No. 406

TRUSTEES—SCHOOL DISTRICTS, second and third class—
SCHOOL ELECTIONS—CANDIDATES, writing in name on
ballot

Held: Any five qualified electors of a school district of the second or
        third class may nominate as many persons as are to be elected to
        the school board at the ensuing election. Such petitions and the
        names of all candidates must be filed with the clerk at least five
        days next preceding the election, in order to have such names
        appear on the printed ballot as candidates. Any qualified elector
        may write in the name or names of any elector of the district on
        the ballot and such name or names must be counted, the same
        as though the name had appeared on the printed ballot.

                                                    April 21, 1942
Mr. Fred C. Gabriel
County Attorney
Phillips County
Malta, Montana

Dear Mr. Gabriel:

    You have submitted the following question:

        "May a qualified elector in a second and third class school dis-
    trict vote for any candidate he desires, by writing in the name of

such person on the school election ballot, where such person was not a candidate or nominated as provided in Section 988, Revised Codes of Montana, 1935? May such votes so written in be counted by the trustee in canvassing the returns of an election for school trustees?"

In answering your inquiry, it is well to restate at the outset our constitutional provisions relative to such elections.

Section 10 of Article XI, Montana Constitution, provides:

"The legislative assembly shall provide that all elections for school district officers shall be separate from those elections at which state or county officers are voted for."

The foregoing constitutional provision definitely determines school district offices are to be elected and therefore are elective offices.

Section 1 of Article IX provides:

"All elections by the people shall be by ballot."

Section 2 of Article IX provides:

"Every person of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are, or hereafter may be, elective by the people . . ."

Article III of the Constitution of Montana, aften referred to as our "Bill of Rights," provides in Section 5 that:

"All elections shall be free and open, and **no power,** civil or military, shall at any time interfere to prevent the free **exercise of the right of suffrage.**" (Emphasis mine.)

It cannot be doubted the framers of our Constitution had but one thought and intent in writing the foregoing provisions, and that intent was the Supreme right of the individual elector to express his individual preference for a trustee was made certain. We come now to the consideration of the statutory provision of Section 988, Revised Codes of Montana, 1935, which is:

"In districts of the second and third class, the names of all candidates for membership on the school board must be received and filed by the clerk and posted at the polling place at least five days next preceding the election. Any five qualified electors of the district may file with the clerk the nominations of as many persons as are to be elected to the school board at the ensuing election."

Is the intent of Section 988, supra, that no one may be voted for as trustee, except the person or persons so nominated? I cannot believe the legislature had any such intention, for if that is the intention, then the section would fall as being violative of Section 5 of Article III. · The result of such an interpretation would be to deprive the individual elector of his right to express his individual preference for a trustee or trustees by writing in the name or names of the persons for whom he desires to vote.

The more reasonable interpretation of the intent of the Legislature—expressed in said Section 988—is that the requirement of Section 988, supra, is that those seeking to have their names placed on the school trustee election ballot by means of nominating petitions must file them at least five days, next preceding the election, and the clerk must receive, file and post the same. This section provides the procedure to be followed by the candidate and the method and right to have his name printed on the ballot. The emphasis is on the candidate and the word "must" devolves on the clerk to receive and file the candidate's petition, and the candidate desiring his name printed on the ballot must file the petition five days next preceding the election. A time limit must necessarily be

set to provide for the preparation of the ballots and the restriction on the names to be printed on the ballot.

The constitutional provision emphasizes the unrestricted right of the qualified elector to vote for any qualified elector for school trustee, whether the name is printed on the ballot, or by writing in the name of his individual choice for school trustee.

Courts are extremely liberal in upholding school trustee elections as expressing the will of the majority of the voters of the district, where no element of fraud is involved.

> State ex rel. Kuhl v. Kaiser, 95 Mont. 550, 27 Pac. (2nd) 1113.

The Supreme Court of Kentucky, in a recent case, had under consideration a similar statutory and constitutional question and it held:

> "Therefore the requirement, that those seeking to have their names placed on the . . . ballot by means of nominating petitions must file them fifteen days, as the case may be, before the election, is discriminatory and hence, in violation of the constitutional provision that all elections must be free and equal. Emphasis is laid upon the right of the voters to select a candidate of their choosing rather than upon the right of the candidate to have his name printed on the ballot. But this argument overlooks the fact that the voter has the unrestricted right to vote by writing the person's name upon the ballot . . . and that a person is not ineligible to hold office by reason of the fact that his name is not printed upon the ballot."

> Asher v. Arnett (Ky.), 132 S. W. (2nd) 772, 775.

In dealing with a like question, the Supreme Court of Missouri held:

> "The law cannot infringe upon the right of voters to select their public servants at such elections, or to be so interpreted as to limit the range of choice for constitutional officers to persons nominated in the modes presented by it."

> Bowers v. Smith (Mo.), 17 S. W. 761.

This question has been passed upon by two former attorneys general of Montana, holding similar views.

Report & Official Opinions of the Attorney General:

> Vol. 5, p. 477;
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> Vol. 17, p. 92, Opinion No. 81;
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> Vol. 18, p. 233, Opinion No. 226.

I have not overlooked the opinion of a former Attorney General, in Volume 2 of the Report & Official Opinions, at page 72, but I am of the opinion said opinion is not correct and was overruled by the opinion in Volume 5, page 477, with which I agree.

It is therefore my opinion, under the constitution, statutes and court decisions, that—in school districts of the second and third class—any candidate desiring to have his name printed on the ballot as such candidate must have his nomination filed by any five qualified electors of the district with the clerk of the district; that any five qualified electors of the district may file with the clerk the nominations of as many persons as are to be elected to the school board at the ensuing election, that such petitions and names must be filed with the clerk at least five days preceding the election; and that such petitions and names must be received and filed by the clerk.

It is further my opinion that, under the constitutional provisions, at an election of school trustees in such districts, any qualified elector may write in the name of any elector of the district, thus exercising his free choice for the office of school trustee; that each such vote must be counted, so that every voter at such election shall have the same right as any other voter; that each voter under the constitution has the right to cast his ballot

for whomsoever he desires and have it honestly counted; thus only can
it be said that an election is public, open and free and in full accord with
our constitution.

Sincerely yours,

JOHN .W. BONNER
Attorney General