

Johnston v. Board of Elections
K. B. JOHNSTON v. BOARD OF ELECTIONS OF WAKE COUNTY and
B. H. PATE K. B. JOHNSTON v. BOARD OF ELECTIONS OF WAKE
COUNTY and B. H. PATE.

172 N.C. 162
Supreme Court of North Carolina
Decided October 04 1916

172 N.C. 164 James II. Pou and Maiming & Kitchin for ■ plaintiff.
Douglass & Douglass for defendant.

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- ¶11 172 N.C. 163 Civil, action to compel defendant board of elections of
Waie County, by writ of mandamus, to place tbe name of plaintiff on the
regular election ticket as one of tbe nominees of tbe Democratic Party
for tbe position of Member of tbe General Assembly, tried before Bond,
J., at July Term, 1916, of Waxe.
- ¶12 There was judgment for plaintiff, and defendants excepted and ap-
pealed.
- ¶13 1. Election — -Primary Laws — County Boards — Second Primary —
Written Notice — Statutes.
- ¶14 Applying tbe rule of construction that every part of a statute should be
given effect when possible, it is Held, that section 24 of the State Primary
Law, ch. 101, Laws of 1915, providing, among other things, that the
successful candidate for certain offices, in this case for member of
General Assembly, shall receive a majority of the votes cast, when con-
strued in connection with the proviso of the same section, that the one
receiving the next highest vote, under a majority, shall file a request, in
writing, with the appropriate hoard of elections for a second primary,
entitles the one receiving the highest number of votes to' be the candi-
date of the party to the office, upon the failure of the one receiving the
next highest vote to comply with the provision within the time stated, i.
e., within five days after the result of the primary has been officially
declared.
- ¶15 2. Same — Results Declared.
- ¶16 Laws 1915, ch. 101, sec. 21%, requires that the county board of elections
shall tabulate the returns made by the judges and registrars, etc., so as
to show the total number of votes cast for each candidate, etc., and with
reference to county officers, when thus compiled on blanks, the returns
shall be made out in duplicate, one copy filed with the clerk of the Supe-
rior Court, one retained by the board, which shall forthwith declare the
result: Held, when this has been properly done, and the result posted at
the courthouse door of the county, the result of the election is sufficiently
declared, and the contestant receiving the next highest vote, less than a
majority, must filé his written request for a second primary within five
days thereafter, in accordance with the proviso of section 24 of the State
Primary law.

¶17 S. Elections — Primary Laws — County Boards — Statutory Bights —
Courts— Jurisdiction.

¶18 ■While ordinarily courts may not control political parties in the selection
of their candidates for office, this principle does not apply where the
Legislature, in the exercise of its powers, has taken control of the
subject, and enacted a statute conferring on successful contestants in a
legalized primary certain specified and clearly defined legal rights, and
enjoining upon an official board ministerial duties reasonably designed
to make these rights effective.

¶19 i. Same — Mandamus—Board of Elections — Ministerial Duties.

¶110 Where a candidate for membership in the General Assembly who has
received the next highest vote in a legalized primary, but less than a
majority of the votes cast, has failed to comply with the proviso of sec-
tion 2'4, chapter 101, Laws 1915, in giving the written notice to the board
of elections for a second primary within the time prescribed, and after
duly declaring the result of the election (sec.-2114), the board then orders
the second primary, the ministerial duty of recognizing the one receiving
the highest vote as the candidate and putting his name on the ticket as
such will be enforced by mandamus.

¶111 5. Elections — Primary Laws — County Boards — Ministerial Duties —
Offices— Title — Quo Warranto.

¶112 Quo warranto lies when the office in question is presently filled by an
incumbent de jure or de facto, and not where the object of the pro-
ceeding is to compel the performance by a board of elections of its min-
isterial duty of recognizing, and properly putting upon the ticket, one
who under the provisions of the primary law is entitled to be placed
thereon as the rightful nominee of a party.

¶113 6. Elections — Primary Laws — County Board of Elections — Advice from
State Board of Elections.

¶114 It appearing in these proceedings that the county board of elections has
wrongfully denied the right of the plaintiff, under our primary law, ito
have his name placed upon the ticket as the choice of his party: Held,
the fact that it acted therein under the advice of the State Board of
Elections- is without controlling significance.'

¶115 Brown, J., dissenting.

¶116 On tbe bearing it was properly made to appear tbat on 3 June, 1916,
an election was beld in Wake County, pursuant to chapter 101, liaws 1916,
same being entitled "An act to provide for primary elections throughout
tbe State" for tbe purpose of selecting, among others, tbe nominees of
tbe Democratic Party as candidates for tbe lower House of tbe General
Assembly; tbat Wake County is entitled to three members of tbe House
of Bepresentatives, and there were at said election six candidates for tbe
Democratic nominees for these positions, and tbe vote for tbe
candidates was as follows:

¶117 E. W. Winston, Jr., received. 2,609 votes

¶118 J. E. Holding received. 2,306 votes

¶119 K. B. Johnston received. 2,016 votes

¶120 B. H. Pate received. 1,924 votes

¶121 B. Moore Parker received.. 1,781 votes

¶122

Tbat the returns having been duly made, the county board of elections of Waite County met on Monday, 5 June, 1916, and duly canvassed and tabulated the returns of said primary. Tbat the canvass and tabulation of the vote of said primary was not completed until the morning of 6 June, when the said county board of elections filed a copy of said tabulated vote, accompanied with the affidavit of its chairman, as required by the provisions of the primary election law, with the clerk of the Superior Court of Wake County, retained one copy for its own use, and posted at the courthouse door in the said county of Wake a copy of said vote, attested by the chairman of the said board of elections. Tbat the board of elections then adjourned sine die. Tbat no demand was made by the said B. H. Pate for a second primary until 15 June, 1916. Tbat the said board of elections fully performed all the duties required of it by the said primary election law. Tbat thereafter, on 15 June, and not before, B. H. Pate, who received the vote next highest to plaintiff, having been advised tbat there had been no nomination for the third place on the ticket for the alleged reason tbat no one had received a majority vote, as required by the statute, filed in writing his request 172 N.C. 165 for a second primary, and same was allowed, the county board being advised thereto by the State Board of Elections; that since said 15 June, 1916, the defendant board has declined to recognize said K. B. Johnston, plaintiff, as one of the Democratic nominees for the House of Representatives.

¶123

On these the facts chiefly relevant to the question presented, the Court concurs in the view embodied in the judgment, that plaintiff is entitled to the position claimed by him, and that the writ of mandamus lies to make such claim effective.

¶124

It is objected to the validity of his Honor's ruling that plaintiff may not be declared the nominee because it appears that he did not receive a "majority of the votes cast" at the primary as required by the statute."

¶125

It may be that the board, in adding up the entire vote for all the candidates and dividing the amount by the number of places to be filled, pursued the correct method for ascertaining the number of votes cast at such a primary, and that, so ascertained, the present plaintiff did not have a majority of such votes, within the meaning of the statute; but the position is not open to defendant on this record, because, in our opinion, and on the admitted facts, the plaintiff is the third nominee of the party, whether he received the majority or plurality of the votes cast, and this by reason of the fact that his only legal opponent did not demand a second primary within the time required by the law. On this question the portion of the act more directly pertinent is as follows:

¶126

"Sec. 24. That nominations for President and Vice President of the United States in the several congressional districts shall be determined by a plurality of the votes cast, and in the case of all other officers mentioned in this act nominations shall be determined by a majority of the votes cast. If in the case of an office other than the offices of President and Vice President no aspirant shall receive a 'majority of the votes cast, a second primary, subject to the conditions hereinafter set out, shall be held, in which only the two aspirants who shall have received the highest and next highest number of votes shall be voted for: Provided. that if either of such two shall withdraw and decline to run, and shall file notice to that effect with the appropriate board of elections, such board shall declare the other aspirant nominated: Provided further, that unless the

aspirant receiving the second highest number of votes shall, within five days after the result of such primary election shall have been officially declared, file in writing with the appropriate board of elections a request that a second primary be called and held, the aspirant receiving the highest number of votes cast shall be declared nominated by such appropriate board.”

¶127 It is said to be an “elementary rule of construction that effect must be given, if possible, to every part of a statute,” Lewis Sutherland on 172 N.C. 166 Statutory Construction, see. 380; and while it is true that this act, in the first portion of the section, requires a majority of the vote cast in order to the selection of the nominee, it enacts further, that if no aspirant shall receive such majority, a second primary may be had, but “subject to the conditions hereafter set out,” to wit, that in the second primary only the highest and next highest shall be voted for, and provides that either one of these two may withdraw, filing notice to that effect; and if neither withdraws, the one receiving the highest vote shall be declared the nominee unless the second highest shall demand in writing a second primary within five days after the result of the first primary shall have been officially declared.

¶128 On the record, the result of this primary was officially declared, at latest, on 6 June. The demand for a second' primary was filed by contestant on 15 June, and not before, and by the express provision of the statute, therefore, the plaintiff was entitled to the position of nominee, and it became the duty of the election board to so declare.

¶129 It is no satisfactory or sufficient answer to this position that the county board did not, in formal terms, undertake to declare who were the nominees, nor does the statute in this aspect of the case make any such requirements. Section 21% of the act in effect provides that the county boards of election “shall tabulate the returns made by the judges and registrars of the several precincts of their respective counties so as to show the total number of votes cast for each candidate, etc., and when thus compiled on blanks, etc., and in reference to county officers these returns shall be made out in duplicate and one copy thereof shall be filed with the clerk of the Superior Court, one copy shall be retained with the board, which shall foithwith declare the results.”

¶130 All this was properly done and the results posted by the board at the courthouse door; that is, the “results of the election, as shown by these returns, tabulated pursuant to law.” This right to become a candidate arises from the vote, tabulated, declared, and published as required by the statute, and is not dependent on a formal declaration of such right by the board. There is no claim or suggestion that there was any irregularity in the election or any error in the returns by the precinct officers or in the tabulation of the vote by the board.

¶131 R. W. Winston, Jr., having received a clear majority of all the votes cast, was one of the. nominees and entitled to go on the ticket. J. E. Holding, also, having a majority, had the same right; and plaintiff, if his votes, as shown by the returns officially tabulated, constituted a majority, would have had the same right; but if, as contended by defendant, it was only a plurality, the law clothed him with an additional right: he was still the nominee unless the next highest opponent should in writing demand a second primary in five days. This he did not do, 172 N.C. 167 and

plaintiff, under the express provision of the statute, thereby became as of right the lawful nominee' for the third place.

¶132 In recognition of the fact that if a second primary is to be ordered much time may be required not- only for holding the election, but for investigating irregularities that may occur therein, this provision for prompt notice becomes of the substance, and should be given substantial effect in passing upon the rights of the parties under the law.

¶133 It is also contended for defendant that the courts may not control the action of political parties in reference to the selection of their candidates nor undertake to determine controversies concerning them, but will leave such questions to the agencies and bodies which they, themselves have established for the purpose.

¶134 While this has, no doubt, been heretofore recognized as the sound rule, it does not prevail when, as in this case, the Legislature, in the exercise of its acknowledged powers, has taken control of the subject and enacted a statute conferring on successful contestants in a legalized primary certain specified and clearly defined legal rights, and enjoined upon an official board ministerial duties reasonably designed to make these rights effective. In such case, where the rights, as stated, are manifest and the duties clearly ministerial, the action of these boards becomes the subject of judicial scrutiny and control, and, on authority, the writ of mandamus is the remedy by which relief may in proper instances be obtained. McCullers v. Comrs., 158 N. C., 75; Edgerton v. Kirby, 156 N. C., 347; Kitchin v. Wood, 154 N. C., 565; Board of Education v. Board of Comrs., 150 N. C., at page 121, citing Moses on Mandamus, p. 68.

¶135 In this connection it is further insisted that mandamus will not lie in the present instance, because the case is in effect a contest involving the title to an office, and the rights of the parties thereto can only be tried by action in the nature of quo warranto, citing Rhodes v. Love, 153 N. C., 468; Ellison v. Raleigh, 89 N. C., 125, and other cases.

¶136 If it be conceded, as suggested, that this controversy is in effect a contest over an office, the principle recognized in these cases does not apply except where a defendant is in the present possession of the office and under some color of right.

¶137 The very term, quo warranto, signifies that the office is presently filled by an incumbent de jure or de facto, and the cases cited by defendant recognize the position that when the office is vacant or an incumbent is in without color or pretense of it, mandamus lies in favor of the rightful claimant, and authority elsewhere is to like effect. S. ex rel. Moore v. Archibald, 5 N. D., 539; People ex rel. Brewster v. Kildreff, 15 Ill., 769. And if the second primary has been held, as suggested, though it does not appear in the record, and defendant Pate selected, the plaintiff not participating therein, the result is the same, for the right of plain 172 N.C. 168 tiff being complete by reason of the failure of his adversary to give the notice required by the statute, the order for the second primary is absolutely void, and affords no color to said defendant.

¶138 The other authorities cited and relied upon by counsel will be found to apply in cases, as stated, where the action complained of was that of political parties through their own agencies and unaffected by statute, or they referred to discretionary. as distinguished from ministerial duties, or

where the questions chiefly were as to the regularity of the election itself and the results of same, as indicated by the votes cast — questions which are usually and in large measure referred by the statute to the decision of the election boards, as in section 26 of the present act; but these decisions have no application to the facts of the present record, where, as heretofore stated, the election board having done all that it was required or permitted to do, in the way of ascertaining and declaring the result of the election, it appears that the right of the plaintiff to the position is clear, and the performance of the duty sought is the ministerial one of placing his name on the general ticket, the only method of making his right effective. 19 A. and E. Enc. (2 Ed.), pp. 745-746.

¶139 The fact that the defendant board acted under advice of the State Board of Elections in the matter is without controlling significance. It was only given in courteous response to a request for it by the local board, and was not and was not claimed to be authoritative.

¶140 There is no error, and the judgment of the Superior Court is
¶141 Affirmed.

¶142 dissenting: I am of opinion that the courts have no jurisdiction in actions of this character in the absence of express statutory provision. The only matter in controversy is the title to the nomination of a certain political party to a public office, and not the title to the office itself. There is no statute in this State that authorizes the courts to try the title to a party nomination. It is the policy of the courts, in the absence of express statutory authorization, to leave the settlement of such controversies to the political party organization interested.

¶143 It is for the controlling power of the Democratic Party in "Wake County, the executive committee or the State committee, to determine who shall be placed upon the tickets of that party as its nominees; and the same may be said as to other recognized political organizations. I think the authorities sustain this view. "The Court has no power to entertain contests between candidates at primary elections, the decision of the executive committee of the party being conclusive." Barbee v. Brown (Miss.), 44 So., 769. To the same effect is Reis v. Foster, 36 So., 200.

¶144 172 N.C. 169 The Wisconsin Court says: "The creation of a tribunal to determine controversies (political disputes), no provision being made for a judicial review of its decisions, necessarily makes its jurisdiction exclusive and its decisions unimpeachable, except for jurisdictional defects." S. v. House, 122 Wis., 534.

¶145 S. ex rel. Burke v. Foster (La.), 36 So., 32, Land, J., delivering the opinion, says: "The decision of disputes as to party nominations rests with the party whose nomination is claimed, in the absence of statutory regulation to the contrary. The jurisdiction of courts in such matters is purely statutory." To the same effect is Reis v. Foster, 36 So., 200; Harris v. Bruce (Ky.), 87 S. W., 1078; Moody v. Trimble, 58 S. W., 504.

¶146 In re Fairchild, 151 N. Y., 359, the New York Court of Appeals says: "It is much more proper that questions which relate to the regularity of conventions, to the nomination of candidates, and the constitution of committees should be determined by the regularly constituted party authorities than to have every question relating to caucus, convention, or nomination determined by the courts, and thus in effect compel them to

make party nominations and regulate the details of party procedure instead of having them controlled by party authority.”

¶147 In *Walls v. Brundoger*, 160 S. W. (Ark.), 230: “Since no equitable right of title is involved in a contest over an election, equity cannot acquire jurisdiction to interfere therein by injunction, even though necessary to protect the rights conferred by the statute. Since the Legislature, by the Primary Election Act (Acts 1911, page 342), has provided a tribunal for hearing contests of such elections, the decision of such tribunal is final, and cannot be reviewed by the courts. Even though a State central committee acted fraudulently in determining a primary election contest, and there was no time for an appeal to the State Convention, the fraud will not give courts of chancery jurisdiction to review the findings and declare the result of the election, since only political rights are involved.” See, also, *Cain v. Page*, 42 S. W., 336.

¶148 The cases are numerous to the effect that the courts have no power to review or interfere with the action of boards of election or executive committees authorized to control and manage primary elections in which only party nominations are contested, unless there is express statutory authority for an appeal to the courts or some other method provided for judicial review. Our State makes no such provision. In the absence of it, I think the action of the defendant cannot be reviewed and controlled by the courts, and that this proceeding should be dismissed.