

as to the total votes cast, and examined the judges and clerks relative to the total votes for each candidate. The canvassing board now seeks advice.

The failure of the judges to arrive at a total for each candidate and thus determine the persons elected is not material, as the canvassing board has this power. This is clearly expressed in Section 996, Revised Codes of Montana, 1935, as it recites in part:

“ . . . No informality in such certificate shall vitiate the election, if the number of votes received for each person can reasonably be ascertained from said tally sheets.”

In other words, the board of trustees as a canvassing board may determine the total vote for each candidate by counting the votes on the tally sheets, and in fact this is their function and duty.

The tally sheets are the primary evidence of the votes cast and should be examined by the canvassing board without recourse to other evidence. (*Dubie v. Batani*, 97 Mont. 468, 37 Pac. (2d) 662.)

In *State ex rel. Moore v. Patch*, 65 Mont. 218, 211 Pac. 202, our court said:

“But it is urged that certain affidavits were filed and certain other evidence produced before the canvassing board. The Board of Canvassers is without any authority under the law to consider any matters except that which appears upon the face of the returns.”

The foregoing rule would preclude any consideration of testimony of clerks and judges by the canvassing board. This rule was re-stated by the Court in *State ex rel. Lynch v. Batani*, 103 Mont. 353, 62 Pac. (2d) 565. In that case the lower court had admitted evidence of the precinct judges and clerks, and the court said of this testimony:

“The admission of testimony mentioned in the above paragraph was improper, and accordingly it has not been considered by us in arriving at this opinion. . . . We agree with counsel for the relator that under the law in this state the powers of canvassing officers are neither judicial

#### Opinion No. 59.

#### Elections—Canvassing Board, powers of—School Elections

Held: A board of trustees of a school district acting as a canvassing board must determine and declare the results of a school election from the tally sheets alone and not consider any other evidence. The fact totals for each candidate were not determined by the election officials is immaterial. Irregularities in the election cannot be considered by the canvassing board, as the remedy for such irregularities is a contest for recount by the unsuccessful candidate.

May 26, 1943.

Mr. Frank J. Roe  
County Attorney  
Silver Bow County  
Butte, Montana

Dear Mr. Roe:

You have requested my opinion concerning the following facts:

In a school election the trustees in canvassing the votes for school trustees found the election judges had failed to determine the total number of votes cast for each candidate on the tally sheets. The tally sheets did contain the votes cast for each candidate, but the trustees as a canvassing board failed to arrive at a decision

nor quasi-judicial; that they have no means given to them to inquire, nor any power to inquire, beyond the returns of the local election boards; and their sole duty is to ascertain and declare the results."

It is therefore my opinion a board of trustees of a school district acting as a canvassing board must determine and declare the results of a school election from the tally sheets alone and not consider any other evidence. The fact totals for each candidate were not determined by the election officials is immaterial. Irregularities in the election cannot be considered by the canvassing board, as the remedy for such irregularities is a contest or recount by the unsuccessful candidate.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General