# Bell v. County Board of Elections

JOHN C. BELL v. COUNTY BOARD OF ELECTIONS OF BERTIE COUNTY
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188 N.C. 311

Supreme Court of North Carolina

Decided October 01 1924

George G. Green for appellants.

Stephen G. Bragaw for appellee.

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In primary elections the returns for county officers must be certified as provided to the county board of elections, who shall declare and publish the result. C. S., 6032, 6036. On the day the returns from Colerain Precinct No. 1 were certified, the chairman of the board of elections, after the board had adjourned, but before the abstract had been signed, consented that the plaintiff should have an opportunity to present affidavits in reference to the two contested votes. Four days afterwards tbe registrar and judges of election offered sucb proof, but it was not accepted or considered by tbe board.

Tbe county board of elections filed tbe abstract of votes for county officers in tbe clerk's office on 14 June, and tbe defendants contend tbat after tbe discharge of tbis duty tbe board was functus officio. It is true tbat a ministerial agency wbicb bas served tbe purpose of its crea-tion is generally treated as devoid of further force or virtue; but tbe question is whether tbe board bad fulfilled its function at tbe time tbe registrar and judges of election requested tbe privilege of correcting tbe error in their returns. Sucb request was made before tbe result was declared, and before tbe abstract was filed with tbe clerk or even signed by tbe board.

In considering the question we may avoid confusion by noting the duties required of election officers and the distinction between general elections and primary elections. In the primary there is no election to public office, the right to which may be put in issue and determined by quo warranto, and no provision for a board "of canvassers clothed with power judicially to determine the precinct returns. C. S., 5984 et seq.; 6018 et seq.; Britt v. Board of Canvassers, 172 N. C., 797. The officers chiefly concerned with the primary are the election boards, the regis-trars, and the judges of election, whose several duties are prescribed by statute. The registrar and judges of election are authorized, not only to pass upon the qualification of the voter, but finally to determine whether a ballot found in the wrong box was placed there by mistake and, if satisfied of the mistake, to count the ballot in making their returns to the county board; for in section 6020 it is provided that primary elections shall be conducted as nearly as may be in accordance with the general electiqn law, and between section 5983 and section 6020 we find no fatal conflict or inconsistency. And the determination of these matters involves the exercise of judicial functions. Rowland v. Board of Elections, 184 N. C., 78; Brown v. Costen, 176 N. C., 63. But in these cases it is likewise held tbat the powers vested in the county board of elections are not judicial, but ministerial. While the board acts in an administrative capacity, its' office is not discharged by merely tabulating the returns and declaring the result. Its organiza-tion is not dissolved in this manner, for it is not the creature of a day. It is composed of three persons, whose term of office continues for two years from the time of their appointment and until their successors are appointed and qualified, and it is organized by the election of designated officers. C. S., 5924 et seq.

In our opinion the eases relied on by the defendant are not in conflict with this position, for the reason that the facts therein stated and the statutes therein construed were not similar to those in, the case at bar.**[188 N.C. 316]** In O'Hara v. Powell, 80 N. C., 104, the decision turned upon the act of 1876, which required the board of county commissioners to meet on the second day after the election, to canvass the returns, and to make abstracts of the votes; and the Court held that the board "dissolved its organization" by adjourning after the completion of its work. And in Swain v. McRae, 80 N. C., 111, the plaintiff's action, brought to compel the county commissioners to reassemble and recount the vote, presented the anomalous case of an incumbent who held over after the expiration of his office and sought to prevent the induction of the successful candi-date until the vote should be recounted under the direction of the court. Neither case sustains the position that the county board of elections was fundus officio at the time the present action was instituted.

Citing Britt v. Board of Canvassers, supra, the defendants say, in the next place, that mandamus can be issued to enforce the performance only of such ministerial duty as presently' exists and that the writ, if granted in this case, will compel the board of elections "to set aside a decision already made." In Britt's case it was said that as the board of canvassers was vested with power judicially to pass upon all matters relating to the election its discretion could not be supervised by the courts, but that the performance of a ministerial duty could be enforced by mandamus. The county

board of elections in tabulating the returns acted in a ministerial capacity, and did not render a judicial decision. As we have said, it is the action of the registrar and judges of election, when taken in the respects pointed out, that is not subject to judicial control. These officials were the sole judges of the questions whether the ballots were put in the wrong box and whether they were cast for the plaintiff, and having resolved both questions in favor of the plaintiff they should be granted the privilege, not to change the vote of any elector, but to correct an error which, if uncorrected, will deprive a condidate of ballots to which be is justly entitled.

We find no error, and tbe judgment is

Affirmed.