

Elections, Nominations When on Two Tickets—Elections, Nominations When Tie Vote. County Clerk, Duty When Tie Vote.

When a person has been nominated for the same office, on two tickets he must file a declaration as to which he will accept.

Where there is a tie vote between two persons for the same office, it is incumbent on the County Clerk to determine in the method provided by law who shall be the nominee.

October 1, 1920.

Mr. A. J. Duncan,
County Clerk and Recorder,
Helena, Montana.

Dear Sir:

I have your letter of September 28th, in which you present to me a proposition resulting from the recent election upon which you desire an opinion.

You state that Charles Hageman and J. M. Adamson were candidates at the primary election on the Republican ticket for Constable of Helena Township. They were both elected on the Republican ticket. Charles Hageman received fourteen votes on the Democratic ticket for the same office by having his name written upon the Democratic ballot. J. M. Adamson and a man by the name of Fred Smith each received eleven votes on the Democratic ticket by having

their names written upon the Democratic ballot. The Democratic party had no candidate for the office of Constable of Helena Township at this election.

You refer to a former opinion written by the Attorney General's office found in Volume 5, at page 639 of the Reports and Official Opinions of the Attorney General. This opinion, you believe, sustains the proposition that Charles Hageman was duly nominated on the Democratic ballot as a candidate for Constable by the Democratic party. You are correct in your interpretation of the opinion to which you refer, as well as the law governing the case. The Primary Election Law, found in the Laws of 1913, is exclusive in so far as its provisions were intended to operate. (State ex rel Reibold vs. Duncan, 55 Mont. 380, 177 Pac. 250.) Section 20 of the Act expressly contemplates that a candidate for office on the Republican ticket may also receive votes for the same office on the Democratic ballot, providing that such votes on the Democratic ballot shall be counted for the person receiving them on the Democratic ticket. This has been expressly recognized by the Supreme Court in the case of State ex rel Metcalf vs. Wielman, 49 Mont. 436, 143 Pac. 565. Section 20 further provides: "In case any person is nominated, as provided in this Act, upon more than one ticket," he shall forthwith file in the proper office a written declaration indicating the party designation under which his name is to be printed on the official ballot. If such candidate fails in this, his name shall be printed upon the party ticket for which the greater number of nominating signatures appear for such candidate; but that no candidate shall have his name printed on more than one ticket.

Mr. Hageman, under the circumstances, should file in your office his written declaration indicating the party designation under which his name is to be printed on the official ballot at the general election. If he fails, you must place his name in this particular case under the designation "Republican Party". In either event, this would leave a vacancy which Mr. Hageman would thus cause.

Section 16 of the Primary Election Act provides the instances in which a vacancy may be filled and the manner of filling the same. Vacancies may only be filled "in case of the death of the candidate or his removal from the state or the county or electoral district before the date of the ensuing election, but in no other case." The circumstances of the case which you present do not create a vacancy which might be filled in Mr. Hageman's case. You are therefore correct in your belief that the office of Constable on both the Republican and Democratic tickets to which Mr. Hageman has been nominated is disposed of so far as you are concerned.

As to the other office of Constable in Helena Township, Mr. Adamson has been regularly nominated for it upon the Republican ticket. As to the Republican nomination there is no dispute. Upon the Democratic ticket both Mr. Adamson and Mr. Smith received a tie vote for this office. This contingency has been provided for by Section 23 of the Primary Election Act. Provision is there made in case of a tie between two persons for the same office "the county clerk shall give

notice to the several persons so having the highest equal number of votes to attend at his office at a time to be appointed by said clerk, who shall then and there proceed publicly to decide by law which of the persons so having an equal number of votes shall be declared nominated by his party," etc. This provision is plain and requires no further comment from me.

I desire, however, to call your attention to the fact that under Section 23 I believe it to be absolutely incumbent upon the county clerk and recorder to make the decision as between the persons having an equal number of votes pursuant to the method therein provided. You will note that this same Section requires the election returns to be canvassed by the method therein provided and requires the county clerk to "certify the nomination for each party and enter upon his register of nominations the name of each of the persons having the largest number of votes for nomination as candidates, etc., and to notify by mail each person who is so nominated." A tie vote makes no decision as to a nomination until a lot has been cast to decide which of the persons receiving such tie vote shall be considered the candidate, even though one of two persons receiving a tie vote should renounce his candidacy upon such ticket. This, in my opinion, would not leave the other person receiving such tie vote the authoritative nominee upon such ticket.

I might further say in this connection that if Mr. Adamson attends the call from your office for the purpose of deciding the tie by lot, such attendance would not constitute an election on the part of Mr. Adamson to become a candidate on the Democratic ticket. The statute expressly provides that such election can only be made by a written declaration filed in your office. The attendance upon deciding the tie vote would not bind Mr. Adamson as to the party designation under which he might choose to become a candidate.

Respectfully,

S. C. FORD,

Attorney General.