

Opinion No. 117**Elections—Ballots—Method of
Marking Ballots.**

Held: That stickers with a candidate's name and a printed "X" placed upon the ballot in the proper place should be counted.

September 12th, 1952.

Mr. John D. French
County Attorney
Lake County
Polson, Montana

Dear Mr. French:

You have requested my opinion on the following question:

"Is a sticker with the name of a person and a printed "X" mark placed in the proper position on the ballot to be counted as a vote for that person at a primary election?"

In discussing this question you mention an Attorney General's opinion in Volume 12, page 344, which indicates that this method of voting is illegal. That opinion was based upon the case of Carwile vs. Jones, 38 Mont. 590. That case has been reversed in substance by the case of Peterson vs. Billings, 109 Mont. 390. The Peterson case did not involve stickers placed upon the ballot, but gave very comprehensive consideration to all of our laws pertaining to the marking of ballots. In that case the court said:

"It is a general rule that election laws must be liberally construed. This court, in Stackpole v. Hallahan, 16 Mont. 40, 41 Pac. 80, (28 L.R.A. 502), on page 57, 16 Mont., and page 85, 40 Pac., announces that 'in construction of election laws the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors.' The reason for this rule is that the para-

mount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them." (*Dickerman v. Gelsthorpe*, 19 Mont. 249, 47 Pac. 999, 1001). "But if, from the marking of the ballot in substantial compliance with the law, the intent and choice of the voter clearly appear, then his ballot should be counted, unless the statute expressly or by clear inference forbids it; otherwise the true spirit of the election law might be violated by subordinating the essence to a mere element of detail, and substance might be sacrificed to form. The elective franchise is not conferred upon the citizen by the legislature, or by virtue of legislative enactment. The right to vote is a constitutional right, and is one of the bulwarks of our form of government and system of civil liberty."

The court pointed out that Section 23-1210 must be read in conjunction with Section 23-1704, which says in part:

"... if part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part." The court then stated this rule:

"Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means."

This essentially reverses the *Carwile* case and demands that wherever the intention of the elector can be gathered from the manner of marking the ballot, whether or not it is in exact compliance with the provisions of Section 23-1210, the vote shall be counted.

Section 23-1102, Revised Codes of Montana, 1947, authorizes a sticker with a candidate's name to be placed upon the ballot. It says:

"Except as in this chapter otherwise provided, it shall be the duty of the county clerk of each county to provide printed ballots for every election for public officers in which electors or any of the electors within the county participate, and to cause to be printed on the ballot the names of all candidates, including candidates for chief justice and associate justices of the supreme court and judges of the district courts, whose names have been certified to, or filed with the county clerk, in the manner provided in this chapter. Ballots other than those printed by the respective county clerks, according to the provisions of this chapter, must not be cast or counted in any election. Any elector may write or paste on his ballot the name of any person for whom he desires to vote for any office, but must mark the same as provided in section 23-1210, and when a ballot is so marked it must be counted the same as though the name is printed upon the ballot and marked by the voter. Any voter may take with him into the polling place any printed or written memorandum or paper to assist him in marking or preparing his ballot except as otherwise provided in the chapter."

Section 23-1210, Revised Codes of Montana, 1947, requires that an "X" be placed in the proper box in front of the candidate's name:

"On receipt of his ballot the elector must forthwith, without leaving the polling-place and within the guard-rail provided, and alone, retire to one of the places, booths, or compartments, if such are provided, and prepare his ballot. He shall prepare his ballot by marking an "X" in the square before the name of the person or persons for whom he intends to vote. In case of a ballot containing a constitutional amendment, or other question to be submitted to the vote of the people, by marking an "X" in the square before the answer of the question or amendment submitted. The elector may write in the blank spaces or paste over any other name the name of any person for whom he wishes to vote, and vote for such person by marking an "X" before such name. No elector is at liberty to use

or bring into the polling-place any un-official sample ballot. After preparing his ballot the elector must fold it so the fact of the ballot will be concealed and so that the indorsements stamped thereon may be seen, and hand the same to the judges in charge of the ballot box, who shall announce the name of the elector and the printed or stamped number on the stub of the official ballot so delivered to him, in a loud and distinct tone of voice. If such elector be entitled then and there to vote, and if such printed or stamped number is the same as that entered on the poll-list as the number of the stub of the official ballot last delivered to him by the ballot judge, such judge shall receive such ballot, and, after removing the stub therefrom in plain sight of the elector, and without removing any other part of the ballot, or in any way exposing any part of the face thereof below the stub, shall deposit each ballot in the proper ballot box for the reception of voted ballots, and the stubs in a box for detached ballot stubs. Upon voting, the elector shall forthwith pass outside the guard-rail, unless he be one of the persons authorized to remain within the guard-rail for other purposes than voting."

The printed sticker with both name and "X" mark meets these requirements and shows the intent required under the above rules.

Therefore, it is my opinion that stickers with a candidate's name and a printed "X" placed upon the ballot in the proper place should be counted. I am also of the opinion that the Carwile case and the previous opinion of the Attorney General in Volume 12, page 344, have been deprived of any force by the case of Peterson vs. Billings, supra.

Very truly yours,
ARNOLD H. OLSEN
Attorney General