

Opinion No. 68

**ELECTIONS; Ballots, Absent voters' ballots, time for application—
ELECTIONS; Ballots, Absent voters' ballots, when must be re-
ceived—Section 23-1305, RCM, 1947—Section 23-1307, RCM,
1947—Section 23-1308, RCM, 1947—Section 23-1309, RCM,
1947—Section 23-1313, RCM, 1947**

- Held: 1. A County Clerk may not refuse applications for absentee ballots before the regular closing hours of his office on the day before a general election if he is still in possession of the ballots for the applicant's precinct.**
- 2. In order to be counted, an absent voter's ballot must reach the judge of election of the absent voter's precinct before the closing of the polls. Mere receipt of the absent voter's ballot by the county clerk before the closing of the polls on election day does not, of itself, entitle the absent voter's ballot to be counted.**

December 29, 1960

Mr. Gene B. Daly
Cascade County Attorney
Great Falls, Montana

Dear Mr. Daly:

You have requested my opinion on the following questions:

1. May a County Clerk and Recorder refuse application for absentee ballots before the regular closing hour of his office on the day before a general election if he is still in possession of the ballots for the applicant's precinct?
2. Are absentee ballots received by mail on election day but before the closing of the polls entitled to be counted?

In answer to your first question, I refer you to Section 23-1305, RCM, 1947, which provides:

"Such application blank shall, upon request therefor, be sent by such county or city or town clerk to any elector of the county, by mail, and shall be delivered to any elector upon application made personally at the office of such county or city or town clerk; **provided, however, that no elector shall be entitled to receive such a ballot on election day, nor unless his application is made to or received by the county or city or town clerk before the delivery of the official ballots to the** judge of election." (Emphasis added)

This statute expresses only two instances in which the county clerk may refuse the timely application of a qualified elector for an absentee ballot. As the Montana Supreme Court stated in *Goodell v. Judith Basin County*, 70 Mont. 222, 224 Pac. 1110, "an elector should not be deprived of his vote through mere inference, but only upon the clear expression of the law." Under the facts presented, there is no "clear expression of the law" which would justify a county clerk in refusing applications for absentee ballots. It is therefore my opinion that a

county clerk may not refuse applications for absentee ballots before the regular closing hour of his office on the day before a general election if he is still in possession of the ballots for the applicant's precinct.

In answer to your second question, I refer you to Volume 8, Report and Official Opinions of the Attorney General, page 492 (1920). In that opinion, Attorney General Ford ruled that an absent voter's ballot must reach the judge of election so that it may be deposited in the ballot box before the closing of the polls. Section 23-1307, RCM, 1947, requires an absent voter to deliver his ballot, by mail or in person, to the county clerk. Sections 23-1308 and 23-1309, RCM, 1947, require the county clerk to deliver the absent ballots received by him to a judge of election of the precinct in which the absent or physically incapacitated elector resides.

The essential prerequisite to an absent voter's right to have his ballot counted is that it be received by the election judges of his precinct before the closing of the polls on election day. Section 23-1313, RCM, 1947; *Maddox v. State Board of Canvassers*, 116 Mont. 217, 149 Pac. (2d) 212 (1944); 8 Report and Official Opinions of the Attorney General 492 (1920); 28 Report and Official Opinions of the Attorney General, opinion No. 67 (1960). It is, of course, the duty of the county clerk to forward absent voters' ballots received by him to the proper precinct before the closing of the polls on election day if it is at all possible. His failure to do so presents the rare instance in which the failure of an election official to perform his duty does operate to disfranchise electors who are duly qualified and without fault.

It is therefore my opinion that, in order to be counted, an absent voter's ballot must reach the judge of election of the absent voter's precinct before the closing of the polls. Mere receipt of the absent voter's ballot by the county clerk before the closing of the polls on election day does not, of itself, entitle the absent voter's ballot to be counted.

Very truly yours,
FORREST H. ANDERSON
Attorney General