

Opinion No. 242.**Soldier Vote Bill—Ballots—Military
Service—Absent Voters Ballots—
Elections.**

- Held: 1. The county clerk must provide for each election precinct in the county ten more than an equal number of ballots as there are electors registered in the precinct. If there is no registry in the precinct, the county clerk must provide ballots equal to the number of electors who voted at the last preceding election in the precinct, unless in the judgment of the county clerk a greater number be needed, but in no case to exceed one and one-half times as many as the number of registered voters in the precinct.
2. After ballots are printed as outlined above, rotation thereof must be in accordance with the provisions of Section 681, Revised Codes of Montana, 1935, as amended.
3. Independent candidates' names are always placed after and below those of the major parties.
4. Any elector in military service eligible to vote under the provisions of Chapter 101, Laws of 1943, may cast his

vote at any time after the ballots have been printed, whether he be present in or absent from the county. In such case, the clerk should retain the ballot as provided by Chapter 101 until delivered to the election judges, and notify the secretary that such elector has voted.

August 21, 1944.

Mr. Melvin N. Hoiness
County Attorney
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Billings, Montana

Dear Mr. Hoiness:

I have your request for an opinion on questions pertaining to the so-called soldier vote law. This office has received several inquiries relative to those you mention and other points. I shall attempt to cover all questions in this opinion.

1. What number of ballots may be printed and how is this number to be determined?

It is necessary for the county clerk to advise of the number of ballots to be printed for each precinct. Chapter 101, Laws of 1943, requires that ballots be printed within ten days after the state canvass has been completed. Section 687, Revised Codes of Montana, 1935, provides that the county clerk must furnish for each election precinct ten more than an equal number of ballots as there are electors registered in the precinct. This section further provides that if there is no registry in the precinct, the clerk must provide ballots equal in number of electors who voted at the last preceding election, unless in the judgment of the county clerk a greater number may be needed, but in no case shall the number exceed one and one-half times as many as the number of registered voters in the precinct.

It may be noted that the legislature made provision for the number of ballots to be furnished by basing it upon the number of registered voters plus ten—but, the legislature recognizing that this method would not be practical in the event there were no registry in any particular precinct, provided the clerk should base his figures on the number of electors who voted at the

last preceding election. The legislature then went further and said, "unless in the judgment of the county clerk a greater number be needed, but in no case to exceed one and one-half times as many as the number of registered voters."

The statute, therefore, is not a strict mandate, but rather is very flexible and leaves it to the clerk, in any case where the general provision, that is, based upon the number of registered electors, cannot be followed, to use his best judgment, as to the number of ballots to be printed, restricted only to one and one-half times the number of such registered voters. If there is no registry, then the figures are based upon the number of electors who voted at the last preceding election.

Chapter 101, Laws of 1943, is designed to supplement the present election laws in such respects that electors absent from the state because of military service and thereby unable to comply with present election laws, may not be disfranchised. It is intended to liberalize the procedure insofar as the same may be done without transgressing constitutional prohibitions. Its provisions, therefore, are to be liberally construed, with a view to carrying out the purpose of the act itself.

The purpose of the provision of Chapter 101 that ballots be printed within ten days after certification by the Secretary of State was clearly to provide more time in which they could get the ballot distributed to the electors in military service so that they might vote and return the ballots by election day. If, therefore, the provisions of Section 687, *supra*, were to be adhered to strictly, ballots could not be printed until the close of registration, which is September 22, 1944. In such event, the purpose of Chapter 101 would be nullified. A liberal interpretation and one which gives effect to the law, rather than one which makes it void, is to be preferred. (Section 8770, Revised Codes of Montana, 1935. *Godell v. Judith Basin County*, 70 Mont. 222, 224 Pac. 1110.)

Therefore, it is my opinion that the county clerk must provide for each election precinct in the county ten more than an equal number of ballots as there are electors registered in the precinct. If there is no registry in the precinct, the county clerk must

provide ballots equal to the number of electors who voted at the last preceding election in the precinct, unless in the judgment of the county clerk a greater number be needed, but in no case to exceed one and one-half times as many as the number of registered voters in the precinct. In determining the number of ballots to be printed, the clerk could, of course, with respect to the number of electors who are in service and who might, in his judgment, be likely to vote, use his knowledge of the situation existing in his county. The clerk is in a good position to know these facts, and by exercising a wise judgment, no injustice will arise.

2. What procedure is to be followed in rotating names?

Inasmuch as I have pointed out in answer to your question number one, how the number of ballots to be printed may be determined, then it follows that when the clerk has determined the number of ballots to be printed, the provisions of Section 681, Revised Codes of Montana, 1935, as amended by Chapter 81, Laws of 1939, may be followed without difficulty.

3. In what position on the ballot is the name of an independent candidate placed, and how rotated?

This question is answered by the provisions of Chapter 81, Laws of 1939, which outlines the procedure in rotating names of candidates, and particularly the last sentence of paragraph (b) of that section, which is as follows:

"It is further provided that candidates of the two major parties as hereinabove defined shall be rotated as one group and the candidates of the minor parties and independent candidates shall be rotated as another group so that the candidates of the two major parties for a particular office shall appear on the ballot before and above any candidates of the minor parties or independent candidates."

Thus, the candidates of the two major parties (Democratic and Republican) shall be rotated as one group, and the candidates of minor parties (Socialists, etc.) and independent candidates as another group, but the candidates of the major parties shall always be before and above candidates of

minor parties and independent candidates, on every ballot.

To answer this question specifically the name of an independent candidate shall never, in the process of rotation, be placed above the name of a candidate of a major party.

4. Your fourth question presents a more difficult subject and one about which this office has had several inquiries. As the different requests raise one or more separate points, I shall attempt to clarify the entire subject and so far as possible cover every point raised as well as those which have occurred to me in the course of my study of the pertinent statutes.

Comprehensively and collectively stated the questions seem to be as follows:

May an elector in the military service vote an absent voter's ballot, if absent from or present in his county when voting, after the ballots have been printed but prior to thirty days before the date of election, and if so, in the event the Secretary of State has personally furnished such elector with a ballot as provided by Section 2 of Chapter 101, Laws of 1943, what procedure shall be followed with reference to such ballot?

The confusion evidently arises from a consideration of the several provisions of Chapters 101 and 234, Laws of 1943, with Sections 716 and 726, Revised Codes of Montana, 1935. For instance, under the provisions of Chapter 101, the county clerk is required to forward to the Secretary of State, at specified times, a ballot for each elector certified by the Secretary of State as absent in military service and qualified to vote an absent ballot. The Secretary of State is required by this act to certify these names ten days after the close of the primary election and every ten days thereafter. The Secretary of State is required to mail these ballots to the elector, who then votes the ballot as provided in the act and forwards the ballot so voted to the Secretary of State, who in turn forwards said ballot so voted to the county clerk of the elector's county. The county clerk retains the said ballot so received until the day of election, when he forwards the same to the judges of the elector's precinct.

Section 716 provides that "at any time within thirty days next preceding a general election, any voter expecting to be absent on the day of election . . ." may make application for an official ballot and vote the same. Section 726 provides that "any qualified elector who is present in his county after the official ballots of his county have been printed and who has reason to believe he will be absent from such county on election day as provided in Section 716 may vote before he leaves his county in like manner as an absent voter . . ." Then, the question arises may an elector in military service make application for and vote an absent voter's ballot prior to thirty days before the election whether he be present within the county or absent therefrom. There appears to be a conflict between these several provisions.

It must be noted that Sections 716 and 726 are a part of Chapter 69, Political Code, 1935, which is the law dealing generally with the subject of absent voting. Chapter 234, Laws of 1943, merely amends certain provisions of Chapter 69 of the Political Code and these amendments merely include in the class of those who may vote absent ballots, electors who are or expect to be physically incapacitated on election day. Chapter 101, Laws of 1943, is a special act dealing specifically with the subject of absent voting by electors in military service. It sets up within itself a complete procedure for such special class and is independent of the provisions of Chapter 69, the general law. Its provisions are supplementary to the general law on the subject. Section 21 specifically provides, "Nothing in this act shall be deemed to repeal or amend any of the provisions of law now existing relating to elections, but this act shall be construed as supplementary to all laws and designed to carry into effect the purposes herein expressed, but in case of conflict or apparent conflict, the provisions of this act shall, within its scope and purpose, prevail."

It is a cardinal rule of construction that a general and comprehensive statute must yield, to the extent of inconsistency, to a statute dealing minutely and specifically with part of the same subject. (In re Stevenson's Estate, 87 Mont. 486, 289 Pac. 566. And, a special statute controls a gen-

eral statute relating to same subject matter and must be read as an exception to the statute covering the same and other subjects in general terms. (In re Wilson's Estate, 102 Mont. 178, 56 Pac. (2nd) 733.)

Section 9, Chapter 101, supra, provides:

"Every elector authorized by the provisions of this act may cast his ballot at any time before six (6) o'clock P. M. of the day on which said General Election will be held." (Emphasis mine.)

These two acts (Chapter 69, Political Code, 1935, as amended by Chapter 234, Laws of 1943, and Chapter 101, Laws of 1943) are separate and independent dealing with the same subject matter, to-wit: voting by absent ballot. Chapter 101, however, is a special act for the benefit of those electors in military service. It is not exclusive in that such electors may not avail themselves of the provisions of the general law. In fact, it is not necessary in any case that such elector avail himself of the provisions of the general law, because the provisions of the special act are sufficiently broad to cover any contingency. In other words, Chapter 101 provides a more convenient and workable method to assure those who will be absent from the election precinct in military service on election day his right to vote. However, if such elector happens to be present within the county after the ballots have been printed, he may under either act, make request and vote his ballot. Likewise, if he is absent from the county after the ballots have been printed, he may request his ballot at any time up to the date of election, provided, of course, his ballot must be deposited with the election judges of his precinct before the close of the polls (6:00 P. M.) on the day of election, to be counted.

It will be noted that no application for a ballot is required under the provisions of Chapter 101, supra, while such application is a pre-requisite under the general law.

An elector in military service may avail himself of the provisions of either act. No restriction appears in Chapter 101, supra, but on the contrary, as pointed out, such elector may vote at any time before six o'clock P. M. of election day.

In view of the procedure contained in Chapter 101 relative to forwarding ballots to the elector, voting of the same by the elector and return of the ballot to the Secretary of State and by him to the county clerk, the question arises, how may an elector in military service obtain and vote his ballot when present in the county?

The procedure outlined in Chapter 101 is not mandatory either by express provision or by inference from the language used, in the sense that a failure to comply strictly therewith would invalidate the ballot or prevent the vote being counted. Our Supreme Court in the early case of *Goodell v. Judith Basin County, et al.*, 70 Mont. 222, 239, 224 Pac. 1110, in passing upon the constitutionality of the State Primary Law, (Chapter 69 of the Political Code) in a long and exhaustive opinion on the subject, expressed the doctrine to be adhered to in this state and there said:

" . . . Since 1895 this court has adhered consistently to the doctrine that the purpose of our election laws is to secure to every qualified voter the right to cast an honest ballot and have it counted as cast; that any arrangement made by law to encourage the exercise of that right will not be nullified by the courts unless the arguments against it are so clear and convincing as to be unanswerable; that a ballot will never be vitiated by anything which is not clearly within the prohibiting words and meaning of the statute; and that an elector should not be deprived of his vote by mere inference, but only upon the clear expression of the law." (Emphasis mine.)

As there is no prohibiting language in Chapter 101, Laws of 1943, there can be no reason why an elector in military service expecting to be absent from his county on election day, may vote on an absent ballot before election day, if present in the county. It may upset the procedure and be inconvenient to the election officials, but this may be no compelling reason to deny such elector his right. It may easily be conceived that such elector present on leave or furlough within his county prior to the date of election might not return to the address

as given to the county clerk for the purpose of mailing him his ballot in time to vote the ballot and return it in time, so that if he could not vote while present in his county, would be deprived of his right. A person in military service never knows from day to day where his orders will take him.

Therefore, if an elector qualified to vote under Chapter 101, is present in his county, after the ballots are printed, but before thirty days prior to date of election, and who will be absent on election day, desires to vote, he may do so before the clerk of his county in the manner provided under said Chapter 101. When completed, the ballot may be retained by the clerk in the same manner as required of ballots mailed him by the Secretary of State or ballots voted before the clerk under Section 726, and forwarded to election judges as provided by said act. However, in such cases, and in order to keep the record clear, the county clerk **should immediately notify the Secretary of State of the voting by such elector.**

An objection to the procedure here pointed out may be that it is inconvenient and confusing, in that the clerk having previously certified the name to the Secretary of State and having forwarded a ballot to the Secretary to be forwarded to the elector, a greater number of ballots than allowed by law would necessarily have to be printed.

In answer to this objection, we might say, in addition to what has already been said with reference to inconvenience as being no reason, that the clerk, as pointed out in the first part of this opinion, is given a discretion in determining the number of ballots required may take into account the procedure here outlined.

In view of the language used by the legislature in Chapter 101, it seems quite clear to me that the intention was to afford every opportunity to our citizens in military service to vote. I am of the opinion the provisions of the act, when read as a whole and keeping in mind the purposes and intent of the law, justify my interpretation herein expressed, without transgressing any principles of law.

To interpret the pertinent statutes strictly and literally, would not only

be contrary to the express terms of the statute, but would lead to a ridiculous result and deprive many of our boys and girls a right to exercise a privilege guaranteed by the Constitution to participate in the government for which they are fighting and dying to preserve. Those of us whom they have entrusted to interpret and execute the laws should not, through technicalities, annul or abridge those rights and privileges.

I am mindful of the statement in the memorandum dated August 2, 1944, approved by this office and sent out by the Secretary of State to all county clerks, to the effect that applications made currently under the provisions of Sections 716-735 should not be honored as they are void because made prior to thirty days before the date of election. Upon further study of all the pertinent statutes, occasioned by the request for this opinion, it is necessary to rescind anything in said memorandum which conflicts with this opinion.

It is, therefore, my opinion:

1. That the county clerk must provide for each election precinct in the county ten more than an equal number of ballots as there are electors registered in the precinct. If there is no registry in the precinct, the county clerk must provide ballots equal to the number of electors who voted at the last preceding election in the precinct, unless in the judgment of the county clerk a greater number be needed, but in no case to exceed one and one-half times as many as the number of registered voters in the precinct.

2. After ballots are printed as outlined above, rotation thereof must be in accordance with the provisions of Section 681, Revised Codes of Montana, 1935, as amended.

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4. Any elector in military service eligible to vote under the provisions of Chapter 101, Laws of 1943, may cast his vote at any time after the ballots have been printed, whether he is present in or absent from the county. In such case, the clerk should retain the ballot as provided

by Chapter 101 until delivered to the election judges, and notify the Secretary that such elector has voted.

Sincerely yours,
R. V. BOTTOMLY
Attorney General