

Opinion No. 16

**Elections—Election Judges—Canvassing Procedures—Place of Election
Canvass—Bystanders at Election Canvass—Improper or Irregular
Canvass Procedures—Interference with Election Canvass—
Marking of Ballots—Statutes**

- Held:**
1. All of the judges of elections must examine every ballot cast before the elector's vote is tallied.
 2. The counting of votes during an election canvass must be done exactly in the manner prescribed by Section 23-1705, RCM, 1947.
 3. The canvass of votes must be done in a public place where every citizen so disposed can observe the manner in which the count is being made.
 4. Any bystander, upon observing that the canvass is being made in an irregular or improper manner, may point out to those conducting the canvass that the canvass is being conducted in an erroneous manner.
 5. A bystander who points out to those conducting a canvass of ballots that they are proceeding in an erroneous manner is not interfering with the canvass, as prohibited by Section 94-1403, RCM, 1947.
 6. Section 23-1210, RCM, 1947, which provides for the marking of ballots by electors must be liberally construed in the light of the provisions of Section 23-1704, RCM, 1947.
 7. If a voter marks his ballot in a manner which clearly and obviously indicates his intention, he has cast a valid vote which must be counted.
 8. A voter need not mark his ballot with an "X" in order to constitute a legally voted ballot. Any mark which indicates the voter's intention will suffice.

June 11, 1957

Mr. H. E. Anderson
Clerk & Recorder
Custer County
Miles City, Montana

Dear Mr. Anderson:

You have directed three inquiries to my office concerning procedures and practices to be followed in the canvass of votes by judges of elections.

Generally stated, the questions are as follows:

1. Is there any set rule or procedure for the counting of ballots after the closing of the polls?

2. Do the bystanders of a ballot canvass have any right to interfere with the judges of elections while the judges are making their canvass?

3. Is a ballot legally voted when marked with a (✓) check, (o) circle, dot or a mark other than an "X"?

In discussing your first inquiry, you have pointed out that you were in doubt as to whether it was necessary that each of the election judges examine each ballot cast before the elector's vote is tallied. Your attention is directed to Section 23-1705, RCM, 1947, which provides in part as follows:

"The ballots and poll-lists agreeing or being made to agree, the judges must then proceed to count and ascertain the number of votes cast for each person voted for. In making such count the ballots must be opened singly by one of the judges, and the contents thereof, while exposed to the view of the other judges, must be distinctly read aloud by the judge who opens the ballot . . ."

The counting of votes should proceed exactly in the manner specified by the governing constitutional and statutory authority. 29 C.J.S. 328 "Elections," Section 227. It is my opinion that the provisions set forth in Section 23-1705, RCM, 1947, quoted above, require that every ballot cast be opened singly, and after each ballot is opened it must be exhibited to all of the judges before being read aloud for the clerks to tally.

Your second question arises from a situation which occurred in Custer County during the 1956 General Election, when, as the ballots were being canvassed, certain of the bystanders protested that the canvass was being conducted in an improper manner. Your question is whether bystanders have any right to "interfere" with the judges and clerks after the polls have closed and while the canvass is taking place.

The Constitution of the State of Montana gives the legislature the power to pass such laws as may be necessary to secure the purity of elections and guard against the abuse of the elective franchise. Section 9, Article IX, Mont. Const. Under this grant of power the legislature has enacted many laws which it believes to be the best method by which this purpose can be served.

In Section 23-1701, RCM, 1947, the legislature has provided:

"As soon as the polls are closed, the judges must immediately proceed to canvass the votes given at such election. The canvass must be public in the presence of bystanders and must be continued without adjournment until completed and the result thereof is publicly declared."

Through the above quoted statute the legislature has directed that, at all times during the canvass of votes, the place at which said canvass is being made must be open to the public, where every citizen so disposed may observe the manner in which the count is being made. Incidental to right of the public to be present during the canvass of the votes is the right preventing the counting of ballots in an irregular or improper manner.

In order to prevent any abuse of this right the legislature provided in Section 94-1403, RCM, 1947, that:

“. . . every person . . . (who) . . . in any manner so interferes with the officers . . . conducting such canvass . . . as to prevent such . . . canvass from being fairly held and lawfully conducted, is guilty of a felony.”

What would constitute “interference” of the nature prohibited by the above quoted statute is clearly a question of fact depending upon the circumstances of a specific case. It is my opinion that, when a member of the public points out to the judges of election an error in the manner in which they are proceeding, this is not such “interference” as is prohibited by Section 94-1403, RCM, 1947.

Your third inquiry is directed to the question of whether a ballot is legally voted when marked with a check, circle, dot or mark other than an “X.”

The method of voting a ballot is outlined in Section 23-1210, RCM, 1947, providing in part as follows:

“. . . He (elector) 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”

The Supreme Court of Montana has ruled that this provision should be liberally construed in the light of the provisions of Section 23-1704, RCM, 1947. *Peterson v. Billings*, 109 Mont. 390, 96 Pac. (2d) 922. See also, 24 Reports and Official Opinions of the Attorney General 117. Section 23-1704 (*supra*) provides in part as follows:

“. . . 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 Peterson Case held that, in taking both Section 23-1704 (*supra*) and Section 23-1210, (*supra*), together, the legislature did not intend to deprive a voter of his vote if he had so marked his ballot that his intention was made clear and obvious to the officers of the election. Upon this authority it is my opinion that a voter need not mark his ballot with an “X” in order to constitute a valid vote. Any mark which indicates the voter’s intention will suffice.

Very truly yours,
FORREST H. ANDERSON
Attorney General