

ELECTIONS: When two poll books of the same precinct are filed with
COUNTY CLERKS: the county clerk, then the poll book that has been
CANVASSERS OF properly signed by all the judges and clerks of the
VOTES: precinct shall be the poll book accepted by the county
clerk, and the other poll book shall be disregarded.
The fact that the poll book and tally sheets of a voting
precinct show a greater number of votes cast than
ballots issued is of no concern of the county clerk or

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his assistants, who constitute the board of canvassers. The county clerk shall issue certificates of election to the respective county candidates having the highest number of votes as soon as the canvassers have mathematically determined the total vote cast for each candidate in the county.

Honorable William B. Norris, Jr.
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

You have requested an official opinion by this department upon the problems presented in your letter. Your letter is as follows:

"Section 11615 of Missouri Revised Statutes Annotated (Reenacted Laws 1945 p886 Sect. 1, directs the County Clerk of each County to select for his assistants one person from each of the two political parties and to examine and cast up the votes given to each candidate and to give to those having the highest number of votes certificates of election. The votes of each of the Precincts of Buchanan County have been examined but certificates of election have not been given to any of the candidates voted for on November 7, 1950, because of errors and discrepancies appearing in the Tally Sheets and Returns of the judges and clerks of Precinct E of the Fourth Ward in St. Joseph, Missouri. The judges and clerks of Precinct E of the Fourth Ward were furnished two books, each of which contained forms for the oath of judges and of clerks of election, Tally Sheets, a form entitled Precinct Returns to the County Clerk and a form of a certificate to be signed by the judges and clerks. An examination of the books mentioned by the County Clerk and his two assistants disclose the following facts:

"(1) The oath of judges of election included in book one above mentioned

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is executed by all six judges who have also signed the certificate to the effect that the foregoing is a full and accurate return of all votes cast for all candidates at said General Election. Book two indicates that only five judges of election have executed the oath and only four judges have executed the certificate. In the case of each book four clerks took the oath and four clerks executed the certificate.

"(2) The number of votes shown on the Tally Sheet of book one differs from the number of votes shown on the Tally Sheet of book two with respect to each of the sixteen candidates voted for at the election.

"(3) In book one the number of votes for the candidates included in the Precinct Return to the County Clerk agrees in the case of twelve candidates with the number of votes shown in the Tally Sheet of book one. However, the number of votes shown in the return differs from the votes shown on the Tally Sheet of book one with respect to four candidates. In book two the number of votes shown in the return differs from the number of votes shown on the Tally Sheet of book two with respect to all sixteen candidates but the number of votes shown in the return of book two agrees with that recorded in the return of book one with respect to twelve candidates.

"(4) In some instances both Tally Sheets and returns show a greater number of votes cast than ballots issued.

"In view of the foregoing the County Clerk and his assistants have been unable from their examination of the Tally Sheets and Returns of both books to ascertain the actual number of votes any of the sixteen candidates received at the general election.

"A Petition was filed in the Circuit Court by the County Clerk and his two assistants in which the Court was informed of the foregoing facts and was requested to make an order that the ballot

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boxes be opened under proper safeguards in order that the actual number of votes each candidate received in Precinct E of the Fourth Ward might be ascertained. The Circuit Court dismissed the Petition for want of jurisdiction. A copy of the memorandum opinion of the Court is herewith enclosed as of possible interest.

"The County Clerk has requested this office to inform you of the foregoing facts and to request your opinion regarding this matter, also to inquire whether the County Clerk under the Provisions of Section 11615 cited above may give to the candidates entitled thereto, certificates of election notwithstanding that his two assistants do not concur in the number of votes cast up for each of the candidates and decline to sign or approve the certificate."

Section 11614, R. S. Mo. 1939, provides as follows:

"At the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion to the clerk of the county court in the county in which the election was held within two days thereafter; if the poll books are not returned in the time provided the clerk shall have the power to either send the sheriff or a messenger for said books; the other poll book shall be retained in the possession of the judges of election open to the inspection of all persons: Provided, that if such poll books be transmitted by messenger, the county court shall pay such messenger for such service at the rate of ten cents per mile for each mile necessarily traveled, going and returning."

Only one set of poll books are to be delivered to the county clerk. Since the judges and clerks of precinct E of the fourth ward in the City of St. Joseph, Missouri have furnished the county clerk with two sets of poll books, then the one to be accepted by the county clerk must be the one that has been properly signed and certified to by all the judges and clerks as provided by law (Sec. 11610, R. S. Mo. 1939). Therefore, poll book No. 1 which has been executed by all the judges and clerks shall be the poll book accepted by the clerk of the county court and considered by

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the canvassing board. Poll book No. 2 may be disregarded.

Section 11616, R. S. Mo. 1939, Sec. 111.72, House Revision Bill No. 2049, Revision 1949) provides as follows:

"When the judges of election of any voting precinct in any county in this state, or in any city in this state not within a county, in casting up the totals of the votes cast in such precinct at any primary or general election, shall make an error giving to any candidate for nomination or election to any office in such county, or city, or to any candidate for any district office voted for entirely within such county, or such city, a greater or less number of votes than such candidate actually received, as shown by the tally sheet of such precinct, it shall be the duty of the county clerk of such county, or of the board of election commissioners of any such city, and the board of election commissioners in all cities of this state having such board, before certifying to the nomination or election of any candidate for a county office, or for a district office voted for entirely within such county, or such city, to give to the candidate or candidates whose total vote, as certified by the judges of election is more or less than the number of votes actually cast for such candidate or candidates, as shown by the tally sheet of such precinct, the actual number of votes cast, for such candidate or candidates in the precinct or precincts in which such error, or errors, occurred, the certificate of the judges of election to the contrary notwithstanding."

(Underscoring ours)

This section gives the county clerk of Buchanan county the authority to correct errors made by judges on poll book No. 1 as to the total number of votes cast for the respective candidates so that the total number of votes shown on the tally sheet of book No. 1 corresponds with the number of votes shown on the poll book. If the number of votes shown on the poll book differs from the votes shown on the tally sheet with said poll book No. 1 then the votes should be changed on the poll book to correspond with the votes shown on said tally sheet.

Section 11618, R. S. Mo. 1939, provides as follows:

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"Any county clerk, or any member of any board of election commissioners, who shall fail or refuse to comply with the provisions of section 11616 shall be deemed guilty of a misdemeanor, and, upon conviction thereof, punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than ninety days nor more than one year, or by both such fine and imprisonment."

The fact that the tally sheets and returns show a greater number of votes cast than ballots issued is not a matter of concern of the canvassing board.

The Supreme Court of Missouri in the case of State ex rel. Attorney General v. Vail, 53 Mo. 97, l.c. 111, has said:

"* * *The Governor, under our Constitution and laws, is an executive officer, not a judicial one. He is provided with no means of investigating questions of fact. In the matter of elective officers he is simply authorized to issue commissions. (Const., Art. 5, Sec. 25; Stat., p. 570, Sec. 32.)

"It could hardly be maintained, that upon an ex parte affidavit or statement he would be warranted to disregard official returns, yet he has no means of resorting to any other kind of evidence. He is relieved of all responsibility by issuing a commission to the person who appears on the records filed at the seat of government to be entitled to it. Though these records may not be conclusive in investigations in either contested elections or judicial proceedings the Governor at least is concluded by them, for he has no means of ascertaining their truth or falsity. His official duties in this matter are purely ministerial. This is the rule as established by the decisions of this Court, in regard to all ministerial officers. (State ex rel., Bland vs. Rodman. 43 Mo. 257.)

"It applies to the Secretary of the State, and to the clerks of the counties, in the exercise of the functions respectively confided to them in regard to elections. 'The law' say the Court, in State vs. Rodman, (43d Mo. R.) 'does not seem to have invested in the Secretary, any discretion in the premises. It requires him to perform the act of opening and counting the returns. It is the law declared by this

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Court as well as by the general current of authority, that a County Clerk, or the Secretary of State, in opening and casting up votes, acts ministerially and not judicially. The matter of determining upon the legality of votes is a judicial function, to be passed upon before a tribunal competent to make an adjudication where the parties interested may be heard.'

"The same point was so held in State ex rel., Attorney General vs. Steers, 44th Mo., p.223. There it is said, in reference to the return of the Clerk of Ralls County:

"If the clerk has sufficient mathematical ability to correctly count up returns, he is perfectly qualified for his office, for that is the only duty devolved on him by law.

"To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims.

"To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure, is to infringe or destroy the rights of parties, without notice or opportunity to be heard-- a thing which the law abhors and prohibits. Admit the power, and there will be no uniformity. One canvassing officer will reject for one thing, and another for a different matter, and no man can tell whether he is legally elected to an office, until he consults the notions of a canvasser. The exercise of such a power is subversive of the rights of the citizen and dangerous and fatal to the elective franchise. But it is enough to say that the claim is utterly unauthorized. The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where the parties interested can appear and have a fair trial upon pleadings and proofs.

"When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law and guilty of usurpation." (underscoring ours.)

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The Supreme Court of Missouri in the case of State ex rel. Donnell v. Osburn, 147 S.W. 2d. 1065, l.c. 1068; 347 Mo. 469, has held:

"* * *We held official returns to be prima facie evidence of election and good until proven otherwise by contest in State ex rel. Attorney General v. Vail, 53 Mo. 97.

* * * * *

"The duties enjoined upon the speaker place him in the same category as a mere canvassing officer or canvassing board. By the overwhelming weight of authority throughout the country the functions and duties of canvassers are purely ministerial. 20 C.J. Sec. 254, 18 Am. Jur. Sec. 254. This state follows the weight of authority. The rule here adopted is that the duty of casting up the vote certified by the returns and ascertaining who received the highest vote is a purely ministerial duty, and being such the canvassers have no right to go behind the returns. Mayo v. Freeland, 10 Mo. 629; State ex rel. Attorney General v. Steers, 40 Mo. 223; State ex rel. Metcalf v. Garesche, 65 Mo. 480; State ex rel. Ford v. Trigg, 72 Mo. 365; State ex rel. Broadhead v. Berg, 76 Mo. 136; Barnes v. Gottschalk, 3 Mo. App. 111; State ex rel. v. Stuckey, 78 Mo. App. 533; State ex rel. Glenn v. Smith 129 Mo. App. 49, 107 S.W. 1051; State ex inf. Anderson v. Moss, 187 Mo. App. 151, 172 S.W. 1180. We see no reason why this is not also true of the canvass which the speaker is required to make by Section 3."

In view of the above statutes and decisions of the Supreme Court of Missouri, we do not see how the county clerk and his two assistants, who constitute the canvassing board, could have any difficulty in determining the total number of votes cast in precinct E of the fourth ward in the City of St. Joseph, Missouri, for each candidate. They should all sign the abstract of the votes cast in Buchanan County without further delay.

29 C. J. S., pages 340 and 343, says:

"It is a common error for a canvassing board to overestimate its powers, but, since such a board is ordinarily a creation of constitution or statute, it may be stated generally

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that it has such powers and duties, and only such, as are conferred by the constitution or statute creating it, notwithstanding their exercise of certain judicial or discretionary powers, the powers and duties of the members of a board of canvassers are primarily ministerial in nature, being limited generally to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained. * * *

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"* * *Where the board of canvassers wrongfully refuse to canvass all the returns they may be compelled to do so by mandamus or other appropriate remedy."

Section 11463, R. S. Mo. 1939, (Sec. 111.11 House Bill 2049, Revision 1949) provides as follows:

"The clerks of the several courts to whom a transcript of the votes is directed shall, within two days after the time limited for the examination of the polls, deliver to the nearest postoffice on the most direct route to the seat of government, addressed to the secretary of state, a fair abstract of the votes given in their respective counties, by precincts for members of congress, governor, lieutenant governor, state senators and representatives, judges of the circuit courts not subject to the provisions of section 29, Article V, of the Constitution of Missouri, secretary of state, state auditor, state treasurer and attorney general. Such abstracts shall be enclosed in strong envelopes, closely sealed, which shall in no case be opened until the second Tuesday of December next after the election, and the said envelopes shall be endorsed by the clerk:

"Returns of an election held in the county of _____ on the _____ day of _____, A.D. 19____ for the offices of _____, etc."

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Section 11622.1 R.S.A. Laws Mo. 1945, p. 898, provides as follows:

"When any person shall have been elected a state senator from a senatorial district wholly within one county, the county clerk of such county, unless otherwise provided by law, shall issue to that candidate receiving the highest number of votes for the office of state senator a certificate of election to said office of state senator and shall certify the fact of such election to the Secretary of State."

Section 11464, R. S. Mo. (Sec. 111.13 House Bill 2049, Revision 1949) provides as follows:

"If there shall be a failure to receive any of the returns at the seat of government for one mail after the same is due, the secretary of state, unless the circumstances shall clearly justify a longer delay, in no case to exceed thirty days from the time of such election, shall dispatch a messenger to the county not returned, with directions to bring up the abstract."

Section 11465, R. S. Mo. 1939, provides as follows:

"If such failure shall happen by neglect of the clerk he shall forfeit to the state one hundred dollars, together with the expenses of such messenger, to be recovered by civil action before any court having jurisdiction thereof. And it shall be the duty of the secretary of state to direct the prosecuting attorney of the proper county forthwith to institute such action against such delinquent clerk."

The duty is upon the county clerk to transmit a transcript of the votes cast in Buchanan County to the Secretary of State of Missouri.

The county clerk cannot perform his duties as set forth above until the votes are tabulated by the three members of the board of election canvassers. It is true that the county clerk constitutes one of the said canvassers. It is the duty of the canvassers to mathematically tabulate the votes cast in their county from the returns made in the poll books by the judges and clerks of election

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of the different voting precincts in their county. The canvassers do not certify that the judges and clerks have correctly counted the ballots. It is the duty of the canvassers to record the total vote cast for each candidate as determined by their mathematical computation from said returns. It is the duty of the canvassers to then sign the certificate at the end of the "abstract of votes cast in Buchanan county." The certificate that the canvassers sign states in the certificate that it is based upon the returns made by the various voting precincts in said county.

CONCLUSION

It is the conclusion of this department that the poll book executed by all the judges of the precinct mentioned in your letter and attested to by all the clerks of said precinct shall be considered as the poll book filed with the county clerk as provided by Section 11614, R. S. Mo. 1939, and the other poll book (No. 2) left with the county clerk shall be disregarded by the canvassers. The county clerk has authority to correct the total number of votes shown on poll book No. 1 so that said totals correspond with the number of votes cast for the various candidates as shown by the tally sheet filed with poll book No. 1. The fact that the tally sheet and returns on poll book No. 1 may show in some instances a greater number of votes cast than ballots issued is of no concern to the county clerk or board of canvassers.

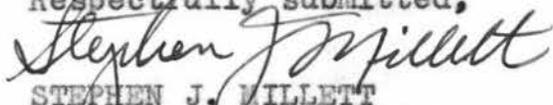
The total vote for each candidate shall be tabulated by the canvassers from the corrected poll book No. 1 of the precinct mentioned in your letter. Then the said results shall be added by the canvassers to the other votes cast in Buchanan County. The abstract or returns of the total vote cast for each candidate in Buchanan County can be thereby mathematically determined. When the results have been mathematically determined and recorded in the "abstract of votes cast" the canvassers shall then sign the certificate at the end of said abstract. Then the county clerk shall immediately issue certificates of election to the respective county candidates (and state senator) having the highest number of votes, and he shall transmit immediately to the secretary of state of Missouri an abstract of said votes concerning the officials named in Section 11463, R. S. Mo. 1939, as amended H.B. 2049, Revision 1949.

APPROVED:


J. E. TAYLOR
Attorney General

SJM:mw

Respectfully submitted,


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