

Opinion No. 140**Schools—Elections—Candidates—Trustees—Vacancy—County Superintendents—Ballots, Cross Before Name Written In—Marking Ballots.**

HELD: In case of a tie between two candidates for school trustee at a school election there is a failure of election and a vacancy results which should be filled by the county superintendent of schools as provided by law.

In an election in a second or third class district if an elector has written a name in on the ballot but has neglected to put a cross before the name, his ballot should nevertheless be counted towards the selection of such a candidate for the office of trustee.

April 6, 1933.

You have submitted to this office for an opinion two questions as follows:

“In case of a tie between two candidates for school trustee at a school election, how is the election determined?”

“At an election, if an elector has written a name in on the ballot but has neglected to put a cross before the name, will this ballot count towards the selection of such a candidate for the office of trustee?”

The statute in regard to tie votes in an election for school trustees has not been changed since Attorney General Wellington D. Rankin rendered opinions on two different occasions, the first of which opinions appears in Volume 9, page 33, and the second in Volume 10, page 59. In both of these opinions Mr. Rankin held that a tie vote for the two highest candidates for the office of

school trustee constituted a failure to elect and therefore that a vacancy resulted which should be filled by the county superintendent as provided by Section 998, Revised Codes 1921. We agree with his interpretation of the law, (*State ex rel. Rick v. Cahill*, 105 N. W. 691; 20 C. J. 208) although in the case of certain constitutional offices the supreme court has ruled that the incumbent holds until his successor is elected and qualified. (*State ex rel. Chenoweth v. Acton*, 31 Mont. 37; *State ex rel. Dunne v. Smith*, 53 Mont. 341.)

Section 989, Revised Codes 1921 provides: "In districts of the second and third classes, the election of school trustees shall be held and conducted under the supervision of the board of school trustees. The voting must be by ballot without reference to the general election laws in regard to non form of ballot, or manner of voting."

Courts of other states having statutes not dissimilar to this have held that the "writing in," at the proper place on a ballot, of the name of a person is a sufficient indication of the intention of the elector to vote for such person, so as to entitle such ballot to be counted, though no cross is made opposite such written name. (*State ex rel. Latham v. Sheets*, 227 N. W. 457; *Findley v. Sorenson*, 276 Pac. 843; *Rice v. Clarke*, 113 Atl. 746; *Board of Elections v. Henry*, 158 N. E. 94; 20 C. J. 160.)

If your second question, then, applies particularly to an election in a district of the second or third class, our answer is in the affirmative.