

**Opinion No. 217.****Board of Canvassers—Canvassing Board—Elections—Votes, Elections—Poll Books, Election—Tally Sheets, Election.**

**Held:** Board of canvassers must determine successful candidate primarily from tally sheets before it. Conflicting tally sheets from Precinct No. 9 prevent determination of election and Board must certify it is unable to determine from the returns which candidate was elected.

November 8, 1946.

Mr. Chester Onstad  
County Attorney  
Powder River County  
Broadus, Montana

Dear Mr. Onstad:

You have requested my opinion on the following:

One of the clerk's tally books of Precinct No. 9, Powder River County, Montana, properly signed by the judges and clerks, states that a candidate received two votes, and the other tally book, properly signed by the judges and clerks states that the same candidate received eleven votes. In both books, the votes are tallied and written at the end of the page. This relates to county candidates, and inasmuch as the race is very close, a proper interpretation would be the election or defeat of one of the candidates. Under this set of facts, what must the canvassing board do?

In the case of *State ex rel. Moore v. Patch*, et al, 65 Mont. 218, 225, 211 Pac. 202, the court held:

"The board of canvassers is without any authority under the law to consider any matter except that which appears upon the face of the returns. This is the law in this jurisdiction, as laid down by Mr. Chief Justice Brantly in the case of *State ex rel. Breen v. Toole*, reported in 32 Mont. 4, 79 Pac. 403, in which it is said: 'We agree with counsel for relator that under the law in this state the powers of canvassing officers are neither judicial 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 that their sole duty is to ascertain and declare the result. They cannot hear evidence touching the regularity or legality of any election, and decide controversies touching these matters . . . (State ex rel. Leech v. Board of Canvassers of Chouteau County, 13 Mont. 23, 31 Pac. 879; *Pigott v. Board of County Canvassers of Cascade County*, 12 Mont. 537, 31 Pac. 536; *Chumasero v. Potts*, 2 Mont. 242.) . . ."

In the case of *Dubie v. Batani*, 97 Mont. 468, 477, 37 Pac. (2d) 662, our Supreme Court stated:

"The returns of the votes of a precinct made in due form and signed by the proper officers are the best evidence as to the state of the vote; yet they may be impeached on the ground of fraud by whomsoever perpetrated, or misconduct on the part of the officers of the election themselves, and the returns, until impeached, furnish prima facie evidence of the correctness of the results so returned. (*Sommers v. Gould*, 53 Mont. 538, 165 Pac. 599.) If the impeachment of the returns be not required as a foundation of the admission of the ballots over objection, then in any election contest, upon general allegations of fraud and misconduct, a contestant, without any preliminary proof, would be permitted to offer the ballots and secure a recount by the court. If such is the law, there would be little occasion for the existence of a board of canvassers. Their function would be an idle form. Much time and expense would be saved by ordering the returns and the ballots to be delivered to the court for a recount. The legislature has not provided for this procedure. Before the ballots may be received in evidence over objection, the returns must be impeached to the extent that there is sufficient evidence to overcome the prima facie case made upon the production of the returns."

In the case of *State ex rel. Lynch v. Batani*, 103 Mont. 353, 361, 62 Pac. (2d) 565, the court repeats the rule

stated in *State ex rel. Moore v. Patch*, supra, and cites the case of *Dubie v. Batani*, supra, with approval, stating:

"The tally sheets are under our law the primary evidence of the count of the votes."

It, thus, clearly appears from the above cases the duties of the board of canvassers compel it to make its determination of successful candidates primarily from the tally sheets before it. In the instant case where such determination is rendered impossible because of the patent conflict between the two tally sheets from Precinct No. 9, it becomes necessary for the board of canvassers to certify it is unable to determine from the returns which of the candidates has been elected to office.

Section 786, Revised Codes of Montana, 1935, as amended by Chapter 23, Laws of 1945, reads as follows:

"Upon the receipt of the packages or envelopes by the county clerk, he must file the package or envelope containing the ballots voted and detached stubs and the package or envelope containing the unused ballots, and must keep them unopened and unaltered for twelve (12) months, after which time, if there is no contest commenced in some tribunal having jurisdiction about such election, he must burn such package, or envelopes, without opening or examining their contents."

It is apparent from this section there is no power in the board of canvassers to refer to the ballots cast in making its determination.

It is therefore my opinion that since the board of canvassers is bound by the checklists, certificates of registration, poll books, and tally sheets in making its determination (Section 788, Revised Codes of Montana, 1935) and since no final determination can be made from these instruments in the instant case, the certificate suggested above would seem to be the only proper course of action for it to take.

Sincerely yours,

R. V. BOTTOMLY, -  
Attorney General