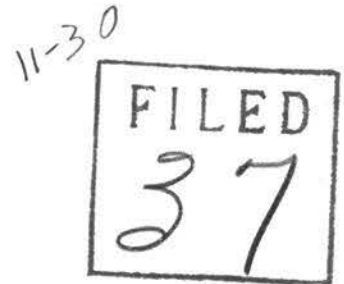


**ELECTIONS:** Votes shown by tally sheets should be counted rather than those shown by certificate of judges and clerks, where there is a discrepancy, but when canvassers have once tabulated the votes and said tabulation has been certified in to proper authorities, canvassers cannot retabulate the votes, nor can the county clerk certify either an amended or new abstract of the votes.

November 19, 1942

Mr. Chas. K. Hart  
Prosecuting Attorney  
Brookfield, Missouri



Dear Sir:

This will acknowledge receipt of your letter of November 12, which reads as follows:

"At the recent election, held on the 3rd day of November, 1942, Wayne W. Cowan was a candidate for the office of Representative. The ballots were canvassed officially by the County Court on the 6th day of November, 1942.

"I have the affidavit of Wayne W. Cowan, which I hand you herewith, in which he states that he was present at that count and of his own knowledge knows that the County Court failed to count the tallies in all of the Tally Books.

"He states that there were differences found in some of the books canvassed between the number of tallies and the number reported. He insists that the County Court should have counted the tallies in all of the books, and as these books are now in the hands of the County Clerk they may still be counted.

"Please let me know whether you have passed on the duties of the County

Court in this regard, and if so favor me with a copy of your opinion, and if not will appreciate an opinion from your department."

As to whether or not the canvassers should certify the number of votes as shown by the tally sheets or as shown by the certificate of the judges and clerks of the precinct, we think Section 11616, R. S. Missouri, 1939, settles the question. Said section reads as follows:

"When the judges of election of any voting precinct in any county in this state, or in any city in this state not within a county, in casting up the totals of the votes cast in such precinct at any primary or general election, shall make an error giving to any candidate for any district office voted for entirely within such county, or such city, a greater or less number of votes than such candidate actually received, as shown by the tally sheet of such precinct, it shall be the duty of the county clerk of such county, or of the board of election commissioners of any such city, and the board of election commissioners in all cities of this state having such board, before certifying to the nomination or election of any candidate for a county office, or for a district office voted for entirely within such county, or such city, to give to the candidate or candidates whose total vote, as certified by the judges of election is more or less than the number of votes actually cast for such candidate or candidates, as shown by the tally sheet of such precinct, the actual number of votes cast, for such candidate or candi-

dates in the precinct or precincts in which such error, or errors, occurred, the certificate of the judges of election to the contrary notwithstanding."

The foregoing section specifically provides that the number of votes as shown by the tally sheets shall prevail as against the number of votes certified by the judges and clerks.

Your second question is whether or not the county clerk may yet correct his certificate to correspond to the votes cast as shown by the tally sheets.

It is a general rule of law that when an officer has exercised a power given to him by law, he cannot re-exercise that power or correct his acts unless the law specifically gives him such power of amendment or correction. The rule is stated in 46 C. J. 1033, Sec. 292, as follows:

"In the absence of statutory authority, an officer in performing a statutory duty which does not involve the exercise of discretion is without the power of amendment; and when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, although the statute conferring authority expressly makes his determination discretionary."

In your case Section 11616, supra, left no discretion to the county clerk as to which figure should be used in arriving at the correct number of votes which had been received by candidates. He exercised the duty which he had in that regard. We assume that he has carried out the provisions of Section 11463, R. S. Missouri, 1939, and has before now certified to the secretary of state an abstract of the votes as determined by the canvassers in his county. That being true, there would be no way by which the county

Mr. Chas. K. Hart

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clerk and his associate canvassers could now retabulate the votes and send a supplemental or corrected abstract to the secretary of state.

CONCLUSION

It is, therefore, the opinion of this office that the votes shown by the tally sheets should be counted rather than those shown by the certificate of the judges and clerks, where there is a discrepancy, but that when the canvassers have once tabulated the votes and said tabulation has been certified in to the proper authorities, the canvassers cannot retabulate the votes, nor can the county clerk certify either an amended or new abstract of the votes.

Respectfully submitted

HARRY H. KAY  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

HHK:HR