating election as it was not then in existence. The intention of the legislative assembly which first enacted Section 4370 could not be changed by the subsequent enactment of the primary law.

We have reached the above conclusion reluctantly and only after careful study and search of the authorities, for the reason that the effect of our opinion, if correct, may defeat the petition in question for the reason that the "poll books in the county clerk's office constituting the returns of the last general election" (November, 1936) probably have been destroyed in accordance with the mandate of the Twenty-fifth Legislative Assembly (Chapter 172, Laws of 1937). No other records may be used by the county commissioners in testing the sufficiency of the petition.

In *Ainsworth v. McKay*, 55 Mont. 270, 175 Pac. 887, it was held that

the board of county commissioners was limited in its investigation of the sufficiency of a petition for the removal of the county seat to a comparison of the names appearing thereon with the poll books to ascertain whether the signers were voters. The court said (p. 274):

“The authority to go beyond the poll-books and assessment-roll to ascertain whether the petition is signed by a sufficient number of persons is not granted in express terms; neither can it be implied from the power which is granted. On the contrary, the language of section 2852 indicates a purpose to confine the board to the particular sources of information mentioned, as they appear in the public records of the county.”

In view of the foregoing opinion on the first question submitted, an opinion upon the other two questions may not be necessary. We think the purpose of the requirement that the petition be presented to the board of county commissioners at least sixty days prior to any action thereon, as provided by Section 4369, R. C. M. 1935, was to give the county commissioners time to test the petition in the manner provided by Section 4370 Id., and we are therefore of the opinion that this question should be answered in the affirmative. We are also of the opinion that the county commissioners may employ such help as is necessary to assist them in checking such petition and that they are not required to do such checking personally, in the absence of statute specifically requiring them to do so. There may be many reasons why the county commissioners may not be able to do such checking personally.