

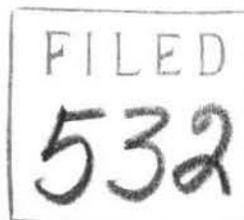
COUNTY COURT:  
COUNTY COURT JUDGES:  
ELECTIONS:  
TIE VOTES:

- (1) Section 49.040 RSMo 1959 is unconstitutional. (2) Section 111.760 is applicable to case where there is a tie vote for candidates for County Court Judge and a special election called.

December 8, 1966

OPINION NO. 532

Honorable George Scott  
Prosecuting Attorney  
Butler County  
Poplar Bluff, Missouri 63901



Dear Mr. Scott:

This is in response to your request for an opinion which reads as follows:

"This is to advise that at the General Election held in Butler County, Missouri, there is a tie vote for the candidates for the office of Judge County Court Western District of Butler County Missouri, each candidate receiving a total vote of 788, namely

Ralph D. Shelton, Democrat  
George M. Morrow, Republican

Please furnish me with your opinion immediately what method to use to declare the elected officer in this contest. Advise on Missouri Law under Section 111.760, also Section 49.040 of Vernon's Annotated Missouri Statutes."

Honorable George Scott

Section 49.040, RSMo 1959, provides as follows:

"All elections of judges of the county court under this chapter shall be certified to the clerks of the county courts of the counties wherein such elections shall be held; and in case of a tie between two or more persons, the same shall be determined by the sheriff of the proper county."

Section 111.760, RSMo 1959, 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 and his assistants appointed pursuant to section 111.710 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 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 assistants, 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."

The general law on tie votes is stated in 29 C.J.S., Section 244, Page 678, as follows:

"Where the vote results in a tie, and no provision is made by law for determining who shall be declared elected in such case, there is no election. That is where two candidates receive the same number of votes, and there is no provision of law for determining which shall be declared elected, there is no choice or choosing and consequently no election; \* \* \*"

26 Am. Jr. 2nd Section 315, Page 140, states the rule:

"Where rival candidates for an office receive an equal number of votes, neither is elected. \* \* \*"

"In the absence of statutory authority, it is not permissible for the election officers to determine by lot which candidate shall be declared elected, nor can the candidates by agreement undertake between themselves to settle the question by lot or otherwise. In a number of jurisdictions, how-

Honorable George Scott

ever, provision is made for the settling of a tie vote by the drawing or casting of lots, and in some cases provision is made for the holding of a second election where the first results in a tie. \* \* \*

The general rule appears to be that in the absence of a statute, where an election of an officer results in a tie vote, no one is elected. This rule seems to be approved in Missouri in State ex rel Speck v. Geiger, 65 Mo. 306, 310, where the Court said:

"\* \* \*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. \* \* \*

Article VI, Section 7, Constitution, provides as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."(Emphasis added)

Article VIII, Section 3, of the Constitution, provides:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. \* \* \*

Section 49.020, RSMo 1959, provides:

"At the general election in the year 1880, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; and at the general election in the year 1882, and every four years thereafter, the presiding judge

Honorable George Scott

of said court shall be elected by the qualified voters of the county at large, who shall hold his office for the term of four years and until his successor is duly elected and qualified. Each judge elected under the provisions of this chapter shall enter upon the duties of his office on the first day of January next after his election."  
(Emphasis added)

Turning to a consideration of the statutes, Section 49.040 purportedly authorizes the sheriff to choose or decide which one of the candidates who received the same number of votes as the other should be considered elected. The Supreme Court in State ex rel Crow v. Kramer, 150 Mo. 89, 51 S.W. 716, held that a statute which authorized the County Court to decide in cases of a tie vote for Justice of the Peace was unconstitutional. Section 7, Article VI, Constitution, requires the County Judges to be "elected" and Section 3, Article VIII, Constitution, requires all "elections" to be by ballot. Certainly the appointment of a County Judge by the Sheriff does not comply with the mandate of the Constitution for an "election". We therefore must conclude that Section 49.040 respecting the determination by the Sheriff in the case of a tie vote for County Judge is unconstitutional and not effective. Moreover, the idea of delegating the selection of a County Judge to the sheriff deprives the electorate of making the choice. Only the electorate has the right to choose or "elect" a County Judge.

The provisions of Section 111.760, RSMo 1959, place the matter where it properly belongs, that is in the hands of the electorate. It is therefore our view that the County Clerk and his assistants as provided by said section, should comply with the provisions of Section 111.760 and issue their order to the sheriff of the county directing him to issue his proclamation for holding a new election for the office of Judge of the County Court, Western District, as provided in said section.

#### CONCLUSION

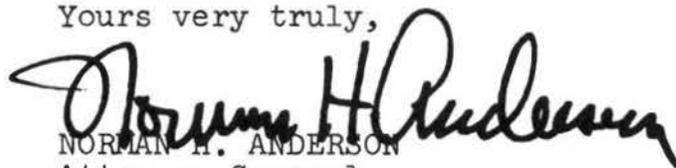
It is the opinion of this office (1) That Section 49.040 RSMo 1959, providing for the determination of the winner of an election for County Judge in case of a tie vote is unconstitutional.

Honorable George Scott

(2) That Section 111.760, RSMo 1959, is applicable in the case where there is a tie vote for candidates for office of Judge of the County Court and the clerk and his assistants should issue their order to the sheriff directing him to issue his proclamation for holding an election for the purpose of electing a Judge of the County Court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General