

**Opinion No. 81.****Schools—Trustees—Election.**

HELD: A school trustee in a second class district may be elected by having his name written in, on the ballot, without nomination.

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April 12, 1937.

Mr. Geo. W. McLean  
County Attorney  
Ravalli County  
Hamilton, Montana

Dear Mr. McLean:

You have submitted the following set of facts, requesting our opinion of the law thereon.

In a certain school district in your county, on March 22, notices of an

election of two school trustees at the election of April 5 were duly made and given. On March 26, Mr. Holt, one of the trustees of the said district, holding over, died. At the election a couple of names were written in on the ballot, for the unexpired term of Mr. Holt. Mr. Buck received the greatest number of these votes for Mr. Holt's unexpired term. The district is a second class district. The question to be determined is whether or not Mr. Holt's position has been filled by the election of Mr. Buck, or an appointment to Mr. Holt's unexpired term should be made.

Article 9, Section 10, of the Constitution, and Section 985 R. C. M. 1935 provide for the qualifications of trustees. Section 988 provides:

"In districts of the second class, the names of all candidates for membership on the school board must be received and filed by the clerk, and posted at each polling place at least five days next preceding the election."

Section 990 has reference to elections in school districts of the first class and, among other things, provides:

"The nomination and election of any person shall be void, unless he was nominated at a meeting as above provided, at which at least twenty qualified voters were present, and his nomination certified and filed as aforesaid, and the board of trustees acting as the canvassing board shall not count any votes cast for any person unless he has been so nominated, and a certificate thereof filed as herein required."

Section 996, among other things, provides:

"The clerk shall enter in the tally list, the name of every person voted for as trustee, and the term, and tally opposite his name the number of votes cast for him, and at the end thereof set down in a column provided for that purpose the whole number of votes he received."

Section 998 provides in part:

"When a vacancy occurs in the office of the trustee of any school district by reason of death, the county superintendent shall appoint some qualified person as trustee, who shall

qualify and serve until the next annual school election."

Section 988 provides that all candidates for members of the school board must be received and filed with the clerk.

Comparing Section 988 with Section 990, it would appear that the language in Section 988 is only directory. The Legislature has distinguished between trustees in second or third class districts, and trustees in a first class district, and have added the additional language in referring to a first class district,—**"that unless such persons are nominated, they cannot be elected."**

This opinion should not be construed as holding that Section 990 requires an additional qualification beyond the qualification provided by the Constitution for the election of trustees in a first class district. The question is not before us. This opinion seeks to differentiate between the language used in Section 988 and in Section 990. The Legislature did not intend to provide, that, if trustees were not nominated in a second class district, but were elected by having their names written in, their election would be void, whereas it was the plain intent of the Legislature to make trustees so elected without being nominated, in a first class district, void. When Mr. Holt died, the county superintendent had a right to appoint a competent person to fill his term from the date of his death until the next annual school election, or until April 5, at which time the electors of that district could elect a new trustee.

Section 996 provides the method and manner of counting the votes received by the candidates.

See 20 Corpus Juris, page 105;

Miller v. Childs, 152 Pac. 972;

Littlejohn v. People, 121 Pac. 159.

Our Supreme Court has passed upon the principle of law involved in the case of State ex rel. Kuhl v. Kaiser, 95 Mont. 550, and the court very aptly said: "Section 1001 reveals no plan or purpose to paralyze the peoples privilege of selecting their own trustee, except only in the case where there must be an adjustment by terms, so that the majority thereof shall not expire in any one year, a situation not present here."

It appears in the Kuhl case, *supra*, that the trustees were elected, without nomination, by use of stickers, by the electors at the general school election.

It is my opinion under the facts you have stated, that Mr. Buck was elected for Mr. Holt's unexpired term, and that the advice that you have rendered to the proper official is correct, and I concur and agree with your views therein.