

**ELECTIONS:** In case of a tie vote for clerk of the county court, the sheriff of the county calls a special election at the direction of the county clerk, Withdrawal of one candidate after a tie vote cannot avoid a special election.

November 19, 1946



Honorable C. E. Ernst  
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Albany, Missouri

Dear Sir:

We are in receipt of your letter of recent date, requesting an opinion of this department, and reading as follows:

"In Gentry County we have a tie in the vote for Clerk of the County Court. To me Section 11621 of Revised Statutes of 1939 is somewhat confusing and I am requesting an opinion as to whether or not the Clerk of the County Court has authority to order the Sheriff to call a special election for the election of a County clerk in case of a tie.

"In some cases of a tie in the vote it seems that the Governor is the proper authority for calling an election in case of a tie, rather than the Sheriff. The question also presents itself as to whether a special election might be legally avoided should one of the candidates withdraw; and also the question as to how much time the Clerk may have to make his order on the Sheriff to call an election in a case of this kind.

"I would also be very grateful if you would send me a form of order for the Clerk and also form of proclamation for the Sheriff."

The questions contained in your letter to be answered are:

- (1) In case of a tie vote between the candidates for clerk of the county court in counties of the third class, who is the proper officer to order the sheriff to call a special election?
- (2) If one of the candidates in the contest for county clerk where a tie vote was cast withdraws, does such withdrawal make a special election unnecessary?

Section 11621, R.S.Mo. 1939, provides as follows:

"If there shall be a tie of the votes given for any two of the candidates, except in cases otherwise provided by law, the clerk or justices casting up the number of votes, or a majority of them, shall issue their order to the sheriff of the county where the same may occur, directing him or them to issue his proclamation for holding an election agreeably to the provisions of this chapter; and in all cases of such special election, the clerk and justices, or a majority of them, when they issue the order to the sheriff, shall, in such order, state the day on which such election shall be held, giving reasonable time for the same to be promulgated."

We are unable to find any other statute regarding the calling of an election when there is a tie vote for county clerk. Therefore, the provisions of Section 11621 are applicable where there is a tie vote in an election for the office of clerk of the county court. Notice of such tie vote must be given to the sheriff of the county, who issues a proclamation calling for an election.

Section 2 of Senate Bill No. 483 of the 63rd General Assembly provides as follows:

"At the general election in the year 1946, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a

clerk of the county court, who shall be commissioned by the governor, and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each clerk of the county court shall enter upon the duties of his office on the first day of January next after his election: Provided, that the term of office of persons holding the office of clerk of the county court at the time this act shall take effect shall not be vacated or affected thereby."

"Elect" is defined in Funk & Wagnalls Dictionary of the English Language as meaning:

"To choose or designate for an office by a majority or plurality vote."

The Supreme Court of Missouri, in State ex rel. Speck v. Geiger, 65 Mo. 306, l.c. 310, said:

" \* \* \* \* At the general election in November, 1874, the relator and one W. C. Kelley, were candidates for the office of prosecuting attorney of Texas county, and were the only persons voted for, and they each received at said election the same number of votes. \* \* \*

"It is admitted in the record that W. C. Kelley, during the time of his candidacy, and on the day of the general election in 1874, did not live in Texas county, and that at least twelve of the qualified voters of Texas county who voted for said Kelley, knew he was not a resident of said county; but it does not appear that they knew that his non-residence rendered him ineligible. It will be unnecessary to express any opinion as to the effect of this admission, as the case can very properly be determined upon other grounds. Both parties concur in regarding the result of the regular election in November, 1874, as a failure to elect, and we will so consider it. Conceding then that there was no election of a successor to the relator in November, 1874, by reason of the fact that each of the candidates received an equal number of votes, \* \* \* "

Mr. C. E. Ernst - 4

In this case it is clear from the quoted portions of the opinion that there was no doubt in the mind of the court that in case of an actual tie vote, and where no contest of the election was held, a special election should be held, although the court did hold in that case that the section now numbered 11621, R. S. Mo. 1939, did not apply to the office of prosecuting attorney of a county. However, the general rule laid down in that case is applicable to the facts in the present case.

It was held by the St. Louis Court of Appeals in the case of State ex rel. John Herget v. Robert Walsh, 7 Mo. App. 142, that when one candidate died several hours before the opening of the polls, and such dead person received a greater number of votes than his opponent, the opponent of the dead man could not be declared elected.

The Supreme Court of Missouri, in Sheridan v. City of St. Louis, 183 Mo. 25, held that where a candidate for the House of Delegates of the City of St. Louis who received a greater number of votes than his opponent was declared ineligible, his opponent could not thereby be declared elected.

The theory of the courts in both of these cases was that to be elected means to receive a majority or a plurality of votes.

The result of a tie vote for county clerk, then, is the same as if no election had been held. The candidates who received the same number of votes for this office are still candidates for the office of county clerk, since no one has been elected.

Since the candidates for county clerk who received the same number of votes are still candidates for that office, the withdrawal of one candidate would have no more effect at the present time than if he had withdrawn his candidacy before the election was held. If one candidate had withdrawn before the general election at which the tie vote occurred, no official, or body of officials, would have had any power to declare his opponent elected until an election was actually held.

The withdrawal, then, by a candidate of his candidacy for the office of county clerk at the present time does not authorize any official, or officials, to declare the candidate who received the same number of votes elected, or to issue such opponent a commission. It will be necessary to hold

Mr. C. E. Ernst - 5

an election to elect a county clerk of Gentry County before January 1, 1947.

The notice to the sheriff should be made at such time so that the sheriff may have a reasonable time in which to give sufficient notice in his proclamation as to the date such election will be held.

We are enclosing forms for the notice to the sheriff and for the sheriff's proclamation.

CONCLUSION

It is, therefore, the opinion of this department that an election for the office of county clerk of Gentry County should be proclaimed by the sheriff of said county when he receives official notice of the tie vote for the candidates for said office.

It is the further opinion of this department that such election must be held even though one candidate withdraws his candidacy.

Respectfully submitted,

C. B. BURNS, JR.  
Assistant Attorney General

APPROVED:

JE. TAYLOR  
Attorney General

CBB:HR