

ELECTIONS:

STATE REPRESENTATIVES:

Where tie vote in election for state representative occurs and question arises concerning legality of several votes cast, the State House of Representatives may make final determination.

November 24, 1948

FILED 3

Honorable William Aull III
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Mr. Aull:

This is in reply to your letter of recent date, requesting an opinion of this department, and reading as follows:

"In the general election held on November 2, 1948, in Lafayette County, Missouri, Homer Pruett, Democrat, received 6255 votes for representative in the state legislature and Charles H. Gladish, Republican, received 6255 votes for representative in the state legislature. No other person received any greater vote within said county for said office.

"(1) Is it mandatory that Sec. 11467 be followed and a special election called?

"(2) If the answer to the above be no, is it possible for one or the other of the two candidates to withdraw and thus certify the other as the winner of said election?

"(3) If the answer to Question One is in the negative is there any legal procedure possible other than a special election to determine the winner of said election?"

In considering the second question presented first, we must determine whether or not under the facts of this case there was in fact an election to the office of state representative. In case of a tie vote, the election fails. The court, in State ex inf. Smith, 152 Mo. 512, (overruled on

other grounds) made this clear where it said at page 521:

"The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected and hence none qualified. Therefore, no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been held in 1898.
* * * *"

We find a more detailed discussion of this question in *State ex inf. v. Kramer*, 150 Mo. 89, where it was held that the term "election" means the act of choosing performed by the qualified people, and that the people alone can choose a public official at an election. The Court made the following statement at pages 96 and 97:

"* * *None could be elected unless he received a greater number of votes than were given for any other candidate. The term election must mean the act of choosing, performed by the qualified electors, in conformity with the requirements of the Constitution and laws regulating the manner in which the choice shall be made. If, therefore, the legal electors on the day appointed shall fail to make a choice, it is confidently believed that no other authority of the State can, at any other time, make good this defect. * * *"

And further on page 100 and 102:

"* * *So as the framers of the constitutional amendment of 1834 never attempted to make any provision for deciding in a case of a tie for the office of clerk of the county court, but left it to the people to elect, there is no spirit or meaning to be invoked, nothing to which it could attach or throw light upon. * * *

"Under the Constitution of 1875 the General Assembly was expressly given power to prescribe

by law how a tie between candidates for judge or clerk of a court of record should be determined, but as to all other ties, the Constitution expressly declares how they shall be decided and does not authorize the General Assembly to otherwise provide, or else it makes no provision for them and does not authorize the General Assembly to do so, but requires such officers to be elected by the people. This must have been intentional and not an oversight, for in section 30 of article VI, the minds of the framers of the Constitution were directed to ties for judges of courts of record, and in section 40 of the ~~same~~ article they were directed to ties for clerks of courts of record. Section 37 of article VI, relating to justices of the peace, comes in between these two sections of article VI, and therefore the question of ties can not fairly be said to have been in mind when section 30 was adopted, out of mind when section 37 was adopted, and in mind when section 40 was adopted. It was plainly intentional. Being left in this shape by the organic law, neither the General Assembly nor the courts have a right to supply an omission, if it could be so considered, either by express legislation or by judicial interpretation, but their duty is to enforce the law and require all such persons to show that they had been elected by the people, and failing so to show, to execute the law applicable to cases where there is an intrusion into a public office."

See also State ex rel. Guernsey v. Melike, Sup. Ct. of Wisc., 51 N.W. 875, where it was held that neither candidate was elected because of a tie vote and that the incumbent held over, and State ex rel. Cherrvoweth v. Action, Sup. Ct. of Mont., 77 Pac. 299, where it was declared that there was no election in the case where an equal number of votes were cast for each candidate.

The legislature, in the situation arising in the case at bar, did recognize that an officer must be chosen by the people and that a tie vote at an election has the same effect as no election. The provisions of Section 11467, RSMo. 1939, make

this evident by requiring the Governor to call a special election where candidates for the office of state representative receive the same number of votes at the general election. Therefore, neither of the candidates in question have been elected to said office and the withdrawal of one candidate would not have the effect of electing the other. In this connection, Section 11467 must be followed in order that a state representative may be chosen by the people of Lafayette County.

However, in the case where two candidates for the office of state representative receive the same number of votes in the county at the general election but a question concerning the legality of a number of such votes has arisen, we must then direct our attention to another procedure.

A procedure by which such elections may be contested is found in the Missouri Revised Statutes Annotated, Sections 11,675.8 through 11,675.18.

The Constitution of Missouri relating to the legislative department provides in Article III, Section 18 that each house shall be the sole judge of the qualifications, election and returns of its own members. An identical provision is found in the Constitution of the United States, Article 1, Section 5, Clause 1, to the effect that each house shall be the judge of the election, returns and qualifications of its own members.

Finding no Missouri cases in point on the question in consideration, we must look to the cases arising under the United States Constitution and in those states having similar constitutional provisions. The general rule applicable is set out in 59 C.J., Section 53, at pages 85 and 86 as follows:

"Under constitutional provisions to the effect that each house shall have power to judge of the qualifications and elections of its members, each branch of a state legislature has the sole power to judge of the election and qualification of its own members and may take such proof and incur such expenses as may be reasonably necessary for it to decide a contest of office. The decision of the legislature is conclusive upon the courts, and its authority to pass upon membership continues throughout the term. The courts have no jurisdiction as to the contest of a legislative election except to the extent that such jurisdiction is specifically conferred. * * * * "

The discussion of the law in 54 Am. Jr., Title U.S., Sec. 17, page 534, is helpful and is as follows:

"While the Constitution prescribes certain requirements as to age, citizenship, and residence, in order to be eligible to be seated as a member of Congress, Article 1, Section 5, thereof, providing that 'each House shall be the judge of the elections, returns, and qualifications of its own members, ' constitutes each house of Congress the sole and exclusive judge of the election and qualifications of its own members and deprives the courts of jurisdiction to determine those matters. It is within the discretion of the Senate whether to seat one who presents himself claiming rights of membership, pending an investigation of and adjudication upon the validity of his election. Whether a Senator or a Representative has been elected in the constitutional way is not a judicial question for the courts to determine, but is a matter resting entirely with the Senate or the House of Representatives as the case may be. Hence, the state courts have no jurisdiction to determine the legality of the election of a member of Congress, or to determine whether a successful candidate for Congress is disqualified because of violation of a state corrupt practices act. However, the exclusiveness of the power of Congress in respect of the election and qualification of its members does not deprive the courts of jurisdiction to compel state election officials to comply with the state laws and to perform their ministerial duties in connection with elections of members of Congress.

"In deciding on the election and qualification of its members, each House has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature. * * * *"

In David S. Barry et al. v. United States of American ex rel. Thomas W. Cunningham, 73 L. Ed. 867, the United States Circuit

Court of Appeals for the Third Circuit interpreted the above provision of the United States Constitution where it said at pages 871 and 872:

"First. Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. 1, Section 5, cl. 1. 'That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections.' *Reed v. Delaware County*, 277 U.S. 376, 388, 72 L.ed. 924, 926, 48 Sup. Ct. Rep. 531. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review. In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so determine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit. In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. * * * "

A further discussion is found in *Keogh v. Horner*, Governor of Illinois, 8 Fed. Sup. 933, where the District Court of the Southern Division of Illinois said at page 935:

" * * * If the Governor refused or was prohibited from issuing such certificates of election and the situation was presented to the House of Representatives, I do not doubt but what the House would have the right to seat the members elected without any certificate just as it could refuse to seat the members with a certificate, if it chose so to do. In other words, the power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme. The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found, controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected, or to interfere with the Governor in furnishing them a certificate or commission as to what the canvass shows with reference to their election."

The state case of *Burchell v. State Board of Election Commissioners et al.*, 68 S.W. (2d) 427, also reaches the above conclusion. Said case was in the Court of Appeals of Kentucky and we cite from the opinion at page 428:

"* * * Article 1, Section 5, of the Constitution of the United States, provides that 'each house shall be the judge of the elections, returns, and qualifications of its own members.' Under this section of the Constitution, jurisdiction to determine the right of a Representative in Congress to a seat is vested exclusively in the House of Representatives, and a state court has no power to determine the right or to adjudge that a particular candidate has been elected. *Barry v. United States*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867; *State ex rel. v. District*

court, 50 Mont. 134, 145 P. 721; Britt v. Board of Canvassers, 172 N.C. 797, 90 S.E. 1005; Wheeler v. Board of Canvassers, 94 Mich. 448, 53 N.W. 914."

Other state decisions to the same effect are Covington v. Buffett, 90 Md. 569, 45 A. 204; State ex rel. O'Donnell v. Tissot, 40 L. Ann. 598, 4 So. 482; State ex rel. Ruh v. Frambach, 47 N. J. L. 85; State ex rel. Smith v. District Ct., 50 Mont. 134, 145 P. 721, and People ex rel. Sherwood v. State Canvassers, 129 N.Y. 360, 29 N.E. 345, 14 L.R.A. 646, where the court said:

" * * * * The courts cannot interfere with this jurisdiction of the senate. Whatever may be determined here or elsewhere as to the election or qualification of the re-lator, or the result of the election in the 27th senatorial district, when the senate convenes, and not until then, it will have absolute jurisdiction of the whole subject, and may determine which of the two persons claiming seats therein was duly elected and qualified to sit therein; and it may determine that one was ineligible, and that the other was not elected, and that thus there is a vacancy in that district calling for a new election. * * * *"

The legislature is authorized to take such steps and proceed in such manner as may be necessary under the circumstances to obtain the information upon which to make a determination concerning the election of one of its members. The legislature may require the attendance and examination of witnesses in order to determine the facts or it may charge a committee of its members with the authority to investigate and report its findings. (Barry v. United States ex rel. Cunningham, supra.)

The legislature may investigate these matters on its own motion. This is indicated in the election case of Reeder v. Whitfield, of Kansas, Contested Election Cases - Bartlett 1834 - 1865, where it was stated in the legislative report of the Congressional Committee at pages 189-190 of the above volume:

"But this is not all. This house needs no parties in court, or names on the record, to guard its own rights and privileges; nor any

extrinsic action to quicken it in the exercise of the exclusive power to judge of the 'election returns, and qualifications' of those who claim seats on this floor; and they may institute, and often have instituted, investigations of the right of members to seats, without any contestant at all. It is not only their right, but their duty, to see that no one shall occupy a seat on this floor whose title is imperfect, and to investigate, of their own motion, whenever there is a reasonable doubt cast upon the case."

The statutory procedure for contesting elections between candidates for the office of state representative, as set out above, is not unconstitutional under the prevailing view but is merely regarded as a method of preparing or securing evidence which may be submitted to the legislature for such consideration as it may be given. The case of *State ex rel. Angus Haines v. D. B. Searle*, Judge of the District Court, 59 Minn. 489, where it was said at page 492:

"There is no force in the suggestion that, as thus construed, the act is in conflict with the Constitution, Art. 4, Section 3. It in no way interferes with the right of the legislature to judge of the election of its own members any more than would a law providing for the taking of depositions to be used on the trial of the contest before that body. It binds nobody and determines nothing. The whole matter is still with the legislature, who can receive or reject the evidence secured by the inspection and examination of the ballots, and, if they receive it, give it only such weight as they see fit. It is merely a convenient method of preparing or securing evidence in advance of the meeting of the legislature, instead of waiting until that body convenes; and it no more interferes with its constitutional right to judge of the election of its own members than does the law requiring the board of canvassers to give a certificate of election to the candidate receiving the highest number of votes. See *O'Ferrall v. Colby*, 2 Minn. 180, (Gil. 148).

There is nothing in State ex rel. v. Peers, 33 Minn. 81, (21 N.W. 860) in conflict with this view. This law, as we have construed it, is a provision enacted by the legislature itself for securing or preparing evidence to be used on the trial of the contest; and, as said in the case last cited, the House may reject it altogether, and provide, if they see fit, for the re-examination of the ballots in some other way. In appointing person to examine the ballots, the court, so far from interfering with the constitutional rights of the legislature, is but carrying out its directions. * * * *"

A later ruling by the Supreme Court of Minnesota is found in In re Williams' Contest, 270 N.W. 586, at page 588:

"This law, as we have construed it, is a provision enacted by the legislature itself for securing or preparing evidence to be used on the trial of the contest; and, as said in the case last cited, the house may reject it altogether, and provide, if they see fit, for the re-examination of the ballots in some other way. In appointing persons to examine the ballots, the court, so far from interfering with the constitutional right of the legislature, is but carrying out its directions."

It is quite clear that the decision of the legislature in these election matters is a final determination and is conclusive on the courts. Burchell v. State Board of Election Commissioners et al., supra; In re Mc Neill, 111 Pa. 235, 2 Atl. 341.

A statement concerning the expense of conducting such election investigations is found in Mercer et al. v. Coleman, 14 S. W. (2d) 144, where the Court of Appeals of Kentucky said at pages 145-146:

"* * * the House, being the sole judge of the election and qualification of its members, has an implied power to take such proof and incur such expenses as may be reasonably

necessary for it to decide the contest intelligently. In any contest the House may appoint its own committee to take further proof and may authorize a committee to employ legal counsel to assist them. If, instead of doing this, where other counsel has been employed and has done the work which the House might well have provided for, there is no sound reason why the House, in its discretion, may not pay for the work which has been done, which saved the committee the expense of doing this work. It is an important public matter who shall constitute the members of the legislative body of the state, which has supreme legislative authority subject to the restrictions placed upon it by the Constitution. A poor man living in a distant part of the state might be slow to incur the expense of defending a contest or of prosecuting one. But the interest of the state being greater than the interest of the individual, the custom has been, both in the Congress of the United States and in the state Legislature, for the House in which the contest is pending to make such appropriation as it sees proper for the expenses of the contest as constituting a proper part of the contingent expenses of the body. * * * "

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that, where two candidates for the office of state representative receive the same number of votes in the county in the general election but a question concerning the legality of a number of such votes has arisen, the state house of representatives is authorized under the provisions of the Missouri Constitution and the prevailing case law in other states to investigate the matter in any way it should deem necessary and upon its own motion and make a final determination which is not subject to review by the courts. The statutes now in existence which set up a procedure by which

such elections can be contested should not be considered unconstitutional. When said procedure is employed it should be considered as an aid to the house of representatives in securing the necessary facts with which to make a determination and which may be given such weight and consideration as is deemed appropriate by the state house of representatives or may be rejected and disregarded altogether.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:LR