3587.

APPROVAL, FINAL RESOLUTION ON ROAD IMPROVEMENT IN HURON COUNTY.

COLUMBUS, OHIO, August 12, 1926.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

3588.

ELECTIONS—BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS MAY REASSEMBLE JUDGES AND CLERKS TO MAKE A PROPER COUNT OF THE VOTE CAST.

SYLLABUS:

1. *The summary statement authorized by section 4933 and section 5089, General Code is not to be considered by the board of deputy state supervisors and inspectors of elections in making the canvass for the official count.*

2. *In cases in which the tally sheets show that the laws relating to the counting and tallying of ballots have not been substantially complied with, and such non-compliance is prejudicial to the substantial rights of parties or the public interest therein, the judges and clerks should be reassembled and a proper count of the vote cast be made as is required by sections 4933 G. C., et seq.*

COLUMBUS, OHIO, August 19, 1926.

HON, CHARLES S. BELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your communication with which you submit communications from the Board of Deputy State Supervisors and Inspectors of Elections of Hamilton county, Ohio, wherein certain questions are asked relating to the canvassing of votes at the primary election.

Your questions are as follows:

1. Where tallies, words and figures in poll books and Form 23 do not agree, which shall prevail?

2. Where election officers have not made individual tally marks but have drawn a line through the columns provided for the tallies and run the line out to a certain point and then placed certain tallies as shown in copy of poll book hereto attached, page 21, how shall this vote be counted?

3. Whether the board should investigate the non-performance of duty by the clerk or other election officials in failing to tally, as required by sections 5083 and 5088, et seq., and should require such clerk forthwith to complete the duties enjoined upon him by law.

4. When tallies and figures in Form 23 agree and the figures in the tally sheets differ.

5. When figures on Form 23 and tally sheets agree and the tallies differ.

6. When tallies and figures in tally sheets agree and Form 23 differs.

It may be stated at the outset that by "Form 23" is meant the summary statement that is certified to by the judges and clerks of the precinct at the conclusion of the count. This summary statement is authorized by section 4933 and section 5089. Such summary sheets are separate from the poll books and tally sheets which are

transmitted to the board for the official count. As Form 23, or the summary statement, is not a part of the poll book and tally sheets and is for the unofficial count which is made on election night, the same could not be considered by the board in making the official count.

Section 4984 provides that on the following Thursday after the primary, the board of deputy state supervisors of elections shall meet and canvass the vote and certify the result or declare the same in the manner provided. The canvass of the vote provided for in section 4984 is made by the board from the poll books and tally sheets which are certified to it by the election officials.

Therefore, in answer to your first, fourth, fifth and sixth questions, it may be said that the Form 23 or the summary statement cannot be taken into consideration by the board in making the official count. The official count is to be made from the poll book and tally sheet, which are the returns made by the election officials.

In connection with your second question, the poll book submitted shows that a lead pencil line has been drawn in the space opposite the name of the candidate through the columns marked 5 to 100 and that in the column marked 105 is one tally. In the certificate of the election officials under the word "figures," may be found 101, and under the head "Write number in words," may be found "One hundred and one votes." Your question is, how shall this vote be counted.

Section 4983, relating to the canvass of the vote at the primary, does not provide how the canvass of the vote shall be made by the judges and clerks of the precinct. However, section 4933, relating to the count of the vote in the cities in which there is registration, provides in detail the method for the count of the vote. Section 4933 provides in part as follows:

> "As soon as the ballots have been counted and tallied and the clerks have estimated the number tallied for each candidate, the chairman of the board shall make a second proclamation in the same manner as the first, stating the whole number of votes cast and the number counted and tallied for each candidate. * * * The judges and clerks in each precinct shall at the same time make out and certify a summary statement of the number of votes cast therein and the number counted and tallied for each candidate announced in the proclamation, and dispatch it without delay by a special messenger in a sealed envelope, to the board of deputy state supervisors at its office."

Section 4934 provides:

> "After completing the counting and enumeration of the ballots, and the proclaiming and issuing the statement of the result, as hereinbefore directed, the number of votes for each person shall be set down in the tally sheets under the inspection of the judges and certified and signed by them in manner and form as prescribed by law. In all certificates the number of votes shall be fully written out in words and also stated in figures."

The sections quoted were all in substantially the same form and part of the act entitled:

> "TO AMEND section 2926 of the Revised Statutes, as amended May 4, 1885, and to provide for determining the legal residence of electors in cities of the first and second grades in the first class, and for conducting elections for such cities."

This act was passed May 19, 1886, and will be found in 83 O. L., page 209. This act was amended in 97 O. L. by an act entitled:

> 'TO REVISE the laws of Ohio relating to the conduct of elections; to abolish city boards of elections in registration cities and boards of deputy state supervisors of elections in certain counties; to create the office of state supervisor and inspector of elections and deputy state supervisor and inspector of elections; and to amend, repeal and supplement certain laws and sections of the Revised Statutes of Ohio herein named."

In substantially the same form as found in 83 O. L., the statutes quoted above may be found in this act. A part of the above act, which has been carried down through the different amendments in substantially the same form, is section 4938 G. C., which provides as follows:

> "The chairman of the precinct board of elections shall safely return the registers, the duplicate lists made therefrom, the ballot boxes and keys thereto and all papers or affidavits accompanying them to the board of deputy state supervisors or the clerk at the office of the board within twenty hours. The judge and clerks of elections shall not adjourn, disperse or cease from proceeding as hereinbefore required until all such requirements have been actually executed and completed in the manner and form prescribed by law"

While apparently the last sentence of this section would relate only to the things mentioned in section 4938, it is believed that the history of the election laws will show that this section was part of section 2926R, Revised Statutes, and related to all things required to be done by the judges and clerks in the canvass of the ballot of all elections in cities having registration.

Section 4967 in part provides:

> "All statutory provisions relating to general elections * * * shall, so far as applicable, apply to and govern primary elections."

It is apparent from the exhibit submitted, that the provisions of section 4933, relating to the manner of counting the ballot, has not been complied with. Section 4933 requires that the ballots shall be counted and tallied.

Clearly the only place to properly tally the votes counted is in the tally sheet and poll books provided by the board of deputy state supervisors of elections for that purpose.

In the case of *In re Contest of Election,* 31 O. D. (N. P.) p. 130, on page 145, Kinkead, J., says:

> "The vote must be read aloud by one of the judges after it has been placed so all judges and inspectors may readily see it, and the clerks (plural) shall forthwith tally the same; this does not contemplate the tallying upon blank ballots as the evidence shows to have been done in this case."

Apparently if the tallying may not be done on loose sheets of paper, the same must be done on the tally sheets provided by the proper officials.

This raises the question that if no tallies are made in the tally books provided by the election officials and only summaries of the vote are placed in the tally books, whether the summaries may be considered in the canvass of the vote.

Interwoven with this question is question No. 3, asked by you, as to whether, when the tally sheets are not complete, the judges and clerks may be called back and required to complete the counting and tallying of the votes in the manner specified by law.

This question has been considered by the courts in many instances and it has been said by the courts that after the completion of the making of the returns the board of canvassers are *functi officio* and their subsequent acts are unauthorized.

> See State ex rel vs. Donnewirth, 21 O. S., 216; State ex rel Ingerson vs. Berry, 14 O. S., 315.

It has also been stated that the board of elections is not authorized to make a recount of the votes at a primary election.

> See State ex rel vs. Tanzy, 49 O. S., 656; State ex rel vs. Russel, 101 O. S., 365; State ex rel vs. Swann, 91 O. S., 61; State ex rel vs. Board of Deputy State Supervisors, 111 O. S., 203.

However, it may be said that if there is authority to recall the judges and clerks and to require them to proceed and make the count as authorized by law, such count is not a recount for the reason that there was no proper count in the first instance.

Surely it could not be said that if the judges and clerks in a precinct refused to tally and count the vote and refused to certify the number of votes cast in the precinct, and adjourned, they could not be compelled to properly perform the duties enjoined upon them. If they may be compelled to perform the duties which they have refused, they certainly may be compelled to properly perform duties which they have improperly performed.

The question as to whether a board of elections has authority to recall the judges and clerks and complete the duties enjoined upon them was considered by the Supreme Court in the case of *Dalton* vs. *State,* 43 O. S., p. 652. In that case the poll book had been returned with an entire absence of any writing upon that part of the poll book known as the tally sheet. There was no tally nor any statement of any vote given to any candidate and the same was not signed by the judge or clerk of elections. Within the sealed envelope containing such tally book was a list of the candidates and below, under the heading of tallies, appeared the figures purporting to be cast for the candidates and the certificates that these were the totals for the candidates within that precinct. Upon ascertaining the imperfect condition of the tally sheet, the canvassers procured the judges to reassemble and in their presence they completed the tally sheets with tallies and footings, and having duly authenticated it, the returns were delivered to the clerk and canvassed by the board. When this question was considered by the supreme court they were unable to agree as to the effect of this proceeding, and on page 665 of the opinion therein may be found the following:

> "As there is not a majority of the court of one view upon the effect of this proceeding, we prefer to consider the return as in its original form."

It may be said at this point that the lower court, in considering this return upon the contest of election, had considered such return a nullity and the same was not included within the canvass. The supreme court, taking the return in its original form, decided that they would not disfranchise the voters of the precinct by declaring the same a nullity and accepted such return.

It may be seen by the above quotation that certain members of the supreme court considered that there was authority for so reassembling the judges and having the returns properly made out.

Subsequent to this decision, which was rendered in October of 1885, the legislature, on May 19, 1886, enacted section 2926R, R. S., which in part provided that the judges and clerks of elections shall not adjourn, disperse or cease from proceeding, as hereinbefore required, until all the said requirements have been actually executed and completed in the manner and form prescribed by law.

Section 2926R R. S. is a part of the act outlining the method of counting the ballot and certifying the same. The part requiring the judges not to adjourn, disperse or cease from proceeding until they have executed and completed in a manner and form prescribed by law their duties, applies to all duties.

As this section was enacted subsequent to the decision of the court above, it is believed that the cases referred to above, viz., State ex rel vs. Donnewirth and Ingerson vs. Berry, are not applicable at this time.

It may be further said in connection with the case of State ex rel Ingerson vs. Berry, supra, that the rule laid down as to the canvassing board being *functi officio*, relates to the facts as set out in that case. In the syllabus of this case may be found the following:

> "When such appeal is perfected, the whole subject matter is withdrawn from the sphere of clerk and justices' statutory power of action, and they become *functi officio*.
>
> "When an inferior board or tribunal has failed to perform a ministerial duty at its proper time and its execution is no longer consistent with the substantial rights of other parties or with public interest, the writ will not be issued to compel its performance."

We may draw from the above expression of the court the conclusion that if no appeal had been perfected from the decision as announced by the canvassing board, the matter would still have been within their jurisdiction and that mandamus would lie to compel them to perform their plain duty.

By perfecting an appeal from the decision, the whole matter was placed within the jurisdiction of the common pleas court and even should a mandamus have been granted, requiring the canvassing board to reassemble and make another canvass of the ballot cast, it would have afforded no relief to the relator for the reason that the common pleas court, before whom the appeal was then existing, could arrive at a different conclusion from the canvassing board.

Further in the opinion of Scott, J., in the case of Ingerson vs. Berry, may be found the following:

> "I see nothing, therefore, in the intrinsic nature of the duty which the law in this case enjoined upon the defendant, nor in the character of his office or station, to prevent the enforcement of its proper performance by mandamus. But this writ will only issue in furtherance of substantial justice and when the relator has no other adequate specific remedy. If it be no longer in the power of the defendant to perform the duty enjoined by the law, or if, having failed to discharge it at the proper time, its present execution would no longer be consistent with the substantial rights of other parties, or beneficial to the relator, the writ should not issue."

The above case is decided on the theory that a writ of mandamus would not be beneficial to the relator and therefore under the facts set out in this case could not issue.

In the case of State ex rel. Wetmore vs. Stewart, 26 O. S., 216, the relator applied for a peremptory mandamus not to determine his ultimate right to the office, but to compel the clerk to put him in possession of a certificate showing he received a majority of all the votes cast, upon which he might be enabled to assert his right to the office in some other legal mode. The court held:

> "Mandamus will not lie to compel the clerk and judges to recanvass the poll books returned and furnish the relator with evidence upon which to contest the election in some other mode."

There is a fair implication from this that if the relator had, at the proper time and with a view to correcting the returns and having a proper canvass made, made application for a peremptory writ of mandamus, the same would have been allowed. This is borne out by the last paragraph of the opinion of Gilmore, J., as follows:

> "Therefore, the statute having provided an adequate and complete remedy by contest on appeal, of which the relator neglected to avail himself at the proper time, he is not entitled now to a mandaumus to redress the grievance of which he complained."

It is, therefore, my opinion that in cases in which the tally sheets show that the laws relating to the counting and tallying of ballots have not been substantially complied with, and such non-compliance is prejudicial to the substantial rights of parties or the public interest therein, the judges and clerks should be reassembled and a proper count of the vote cast be made as is required by sections 4933 G. C., et seq.

Respectfully,
C. C. Crabbe,
Attorney General.

3589.

ABSTRACT, STATUS OF TITLE, TO PREMISES LOCATED IN McCLAIN TOWNSHIP, SHELBY COUNTY, OHIO.

Columbus, Ohio, August 18, 1926.

Hon. George F. Schlesinger, *Director, Department of Highways and Public Works, Columbus, Ohio.*

Dear Sir:—Examination of an abstract of title and other data submitted by you for my examination and formal opinion discloses the following:

The abstract as submitted was certified under date of July 22, 1926, and pertains to premises located in McClain township, Shelby County, Ohio;

> "Being a part of tract No. 3, south half of section 12, town 8 south, range 4 east, as said south half of said section was aparted in a proceedings by the trustees of said township to sell school lands, a record of which proceedings is found in Volume 12, page 225, of the civil record of the court of common pleas, Shelby County, Ohio, said premises being a strip of land 25 feet wide (being a total of 50 ft. on each side of a central line described in the caption of the abstract to which this opinion is atached."

Examination of said abstract discloses a sufficient title to said premises in Anna Mary Fleckenstein, subject to the following: