

2295.

ELECTION—DISCUSSION OF LAWS GOVERNING ELECTION OF BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT—IRREGULARITIES IN SUCH ELECTION.

SYLLABUS:

1. *Where in an election for members of a rural board of education, the returns certified to the county board of elections by the precinct officials are such as to enable the board to determine which candidates are elected, it is the duty of the said county board of elections to canvass the vote and declare such persons elected, and there is no authority in the said board to withhold such declaration because of claimed irregularities in connection with the election.*

2. *A board of education in a rural school district shall consist of five members only, and when any member of such board is elected he shall hold office for a period of four years and until his successor is elected and qualified.*

3. *There should be an election in each rural school district on the first Tuesday after the first Monday of November of each odd numbered year, for the election of such a number of members of the board of education of said district as there are members of said board of education whose regular term expires on the first Monday of the following January. At such election no more than the said number can lawfully be elected.*

4. *The question of whether or not an election is void for irregularities, can be determined only in a proceeding to contest the election where the law makes provision for such a contest.*

COLUMBUS, OHIO, February 17, 1934.

HON. FRED W. EVERETT, JR., *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“About seventeen years ago, in Scioto Township, Jackson County, Ohio, some way or other, that township began electing two members to the Board of Education when they were supposed to elect three and then on the next election they would elect three when they were supposed to elect two; I cannot learn what caused them to switch in this manner.

In 1931 when all other boards in the county were electing two members the election officials in Scioto Township changed the printed form at the head of the School Board ballot where it said, ‘Vote for not more than two’ to ‘Vote for not more than three’. This change was made by the election officials by marking out ‘two’ with a pencil and writing in ‘three’. They did this following their previous custom of electing three members when all other boards in the county were electing two. Consequently, in 1931 three members were elected and given certificates of their election by the County Board of Elections.

This past election when all boards were electing three members, Scioto Township elected three members also, when, if they had followed their previous custom, only two members should have been elected. As it now stands they have six members on the school board and all are claiming to be legally elected. The third member elected in 1931 who

received the least number of votes of the three given certificates was advised by the Clerk of the County Board of Elections to run for re-election this past November, but refused to do so, claiming that he was elected in 1932 and holds a certificate entitling him to hold the office until 1934. On the other hand, the three that received the highest number of votes in the past November election all contend that they are duly elected and entitled to certificates.

Who are legally entitled to be the members of the board of education of Scioto Township when they organize January 1, 1934?"

The condition which you describe as existing in the Scioto Township Rural School District, with respect to the number of members of a board of education that are elected from time to time, is one that exists in quite a number of districts within the state. In some districts four members are elected at one time and one member the succeeding time. In one district that has come to my attention, all five members are elected at once. This has come about in most instances through an error at some time in the past. In some cases, however, it has arisen by reason of the creation of a new district and the appointment of a new board therefor, by authority of Section 4736, General Code, or where new villages are created and a board of education appointed for the new village district that automatically comes into existence upon the incorporation of the village, by virtue of Sections 4709 and 4710, General Code. It could very easily happen when such new boards are appointed that the terms of two members would expire, and thus the election of two members to succeed them be necessitated, at a time when the other districts in the natural course of events would be electing three members and vice versa. Instances of this condition and the history of the legislation affecting the matter will be found in an opinion of a former Attorney General, published in the Opinions of the Attorney General for 1928 at page 506.

It is immaterial what brought about this condition in the Scioto Township District. It appears from your statement that there were three members of the board of education for this district elected at the last election prior to the November, 1933, election and certificates of election were granted to them. This election does not appear to have been questioned and I assume it was in all respects regular. These three members so elected, must necessarily have been elected for four years and have a right to hold their positions for four years as the law expressly provides with respect to the term of office of members of rural boards of education, "each such officer shall hold his office for four years." (Section 4745, General Code.)

That being the case, there could not be more than two members of this board of education lawfully elected in November, 1933. Either the election that was held at that time was entirely void or two members were elected.

It is the duty of the county board of elections in each county to canvass the abstracts of returns of the election of school district officers and, "the person receiving the highest number of votes for each office so canvassed shall be deemed elected." See Section 4785-159, General Code. Said section further provides:

"When it has ascertained and declared the result of an election for county, township, school district or municipal officers, the board shall make and deliver to the persons elected certificates of their election on blanks, the form of which shall be determined by the secretary of state."

Unless we are to regard the election held in November, 1933, for members of the board of education of Scioto Township Rural School District as being a void election, it is clearly the duty of the board of elections of Jackson County to issue certificates of election to the two candidates for the office who received the greatest number of votes. A certificate granted to a third person who had received the third greatest number of votes would be entirely unauthorized and wholly void, as there were but two members of this board to be elected.

The law provides with respect to the form of ballot to be used in school board elections, "At the head of the list of school board candidates shall be the title, 'For Members of the Board of Education', the number to be elected, directions to the voter as to voting for one, two, or more, as the case may be." Section 4785-102, General Code.

It is also provided in Section 4785-102, General Code, that:

"Where the names of several persons are grouped together upon any ballot, as candidates for the same office, the ballot shall contain immediately above the names of such candidates the words 'Vote for not more than' (filling the blank space with the number of persons who may lawfully be elected to such office)."

The only material controversial point involved in the determination of whether or not this election was a legal election is whether or not it was vitiated by reason of the fact that the ballot carried an instruction to the voter that he should "vote for not more than three" instead of the proper instruction to "vote for not more than two".

This question necessarily involves the question of whether or not the ballots as cast, may be counted. If the ballots were illegal, none of them should be counted, and it of course follows that no candidate could be said to have received the highest number of votes and no candidate could therefore be certified as having been elected. In that event, the present members of the board of education would hold over until their successors should be legally elected. See Section 4745, General Code.

At this time we are concerned only with the duty of the county board of elections in the premises. It appears that the local precinct election officials counted the ballots for the members of the board of education in this district and certified abstracts of the result of their count to the county board of elections despite the irregularity in the ballots.

It is well settled that in the absence of statute providing otherwise, the duties of a canvassing board in canvassing and certifying the result of an election is purely ministerial. In an opinion of this office, which will be found in the reported Opinions of the Attorney General for 1929, page 1910, it is held:

"After an election has been held and the returns are certified to the proper canvassing officials or board, it is the duty of such official or board to proceed to canvass the vote and determine the persons duly elected to the offices to be filled at such election, if it is possible upon the face of the returns to determine such result. It is not within the province of such canvassing official or board to pass upon questions of irregularities in connection with such election resulting from the use of improper forms of ballot, or otherwise, since the duty of such official or board is ministerial in character and confined to a consideration of the returns alone."

In the case of *State ex rel. vs. Tancey*, 49 O. S. 656, it is held:

“The duties of the board of deputy supervisors of elections, in making the abstracts of the votes returned by the officers of the election precincts of the county, are purely ministerial, and are limited to compiling the votes shown by the tally-sheets so returned, and setting down to each candidate the aggregate number of votes so appearing to have been cast for him, and to certifying and transmitting the abstract so made, to the proper officer.”

See also *State vs. Petterson*, 73 O. S. 305; *State ex rel. vs. Graves*, 91 O. S. 113; Opinions of the Attorney General for 1929, Vol. 3, page 1914.

The county board of elections is limited in the performance of its duty in cases of this kind, to a canvass of the abstracts of election as certified to it by local election officials and the certification of the result of the election as determined from that canvass.

This board has nothing whatever to do with the determination of the question of whether or not this election was a legal election. That question can be raised only in an election contest proceeding. If such a contest should be instituted, the material question involved would be whether or not the direction in the statute as to the designation of the number of candidates for whom the elector should vote, is directory or mandatory. If directory it means merely the failure to comply strictly would be regarded as a mere irregularity for which the election would not be set aside in the absence of an express statutory provision that a ballot not in the prescribed form should not be counted. There is no such statute in Ohio. It is a general principle of law applicable to elections that irregularities on the part of election officials will not defeat the will of the people if that will may be determined. Thus, in the case of *State ex rel. Thompson vs. Arnold, et al.*, 213 S. W. 834, it is stated in the first branch of the syllabus:

“An election irregularity is not fatal to the validity of the whole return of the precinct unless made so by statute, or unless the irregularity is such as probably prevented a free and full expression of the popular will.”

The Supreme Court of Florida, in the case of *Carn vs. Moore*, 76 So. 337, in the fifth branch of the syllabus, held:

“An election will not be set aside on purely technical grounds where no fraud is established and where no voter was prevented from expressing his choice or where it is not shown that but for the acts complained of, the result would have been different.”

Another pertinent provision of law is stated in Paine on Elections, Section 499, page 421, as follows:

“While it is well settled that the mere neglect to comply with directory requirements of the law, or the performance of duty in a mistaken manner, without bad faith, or injurious results, will not justify the rejection of an entire poll; it is equally well settled that when the

proceedings are so tarnished by fraudulent, or negligent, or improper conduct on the part of the officers, that the result of the election is unreliable, the entire returns will be rejected."

The Supreme Court of Appeals of the State of Missouri, in the case of *Horsefall vs. School District of the City of Salem*, 128 S. W. 33, said in the fourth branch of the syllabus:

"Where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; but where the statute merely provides that certain things shall be done, the statute is directory merely, and the test as to the legality of a ballot is whether or not the voters were given an opportunity to express, and fairly expressed their will."

I am of the opinion that it is the duty of the board of elections of Jackson County at this time to canvass the abstracts showing the returns of the election for members of the board of education of Scioto Township Rural School District, as those abstracts have been certified to them, and to determine therefrom the two persons receiving the highest number of votes for members of the board of education and to certify those two persons as having been elected members of the board of education in said Jackson Township Rural School District.

If, after this certification is made, the election is contested in the manner provided for by Sections 4875-166, et seq., a question of whether or not this election is a legal election will become material and will be decided by the appropriate court in which the contested proceedings is instituted. It would be presumptuous for me to say how the court would decide the question. I have, however, herein referred to some of the authorities bearing on the question.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2296.

APPROVAL, ABSTRACT OF TITLE TO LAND IN VILLAGE OF WOODSFIELD, MONROE COUNTY—JOHN BURGBACHER.

COLUMBUS, OHIO, February 19, 1934.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication submitting for my examination and approval Abstract of Title, Warranty Deed and other files relating to the proposed purchase of a parcel of land in the Village of Woodsfield, Monroe County, Ohio, which is now owned of record by one John Burgbacher. This parcel of land which is in the form of a square with dimensions stated in feet of 120 x 120, is more particularly described in the deed therefor tendered by John Burgbacher and wife to the state, as follows: