

ELECTIONS: When Constitutional Certificate to office shall issue.

December 15, 1936.



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated December 10, 1936, which reads as follows:

"Referring to telephone conversation this morning, please note the enclosed certification of county officers-elect in Phelps County and amended certificate regarding the office of Sheriff, and give us your opinion regarding issuance of commission by this office."

We also acknowledge the exhibits attached to your request. By one exhibit the County Clerk on November 6, 1936, certifies that Roy L. Kirgan was the duly elected sheriff of Phelps County, receiving the highest number of votes for the office. By a subsequent certification shown by another certificate, the same county clerk on November 9, 1936, certifies to a recount of said votes pursuant to an election contest, certifying that Fred C. King received the highest number of votes for the office of sheriff of Phelps County. Both of these certifications are herewith returned to your possession.

What you want to know is whether your office, possessed with these two certifications of election should issue a certificate of election under the State Seal for the office of sheriff of Phelps County, and if so, to whom should it be issued?

Article V, Section 23 of the Missouri Constitution provides:

"The Governor shall commission all officers not otherwise provided for by the law. All commissions shall run in the name and by the authority of the State of Missouri, be signed

by the Governor, sealed with the Great Seal of the State of Missouri, and attested by the Secretary of State."

In the case of *Nash v. Craig*, 35 S. W. 1001, 134 Mo. 347, l. c. 361, the Supreme Court said in a similar election contest case.

"The recount by the clerk takes the place of the canvass by the election officers. This rule has been generally recognized. The count by the clerk is called a recount."

In the case of *State ex rel Attorney General v. Pool* 41 Mo. l. c. 37, the Supreme Court said:

"It is true there is no direct means pointed out by which the Governor is to be informed of the election of sheriff so as to enable him to execute the commission; and this is obviously a casus omissus, and leaves to him the responsibility of acting on such evidence as he may deem satisfactory."

In the case of *State ex rel v. Clark*, 52 Mo. 508, l. c. 512, the Supreme Court said:

"The commission issued to the relator invested him with the title, and is prima facie evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law."

#### CONCLUSION.

This department is of the opinion that under the Missouri Constitution the Governor's commission should issue to the duly elected sheriff of Phelps County upon satisfactory proof as to who received the majority votes in the November election.

Dwight H. Brown

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December 15, 1936.

It is our opinion that the Governor's certificate should be issued to the successful person in the recount. To issue the constitutional certificate to one not able to sustain his title to office by a legislative recount in a Court of record would be to place a person duly elected by the recount to a disadvantage not intended by the Legislature when they provided a legal method of recount. The very purpose of a recount is to determine who has the prima facie right to the office, who is entitled to this certificate of office.

Respectfully submitted

WM. ORR SAWYERS:  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:H