

act as originally passed by the Legislature. And under the authority of the Act of Congress above recited, this board was appointed by the Utah Commission to act as a canvassing board, to canvass the votes of the August election, held for the election of county officers in the several counties of the Territory of Utah.

The board of canvassers have had before them what may be denominated, for the purposes of this opinion, contests arising over the canvassing of the vote of Salt Lake, Weber and Box Elder Counties, and the contestants have been represented by counsel of great ability on both sides, and all the questions that have arisen, or, as it would seem, that possibly could arise, have been argued with distinguished ability before the board. And I now come, so far as I am concerned as a member of the board, to announce my conclusions upon the questions raised. And—

First. It has been stated and argued, and much authority has been produced to show, that the duties of this board are purely ministerial, and that it was not intended by the legislature to impose upon the board any judicial duties. Text books and cases from many States of the Union have been read, which seem to support the view—and I may say do support the view—of those who take the position that the duties of the board are for the most part ministerial. But, after all, these cases must be read in the light of the statutes which the court is construing, for it will be seen by comparison that no two of the statutes under which the canvassing boards of the several States and Territories act are exactly alike. Ours differs in some of its requirements from them all; so that, after all, for any final conclusion, we are bound to come to a construction of our own statute, and by such construction evolve therefrom such rules of action as seem to be justified by the legislative intent.

The statute, after providing for the manner of holding the election, at section 15, says:

"As soon as the poll shall be closed, such judges of election shall immediately proceed to canvass the votes cast at such election, and continue, without adjournment, until completed."

Section 16 provides:

"The canvass shall commence by the judges, who have acted as clerks of the election, comparing their respective lists, and ascertaining from said lists the number of votes cast. The box shall then be opened, and the ballot therein taken out and counted by the judges; and the judges, acting as clerks, shall each make a list of the persons voted for. The presiding judge shall then proceed to open the ballots, and call off therefrom the names of the persons voted for and the offices they are intended to fill; and the judges, acting as clerks, shall take the count of the same upon their lists, and all the ballots shall be immediately returned to the ballot box, and the ballot box shall be locked and securely sealed."

Section 17 provides:

"That after the canvass shall have been completed, the judges of election

shall add up and determine the number of votes cast for each person for the several offices, which result shall be placed upon the lists made by the judges acting as clerks of the election; and the judges shall thereupon certify to the same, and forward all the lists securely sealed, together with the ballot box, to the clerk of the county court, by a qualified voter of the county, who shall, before taking the same, take and subscribe an oath to the effect that he will deliver the same to said clerk without unnecessary delay, and that he will use his utmost ability to prevent any interference whatever therewith by any person whatever."

It will be seen from the quotations that sections 15 and 16, above quoted, prove exactly as to how the judges of election shall canvass the votes cast. Not only that; but it provides how they shall set the result of their canvass down, by saying, "that they shall make a list of all the persons voted for," and then it provides, "that the presiding judge shall proceed to open the ballots, and call off therefrom the names of the persons voted for, and the office they are intended to fill; and the judges, acting as clerks, shall take a count of the same upon their 'lists.'"

Section 17 provides:

"That the judges shall add up and determine the number of votes cast for each person for the several offices, which result shall be placed on the 'lists' made by the judges acting as clerks of the election."

Now these "lists," together with the ballot boxes, are to be returned, under the statute, to the clerk of the county court; but now, under the act of Congress, to the Utah Commission. Having received these "lists," made up in the way that the statute provides, and certified as the statute provides, it is the duty of the Commission, as they have done in this case, to appoint a board of canvassers, and pass the "lists" and ballot boxes to that board, for the purpose of enabling them to canvass the votes; for the next section, 18, provides as follows:

"Section 18. On receipt of the ballot boxes and returns of the election, the canvassing board shall break the seal of the returns, and all candidates may be present, as provided in section 15 of this act; and said Canvassing Board shall carefully examine the returns, and if no irregularity or discrepancy appears therein affecting the result of the election of any candidate, they shall accept said returns as correct; but if the right of any person voted for for any office is in any way affected, the canvassing board shall open the ballots from said precinct and canvass the same so far as to determine the rights of the person whose office may be affected. They may also cause to appear before them any persons whom they may deem proper, and take their testimony in relation to said election in said precinct."

This section, last quoted, is the section of the act which defines the duties and confers the powers exercised by this Board of Canvassers as such; and whatever duties are imposed upon the Board, and whatever powers are given, are to be found in this section. It will be seen that the statute contemplates

that the officers of the election have performed their duty by forwarding all the "lists" which they have made in counting and canvassing the votes cast, together with the ballot boxes in which the votes are preserved, sealed up; and that, being thus in possession of all the records, so to speak, made by the officers of the election, together with the ballot boxes containing the ballots cast, they are to proceed, in the language of the act, first, "to break the seal of the returns and carefully examine the same, and if no irregularity or discrepancy appear therein to affect the result of the election of any candidate, they shall accept said returns as correct." In other words, if the returns, which mean the "lists" kept by the officers of election, are upon their face fair, smooth, and no irregularity or discrepancy appear therein, the duty of the board extends no farther than to canvass those "lists," and foot up and announce the results; but if, by reason of any discrepancy or irregularity appearing thereon, an intelligible result cannot be reached, satisfactory to the board, and if such irregularity or discrepancy affect the right of any person voted for, for any office, it is then the duty of the board to open the ballot box from the precinct where such irregularity or discrepancy may appear, and canvass the votes found therein, so far as to determine the right of the person whose right to the office may be affected. The statute adds: "They may also cause to appear before them any persons whom they deem proper, and take their testimony in relation to said election in said precinct." I have shown that when the returns from any precinct, or precincts, are opened by the board, and no irregularity or discrepancy appear therein, the duty of the board ends by simply canvassing those returns. I have shown that if any irregularity or discrepancy appear in any precinct affecting the right of any person to an office, it is then the duty of the board to go to the ballot box and canvass the ballots.

Now the question arises, What is the effect of this last clause, allowing the board to send for persons whom they may deem proper, and take their testimony in relation to said election? It certainly cannot be that the Legislature intended by this to open up before the board every possible question that might be made to concern the regularity of an election; but the language quoted must necessarily be confined by the context which has preceded it. And being thus confined, the proof which the board may take, or the witness, or the testimony that it may cause to appear before them, would be confined alone in their operation to an explanation of such "irregularity or discrepancy" as might appear upon the face of the returns, or as might enable the board to arrive at an explanation of any irregularity or discrepancy that might arise upon the returns, as mentioned in the former part of the statute. I am strengthened in these conclusions by the fact that the legislature has