

BERNARDO TORRES, PROTESTANT AND APPELLANT, VS. MAMERTO S. RIBO AND ALEJANDRO BALDERIAN, RESPONDENTS AND APPELLEES.*G.R. No. L-2051. May 21, 1948*

Ponente: TUASON, J.

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This is an appeal from an order of the Court of First Instance of Leyte dismissing a motion of protest for provincial governor on the alleged ground that the motion was filed out of time. The question turns upon whether the period for filing the protest should be cojanted from the 22nd or from the 24th of November, 1947. The court below used the first date as the starting point of computation.

The pertinent facts are these: The protestant, Bernardo Torres, and the defendants, Mamerto S. Ribo and Alejandro Balderian, were opposing candidates for provincial governor of Leyte in the general elections held on November 11, 1947. As Mamerto S. Ribo, who was provincial governor, and the two members of the provincial board were candidates, they were disqualified to form parts of the provincial board of canvassers of which they were to be members under section 158 of the Revised Election Code. Consequently, and in pursuance of Section 159, the commission on elections, in a telegram to the provincial treasurer dated November 20 and received on November 21 in Tacloban, Leyte, appointed the division superintendent of schools, the district engineer and the district health officer to replace the disqualified members, with advice that they might assume office upon receipt of their appointments. It so happened that the division superintendent of schools and the district engineer were on that date on the west coast of the province and did not return to Tacloban until the 24th. In the meantime, on November 22, F. Martinez, provincial treasurer, as chairman, Gregorio Abogado, provincial fiscal, Vicente Tizon, assistant civil engineer in the district engineer's office, Evaristo Pascual, chief clerk in the office of the division superintendent of schools, and W. Enage, acting district health officer, canvassed the votes for provincial governor and other officers and proclaimed Mamerto S. Ribo as Governor-elect." Vicente Tizon and Evaristo Pascual sat as members "representing the district engineer and the division superintendent of schools respectively.

On November 24, 1947, the provincial board of canvassers again met, the meeting this time being attended by the provincial treasurer, the provincial fiscal the district health officer, the division superintendent of schools, the district engineer and the provincial auditor. In that meeting the board made a new canvass of the votes and proclaimed Mamerto S. Ribo elected to the office of provincial governor.

Were assistant civil engineer Vicente Tizon and chief clerk Evaristo Pascual lawful members of the provincial "board of canvassers? Judge Victoriano who first took cognizance of the case decided this question in the negative. On a motion for reconsideration Judge Edmundo Piccio, another judge sitting in Tacloban, reversed Judge Victoriano's order. Judge Piccio said, "Verily it would be absurd to suppose that in this kind of official commitments, the District Engineer, the Division Superintendent of Schools could not be represented by their Assistants who are in themselves competent and qualified persons, * * * it is unreasonable to sustain the argument

that the District Engineer and the Division Superintendent of Schools could not delegate their prerogatives because as contended, this power or prerogative belongs exclusively to the Commission on Elections."

A statement in Judge Piccio's decision needs correction although the point, in our view of the case, is not material. It does not appear, and there is no pretense on the part of the protestee, that the division superintendent of schools and the district engineer delegated their authority to Pascual and Tizon. Upon whose instance or suggestion these two presumed to act in representation of their chiefs is not shown.

Section 158 of the Revised Election Code designates the officers who are to comprise the provincial board of canvassers, and section 159 enumerates the officers to be appointed substitute members by the commission on elections in case of the absence or incapacity of any of the members named in the next preceding section. They are the division superintendent of schools, the district engineer, the district health officer, the register of deeds, the clerk of the court of First Instance, and the justice of the peace of the provincial capital.

This express enumeration excludes other officers, *Expresio unius est exclusio alterius*. Not even the commission on elections may lawfully appoint any person or officer outside of those mentioned. Much less may any one other than these officers act as member of the provincial board of canvassers by delegation by a substitute member, by the indication of other members of the board, or of his own volition. The appointment of a substitute member is personal and restricted and his powers must be performed directly and in person by the appointee. To hold otherwise would be to authorize the appointment, say, by the provincial treasurer, the provincial auditor, or the provincial fiscal of another person to act in his stead and thus take away from the hands of the Commission on Elections the authority to appoint under section 159.

An officer to whom a discretion is entrusted can not delegate it to another. The powers of the board of canvassers are not purely ministerial, as the court below erroneously holds. The board exercises quasi judicial functions, such as the function and duty to determine whether the papers transmitted to them are genuine election returns signed by the proper officers. Thus, where what purports to be two or more returns from the same municipality are received, the canvassing board must necessarily determine from the face of the papers which one shall be regarded as the true and genuine return. (20 C, J. 201-202.)

In truth, there was presented to the board on the 22nd a matter which required the use of judgment. It appears from the minutes of the meeting of that date that the returns from four municipalities were incomplete or entirely missing, so much so that in accordance with section 161 the provincial treasurer notified the provincial fiscal of that fact. The minutes read:

The report of the Provincial Treasurer, dated November 21, 1947, to the Provincial Fiscal, regarding missing election returns in certain municipalities, that is not as yet received by the Provincial Treasurer, was read and considered by the Board. Also, certified statements by municipal treasurers of the municipalities concerned, showing the votes cast in their municipalities as shown in their (treasurers') copies of the election returns for which no copies for the provincial treasurer were yet received, are also presented. In order not to delay the canvassing, it was decided that such certified statements of the respective municipal treasurers be taken at their face value in lieu of the missing election returns, municipalities effected are as follows:

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Hinunangan — (a) No election return for board members in Precinct No. 1. (b) No election return in Precinct No. 11.

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Leyte — (a) No election return in Precinct No. 6 (b) No election return for board members in Precinct No.11.

(Certified copies of those election returns were received from the office of the Municipal Treasurer in the course of the session of the Board of Canvassers.)

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Pastrana — No election returns for governor and board members in Precinct No.1. (The missing returns were received from the municipality in the course of the session of the Board.)

- Morida — No election return for board members in Precinct No. 10.

Nevertheless, the Provincial Treasurer informed the Board that efforts have been and are being exerted by his office to obtain said missing election returns. As soon as they are received, authenticity of the said municipal treasurers' statements will have to be considered from said returns.

On this vital question Tizon and Pascual voted. This was not a ministerial or mechanical task. That the returns subsequently received tallied with the municipal treasurer's certificates does not cure the mistake committed.

Quite apart from the intervention of Tizon and Pascual in the canvass, we are of the belief that that canvass was premature and illegal. Section 162 of the Revised Election Code provides that "If it should clearly appear that some requisite in form has been omitted in the statements, the board shall return them by messenger or by another more expeditious means, to the corresponding board of canvassers for correction." The board had before it not defective returns but papers or documents that were not returns at all.

The requirement of section 160 that "the provincial board of canvassers shall meet as soon as possible within fifteen days next following the day of election" and that "as soon as all the statements are before it but not later than fifteen days next following the date of the election, the provincial board of canvassers shall proceed to make a canvass of all the votes cast in the province for national, provincial and city candidates, etc," is merely directory (20 C.J. 199) and does not legalize the making and completing of the canvass before all the returns are in.

The protestee maintains that at any rate Pascual and Tizon were de facto officers. This contention is without any foundation in law. An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. He must have acted as an officer for such a length of time, under color of title and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induces people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action. (46 C. J. 1053.)

Tizon and Pascual did not possess any of these conditions. They acted without appointment, commission or any color of title to the office. There was no acquiescence, public or private, in their discharge of the position. In fact the very person most greatly affected by their assumption of the office, Bernardo Torres, was not notified and was unaware of it.

Tizon and Pascual eliminated, there were only three lawful members sitting on the board of canvassers on November 22. Under section 159 of the Revised Election Code the provincial board of canvassers is to be composed of six members — the provincial governor, the two members of the provincial board, the provincial treasurer, the provincial auditor and the provincial fiscal — subject to be replaced by the officers named in the same section in case of their absence or disability. The Revised Election Code does not state the number of the members of the canvassing board necessary to be present at the canvass. One court has held that when one member absents himself from the session before completion of the canvass the acts of the remaining members of the board in completing the canvass and certifying the result were valid. (Ex parte Smith [Okl.] 154 page 521.) Some courts, however, have held that the canvassers can not act unless all are present. (Chumaseo vs. Patts, 2 Mont. 242 [writ of error dismissed 92 U. S., 358; 23 L. ed. 499].)

We do not decide whether the presence of the six members of the board of canvassers is essential. We leave this question open. Whatever the law, it is our considered opinion that the presence of three members is not enough compliance with the law. If it were, two would be, and even one, There must at least be a quorum, which is a majority of all the members, or one half their number plus one. In the present case, four constitute a quorum. The decisions just cited are very helpful on the other aspect of the case. They serve to emphasize the importance attached to the office of member of the board of canvassers and the gravity and non-delegability of its functions and duties.

Upon the foregoing considerations, our is that the meeting of November 22, 1947 of the provincial board of canvassers and the proclamation in that meeting of the protestee were illegal and of no affect. With this conclusion we refrain from discussing the other errors assigned by the appellant.

The appealed order will be reversed with costs against the appellees. It is so ordered.

Parás, Feria, Perfecto, and Bengzon, JJ., concur.

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