

GENERAL ASSEMBLY: Power to investigate election returns prior to seating executive officials.

January 9, 1941 1/9

Democratic Caucuses
c/o Honorable L. N. Searcy
Missouri Senate
Capitol Building
Jefferson City, Missouri



Gentlemen:

We acknowledge receipt of the letter from the Democratic Senate Caucus requesting an opinion, which reads as follows:

"The General Assembly desires and requests that you furnish us with an opinion on the following question, that is:

Can the General Assembly proceed with an investigation of the election and election returns for the office of Governor without filing a formal contest and without seating the person who apparently, from the election returns, received the highest number of votes for that office?"

Within the limited time that we have had to examine the authorities and to study the question presented, we have arrived at the conclusions hereinafter set out.

At the outset it becomes necessary to consider the following statutes and provisions of the Missouri Constitution:

Article V, Section 3, of the Constitution of Missouri reads:

"The returns of every election for the above named officers shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the House of Representatives, who shall, immediately after the organization of the House, and before proceeding to other business, open and publish the same in the presence of a majority of each House of the General Assembly, who shall for that purpose assemble in the hall of the House of Representatives. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more shall have an equal and the highest number of votes, the General Assembly shall, by joint vote, choose one of such persons for said office."

Section 10169, R. S. Mo. 1929, provides:

"After each election of governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney-general, and superintendent of public schools, the secretary of state shall, immediately after the organization of the house of representatives, deliver to the speaker thereof the returns of the votes given for the last named officers, who shall thereupon immediately notify the senate of the same, and that the house is ready to receive the senate in joint session to open and publish the same, whereupon the senate

shall immediately repair to the hall of the house of representatives; and the speaker of the house shall, before proceeding to other business, in the presence of a majority of the members elected to each house of the general assembly so assembled in joint session, open and publish the same. In case of an alleged mistake in any return, or when more than one return has been made for any of said officers from any county or city or precinct, the two houses shall, in joint session, correct such mistake, if any, and determine which is the true and correct return by a vote of a majority of the members present, and the same shall be counted by the speaker, under the direction and control of the two houses thus assembled. The person having the highest number of votes for any of said offices shall be declared by the speaker of the house to have been duly elected."

It is clear the question here presented concerns only the legislative branch of our government. Taylor v. Beckham, 56 S. W. 177; 178 U. S. 547; 44 L. Ed. 1187.

Section 3 of Article V of the Missouri Constitution, supra, provides the following steps as the procedure before the General Assembly:

First, the returns of every election for the Governor and other officers named in the Constitution shall be transmitted by the Secretary of State to the Speaker of the House of Representatives.

Second, the Senate and House shall meet in the hall of the House of Representatives in joint session.

Third, the Speaker of the House, before proceeding to other business, shall open the returns and publish the same in the presence of a majority of each house of the General Assembly.

Fourth, the members of each house of the Assembly shall, by their vote, declare one or the other of the candidates for the office (in the instant case that of Governor) elected.

We believe that in determining the power of the General Assembly to perform the duties enjoined on it by the Constitution that the following generally accepted rule should be considered, as set out in the case of *Wire Co. v. Wollbrinck*, 275 Mo. 350:

"* * It is well to note the true function of the Legislature as the representative of the people, in the enactment of laws for their government, and its true relation to the Constitution of the State. That it is vested, in its representative capacity, with all the primary power of the people, unless fettered by the Constitution, is a proposition which is the corner stone of our State government, and one whose stability is unquestionable, and which has been enunciated by this court whenever the relation of the Legislature to the Constitution was held in judgment."

It is provided in Article V, Section 3, of the Constitution of Missouri, and also in Section 10169, R. S. Mo. 1929, that, "The person having the highest number of votes shall be declared duly elected." Does the highest number of votes, as used in the Constitution and the statutes, mean the result shown by the face of the returns, or does it mean the legal votes cast at the General Election for Governor?

"Votes" have been defined by the Supreme Court of Missouri in State ex rel. Chaney v. Grinstead, 314 Mo. 55, 282 S. W. 715, l. c. 718, as follows:

"The word 'votes' means ballots cast by those authorized to vote by law; in other words ballots cast by legal voters."

The above constitutional and statutory provisions use the words "duly elected." "Duly" is defined as "proper" or "according to law." 19 C. J., p. 833.

Therefore, the Legislature should determine whether the purported votes cast for any candidate shown by the returns published to the joint session were, in fact, legal votes and cast for the particular candidate by qualified voters.

It is apparent the framers of the Constitution did not intend to limit the General Assembly to the mere ministerial act of witnessing the opening and publication of the returns by the Speaker of the House, but placed on it the responsibility of ascertaining and determining which candidate actually received the highest number of legal votes cast.

Any other conclusion could lead to the absurd result of forcing the General Assembly to seat a candidate even if it had conclusive knowledge that he was not qualified under other provisions of the Constitution, or that the returns before them were fraudulent. Assume, for instance, that the General Assembly knew beyond any doubt that certain returns had been fraudulently altered; that such returns showed on their face that more votes were cast in a county than there were inhabitants; or that a return received by the Speaker was blank as to the candidate for Governor; assume, further, that the records showed that a candidate for Governor did not have the qualifications necessary to hold that high office, although such candidate received the highest number of votes as shown by the returns, then under

any of the above circumstances, if the provisions of Section 3 of Article V, supra, compel the General Assembly to declare the candidate elected as shown by the face of the returns, then, it would be placed in the strange position of merely having the authority to ratify fraud, to seat a candidate in violation of other provisions of the Constitution, or to vest the powers and duties of the office of Governor in a person not duly elected or qualified under the provisions of the Constitution.

The General Assembly itself has construed its authority as being greater than the mere perfunctory duty of declaring elected the candidate shown by the face of the returns to have received the highest number of votes. Section 10169 R. S. Mo. 1929, supra, clearly authorizes the General Assembly to correct any "alleged mistake in any return". "Mistake" is defined in Webster's New International Dictionary, Second Edition, as follows:

"An apprehending wrongly; a misconception; a misunderstanding. A fault in opinion or judgment; an unintentional error. (2) Misconception or error of the mind leaving a person to do an act which he otherwise would not have done; also, the act or omission so arising, as an intentional act or omission arising from ignorance, surprise, imposition, or misplaced confidence."

The construction placed on a statute or constitutional provision by the Legislature is entitled to great weight. 59 C. J. Section 612, page 1033. Furthermore, the General Assembly in the past has construed Section 10169 R. S. Missouri 1929 and Article V, Section 3 of the Constitution of Missouri as authorizing it to institute and conduct an investigation of alleged mistakes, errors and irregularities in the returns for the office of Lieutenant Governor before seating the candidate shown on the face of the returns to have received the highest number of votes.

In 1909, the committee appointed by the joint session of the General Assembly to canvass the returns of the previous general election, reported that it found alleged mistakes in the returns and also found amended returns and corrections certified by the county clerks with other irregularities which, had been called to its attention. It reported further that by reason thereof it was unable to definitely and correctly report the vote cast at said election for the office of Lieutenant Governor. This committee asked the General Assembly for authority to investigate such mistakes, errors and incomplete returns, which was granted it by the joint assembly. Pursuant to such authority, said committee commenced and conducted an investigation of such alleged errors, mistakes and incomplete returns before the Lieutenant Governor was declared elected.

It is true that under the provisions of Section 10361, R. S. Mo. 1929, any person may present a petition to the General Assembly to contest the election of Governor or Lieutenant-Governor. This statute giving third persons the right to file a petition for contest, however, does not in anyway affect the right and authority of the General Assembly under the provisions of Section 3 of Article V of the Constitution and Section 10169, R. S. Mo. 1929. In other words, the General Assembly must exercise its power to determine which candidate received the highest number of legal votes and who has been duly elected.

Section 25 of Article V of the Constitution of Missouri provides that contested elections of the Governor and Lieutenant-Governor shall be decided by the General Assembly in such manner "as may be provided by law." Pursuant to such constitutional provision, the Legislature enacted Section 10361, R. S. Mo. 1929, which permits third persons to file petitions for contests. Any contention that this section is exclusive and prohibits the General Assembly from exercising its statutory and constitutional powers, is untenable.

In the case of State v. Wymore, 119 S. W. (2d) 941, the defendant contended that the statutory method of removal of officers was exclusive.

Section 7 of Article XIV of the Constitution provides that "Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

In pursuance to such constitutional provision, the Legislature enacted a statutory method for the removal of such officers. The defendant in the above case contended that such statutory method was exclusive. The court held, however, that the statutory method providing for removal of officers was not exclusive, and that an officer could be removed by the constitutional remedy of quo warranto.

We have failed to find any Missouri case interpreting either the constitutional provisions or the statute above quoted. A search disclosed that many states have constitutional provisions identical with Sections 3 and 25 of Article V of the Missouri Constitution.

The case of State v. Elder, 47 N. W. 710, decided by the Supreme Court of Nebraska in 1891, was a case in which the Speaker of the House of Representatives presided at a meeting of both houses of the Legislature under a constitutional provision similar to our own, and refused to open and publish the election returns transmitted to him by the Secretary of State and which purported to certify the number of votes cast for candidates for the office of Auditor of Public Accounts. The court interpreted the opening and publishing of the returns to be a ministerial duty, and, by its opinion, compelled the performance of such duties by mandamus. However, in that case there was no attempt to force the members of the Joint Session to declare either candidate elected, the court apparently recognizing that such an act on the part of the Assembly involved the exercise of discretion.

There is only one case, so far as we have been able to ascertain, which bears directly on the question

at hand, Goff v. Wilson, 32 W. Va. Rep. 393. An examination of the Constitution of West Virginia discloses that it contains a provision identical with Sections 3 and 25 of Article V of our own Constitution. The facts were that the plaintiff was a candidate for the office of Governor at the General Election held November 6, 1888; that the commissioners of the various counties in said state transmitted the returns of the election to the Secretary of State in sealed envelopes, directed to the Speaker of the House, as required by the Constitution. The Speaker opened and published the returns at a joint session of the two houses of the Legislature, and they were submitted to a joint committee for the purpose of reporting on the verity of the returns. The committee returned a report, finding one A. B. Fleming to have received more legal votes than plaintiff, and the joint session, in adopting the report, declared the said A. B. Fleming duly elected. We find the following in the opinion of the court: (l. c. 398)

"In this condition of the law the legislature, when it assembled in January last and found, that there was a contest pending between Gen. Goff and Judge Fleming for the office of governor, was confronted with this very grave and serious question: Was it their duty to declare either of the claimants elected to the office of governor, until after the contest could be decided? If they or the speaker of the house should at the commencement of the session, or during the term fixed by law for its continuance in regular session, declare either Goff or Fleming governor, the inevitable consequence would be, that the person so declared would have to assume the duties of the office, before it would be possible to try the contest or determine his right to the

office under the existing law. The result of this might be to place in the high and responsible office of governor and at the head of the state government a person, who had never been elected or otherwise designated by either the constitution or the law to discharge the duties of that office; for, if the trial of the contest should result in favor of the other claimant, his title would relate to the date of his election, and he would be the de jure governor from the commencement of the term fixed by the constitution. The decision upon the contest would be simply the determination of a fact. It would not create a fact or a right nor confer the office. The election gives the right to the office, and the decision of the tribunal fixed by law to try the contest simply declares the title upon the evidence but does not create or confer it; and if a person has the title by virtue of his election, his qualification entitles him to exercise the duties of the office. Bier v. Gorrell, 30 W. Va. 95, 100, (3 S. E. Rep. 30.) This being so, it is plain, that the person thus placed in the office before the decision of the contest would be there without any legal right. He would be a mere intruder, because he had never been elected, and was never legally entitled to the office.

* * * * *

It is scarcely possible to believe, that it was contemplated by those, who made and adopted our constitution, that we should ever have the anomaly of a person discharging the high and responsible

January 9, 1941

duties of the chief executive office of the state, who had never been elected or otherwise designated by law to perform the duties of that office."

CONCLUSION

It is the opinion of this office that it is not mandatory that the General Assembly accept the result of the election of Governor as evidenced by the returns certified to the Speaker of the House, but it has the power to ascertain and determine by investigation or otherwise, before declaring any candidate duly elected, whether such returns are true and correct, and whether or not the candidate who has the greatest number of votes as shown by the returns was in fact the duly elected Governor of the State of Missouri.

Respectfully submitted,

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Attorney General

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