

RAMON HONTIVEROS, PETITIONER AND APPELLEE, VS. JOSE ALTAVAS, RESPONDENT AND APPELLANT.*G.R. No. 8606. March 29, 1913*

Ponente: TRENT, J.

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At the general election held in the Province of Capiz on June 4, 1912, Jose" Altavas, according to the proclamation of the provincial board of canvassers, received 3,542 votes, and Ramon Hontiveros received 3,371 votes, for the office of provincial governor. Hontiveros protested. The Court of First Instance, after trial, found that the protestant received 3,173 legal votes and the protestee 2,842. Judgment was entered directing the provincial board of canvassers to correct its canvass accordingly. The protestee appealed.

The appellant now insists that the court erred: (1) In not declaring the appellee ineligible to be elected to the office of provincial governor because his certificate of candidacy was not in accordance with the law; (2) in not dismissing the protest upon the ground that the same was premature; (3) in not dismissing the protest because it was not presented within the time required by law; (4) in not finding that the provincial board of canvassers issued its proclamation on July 12, 1912; (5) in holding that the document filed by the appellee on July 27 was sufficient to constitute a protest; (6) in not requiring the appellee to make a prima facie showing of fraud or irregularity in the manner of casting or counting the ballots before the ballot boxes were opened on the hearing; (7) in denying his (appellant's) request to intervene and select one of the commissioners appointed by the court to examine and recount the ballots; (8) in refusing to allow him or his counsel to be present at the opening of the ballot boxes and the examination and counting of the ballots by the commissioners; and (9) in not permitting him to examine in court the ballots rejected by the commissioners and present additional testimony with reference to the validity of such rejected ballots.

1. Questions relating to the eligibility of candidates to be elected to or to hold "office cannot be drawn in question in these proceedings. (Topacio vs. Paredes, 23 Phil. (Rep.), 238.) But if we were now called upon to determine the validity of the ses.

2. The second, third, and fourth alleged errors may be considered together. The facts are these: The ballots were deposited on June 4, and the counting of the same commenced on the night of the 4th and continued until terminated. The first protest was filed on June 18. In this protest it was alleged that up to that time the provincial board of canvassers had not determined who had been elected provincial governor. No proceedings pertinent to the questions here involved were taken in the Court of First Instance until August 10. The provincial board of canvassers met on July 12 and proceeded with a canvass of the returns from the various voting precincts. On that date they completed the canvass of the returns in so far as the offices of delegates to the Assembly and the provincial governor were concerned, and stated that owing to the lateness of the hour they would adjourn until the following day, the 13th, without having canvassed the returns for third member. On the 27th of that month the appellee presented what he called an "amended protest" and asked permission of the court to substitute this "amended protest" for the one filed on June 18. This permission was granted. The "amended protest" is complete

in every particular, and it is not necessary to take into consideration for any purpose the protest filed on the 18th of June. In fact, this latter protest was never drawn in question thereafter, or referred to for any material purpose during the trial of the cause in the court below or in this court, except for the purpose of determining from what date the two weeks within which the protest might be filed, as provided in section 27 of Act No. 1582 as amended, should begin to run. Copies of the "amended protest" were served upon all the candidates voted for on June 4. The word "candidates" as here used is restricted to those persons who had filed certificates of candidacy with the authorities and who had not on June 4 withdrawn their candidacy.

Upon the foregoing facts, the question to be decided is (a) whether the time within which the motion which introduces an election contest for a provincial governorship expires two weeks after the day upon which the ballots are cast or two weeks after the day upon which the provincial board of canvassers determines who has been elected; and (b) in computing the time, should the first or the last day be excluded from the computation?

This is not the first time that this question has been under consideration by this court. It was directly involved and after a thorough investigation and extended discussions, it was answered in two cases. (*Navarro vs. Veloso*, 23 Phil. Rep., 625; *Manala vs. Sevilla*, ante, 609.) In these cases we held that the two weeks begin to run from the date of the proclamation of the provincial board of canvassers and not from the day the ballots were cast. This question is no longer an open one in this jurisdiction, and if our attention had not been called to a number of adjudicated cases in the United States which it is claimed hold differently, we would say no more upon the question. But in view of these citations, we deem it advisable to somewhat further discuss the matter. Our further remarks, however, will be confined to an attempt to distinguish between the cases relied upon and the law and the conditions in our own jurisdiction.

It is believed that no one will disagree with the statement that the Legislature is presumed to have used words in their natural and commonly accepted meaning unless that meaning would contravene the manifest intent of the enactment. In *State vs. McCoy* (2 Marv., 576; 43 Atl., 270, 273) it is said:

"An election, under the Constitution, involves every element necessary to the complete ascertainment of the expression of the popular will, embracing the entire range, from the deposit of the ballot by the elector up to the final ascertainment and certification of the result. An election by the people means and includes the perfect ascertainment of such result."

In *Norman vs. Thompson* (73 S. W., 62-64; 96 Tex., 250) and in *Ex parte Conley* (Tex.) (75 S. W., 301, 302) it was held that the word "election," as used in Revised Statutes, section 3397, providing that, after the result of an election under the local option law has been declared, the election may be tested, and that if it appear that it was illegal or fraudulently conducted, or such a number of voters were denied the privilege of voting as might have changed the result, or the true result of the election cannot be ascertained, "another election shall be ordered," means the act of casting and receiving the ballots from the voters, counting the ballots, and making the returns thereon. (*State vs. Tucker* 54 Ala., 205, 210.) That is the meaning of the word "election" in the ordinary usage, and it must be so construed, there being nothing in the law to suggest that the Legislature intended to use it in a different sense. (3 Words and Phrases, p. 2334.)

The treatise on the subject of "Elections" in 15 Cyc, 279 et seq., defines the word as follows:

"An election is the embodiment of the popular will, the expression of the sovereign power of the people. In common parlance an election is the act of casting" and receiving the ballots, counting them, and making the return."

If this be the only meaning of the word, there is little room for doubt as to the meaning of the term "after the election" as used in section 27. But it is insisted that the word is used in numerous places throughout the Act to

designate only the day and the operation of casting the ballots by the duly qualified voters. From this source is derived the chief if not the sole reliance of the advocates of the contrary construction. In view of the speciousness of this argument and the tenacity with which it is maintained, we are not disposed to set it aside upon the mere strength of a lexicographer's definition of the word "election." We shall endeavor to show that it is also inappropriate to the manifest intention of the Legislature.

Section 3 probably gives more color to the argument in question than any other. In it we find (quoting from the original act) such expressions as the following:

"An election to elect such delegates shall be held upon the thirtieth day of July, 1907.

"Subsequent elections for such delegates shall be held on the first Tuesday after the first Monday in November of 1909, and of each odd-numbered year thereafter.

"An election for provincial governor and third member of the provincial board shall be held on the first Tuesday after the first Monday in November of 1907, and upon the first Tuesday after the first Monday in November of each odd-numbered year thereafter.

"An election shall be held on the first Tuesday after the first Monday of November of 1907, to elect municipal presidents and vice-presidents."

At first blush it would appear that the word "election" as used in these excerpts is confined to the day upon which those enjoying the right of suffrage are called to the polls to express their choice of candidates; or, in other words, that it is equivalent to the expression "election day" as used in section 10. But although the statute requires that an election be held upon that day, it does not require that it be concluded upon that day. Subsequent sections of the act show this most clearly. Section 21 is the section which, as a matter of fact, provides for the actual operation of depositing the votes. It is there provided that the duly qualified electors shall have access to the polls "from seven o'clock in the morning until live in the afternoon." It also provides the method by which the ballots shall be deposited. If this is the only meaning of the word "election" as used throughout the act, what relation to an election must be attributed to the operation described in a subsequent section (No. 25) entitled "counting the votes; announcement of the results?" We started with a definition which contained the statement:

"An election is the embodiment of the popular will, the expression of the sovereign power of the people."

In 3 Words and Phrases (p. 2329 et seq.)t under the title Elect-Elected-Election, a large number of definitions, pivoting upon the words "a choosing or selection of one from among others" may also be found. It is difficult to conceive of any of the essential subdivisions of this act of choosing being excluded from the operation of the term which concretely expresses this act of the people, i. e., "election." We apprehend that no one would have the temerity to say that the counting of the votes is unnecessary to an election. Yet that it is not indispensable to a valid election to conclude this operation during the day upon which the election is "held" is evident by section 24 itself, wherein it states that "if, by reason of the length of time required for the count * * * it shall be impracticable to return the same before midnight * * *." Again, who will say that the formal announcement by the board of canvassers is not essential to an expression of the popular will? If the count may be concluded upon a subsequent day, a fortiori may the announcement of the result.

Section 25 provides that the provincial board shall sit as a board of canvassers to tabulate the statements prepared by the municipalities in accordance with section 24. Yet, that this canvass is indispensable to the election of a delegate to the Assembly or a provincial officer cannot be denied. The counting of the votes and the announcement of the results by the municipal officers, and the canvass by the provincial board are integral parts of the election, and the word cannot, therefore, be confined to the day upon which the ballots were cast. We think

it too clear for argument that the Legislature in saying that an election should be held on a specified date intended only to convey the idea that the initial operation of selecting the candidate should start upon that day. The expression is thus used so frequently and with this certain meaning in all election statutes as to practically amount to an idiom of language, "the meaning of which as a whole cannot be derived from the conjoined meanings of its elements."

Keeping in mind the meaning of the word "election" as above set forth, let us examine some of the authorities called to our attention. At the outset it is well to quote the following from *Topacio vs. Paredes* (23 Phil. Rep., 238):

"The utmost care must be exercised in the citation of authorities in support of any particular contention in the interpretation of election laws. They are universally statutory and seldom similar in the matter of election controversies. A single statutory or constitutional provision may render worthless as an authority the best considered case coming from some other jurisdiction on the point under discussion."

The period within which a statutory contest by a defeated candidate may be instituted differs in the various States, not only as to the length of time allowed, but also as to the designated date that it shall start to run. The latter is the only point with which we are herein concerned. It is submitted that a provision of law requiring that the period shall commence to run "after the official counting of the votes" (*Montgomery vs. Dormer*, 181 Mo., 5; 79 S. W., 913), "after return day" (*Carbis vs. Dale*, 23 Utah, 463; 65 P., 204), and other similar expressions which clearly designate a time included within the term "election" and precede the final steps necessary to the election of a candidate are not equivalent to the phrase "after the election" as used in our own statute; for, as we have seen, the scope of the term "election" includes every step necessary to the choice of a representative by the people, from the casting of the ballots to the certificate of election. However correctly these phrases were construed in the cases, and there are a number of them in the books, it is submitted that the tribunals which prepared them were not considering the phrase "after the election." These cases are not, therefore, in point.

It is claimed that the case of *Carlson vs. Burt* (111 Cal., 129, 131) is in conflict with our holding. The law under discussion in that case read as follows:

"When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of such election, file with the county clerk a written statement, etc."

In the course of the decision it was expressly decided that "return day" was prior to the determination by the board of canvassers of who was elected. It is therefore not understood how the requirement that a protest be filed "after return day" can be equivalent to the requirement that it be filed "after the election." If it can, then any intermediate step necessary to a valid election, such as the casting of the ballots, the counting of the ballots, or the official declaration by the local authorities of the number of votes cast in a precinct may be deemed equivalent to the election of a person to office; in other words, a part is equal to the whole. We conclude that this case is not in point.

The case of *Belden vs. Sherbourne* (27 La. Ann., 305), also cited, is, however, exactly in point. The phrase used in the law which the court construed in that case was *totidem verbis* the one found in our own statute. The court in that case dismissed a protest filed more than ten days subsequent to the day the ballots were deposited, but within ten days of the announcement of the results. But it must be remembered that this was a contest for a municipal office, and that the returns were doubtless known within a day or two at the most after the ballots were cast. The positive injustice of not allowing the candidate time to ascertain the result of the election before filing his contest was not, therefore, before the court. It is also a fact that this case is some forty years old, and further that the law in that State has now been changed to read "after the promulgation of the result of said election," thereby

indicating that the legislature arrived at the conclusion that it was not advisable to date the period from the day the ballots were cast. (Revised Laws of La., § 1419.) Nor does the case appear to have been thoroughly considered by the court.

An investigation of the statutes of the various States shows that in most of them where a statutory proceeding for contesting elections is provided, the time within which such a proceeding may be instituted commences to run "after" the result of the election has been determined;" "after the person whose election is contested is declared elected;" "within thirty days after the official promulgation of the result of said election;" "within twenty days after the day the incumbent was declared elected," etc. In those few States where the wording is "after the election" it is most probable that the question has seldom if ever arisen under the conditions of the case at bar, i e., where the official returns were not public property within the time allowed. The facilities for communication in all parts of the United States are such that the result of an election is known most often by daylight of the day following the election day, and the candidate, therefore, has at least unofficial knowledge as to whether he has been elected or not. Furthermore, the time allowed for the filing of a protest is generally sufficient to extend far beyond the time the official returns are made known. For these reasons, the proposition that a candidate may be deprived of his right to institute a contest from lack of information, either official or unofficial, of the result of the election, has probably never been actually presented to the courts of the United States. Probably no better illustration of this fact can be found than the following from the California case of *Carlson vs. Burt* (111 Cal., 129, 133), which we have discussed above:

"To the suggestion that the board may take more than forty days to canvass the votes, it may be said that it may be possible, but it is quite improbable. If it should take much more than forty days the vote would not be canvassed until the term for which officers are to be elected will begin. Such a contingency was not anticipated, and can rarely happen, except through a criminal intent. The presumption is that in fixing the election at a certain period before the commencement of the terms of office, and in limiting the period for the commencement of a contest, the legislature has taken all these things into consideration, and has concluded that the period fixed will always prove sufficient, and I believe that in practice it always has."

In this jurisdiction the contingency which the California court terms as possible but quite improbable is a reality.

It is a well-known fact that all the returns from the various municipalities in some of the provinces of this Archipelago could not reach the capital within two weeks time, with the consequence that no one can know, either officially or unofficially, which candidate was successful in those provinces within two weeks after the day upon which the ballots are cast. Nor was it ever the expectation of the legislature that such a result could be accomplished.

Even the authorities in the United States agree with our holding that there cannot be a contest until it is known who has been elected. (*Bowler vs. Eisenhower* (S. D.), 12 L. R. A., 705; *Hill vs. Holdam*, 120 Ky., 660,) If this be true, it is simply depriving a candidate of his right to a hearing to hold that the two weeks commence to run immediately after the day upon which the ballots are cast. Did the Legislature intend any such consequences? The term "after the election," as we have shown, may be construed in a manner which will best conform to the literal and common meaning of the words used and at the same time really allow the candidate two weeks within which to file his protest. The construction we have rejected not only assigns to the word "election" a significance not warranted by any available definition of the term, but makes of the two weeks period within which a protest may be filed a mere catch word; an illusion which disappears before the candidate can use it, and which deprives him of a hearing. Which of the two constructions should a court adopt? The one is practical, just, and adequate for the purpose in view. The other has nothing to recommend it. We are of the opinion that the phrase "after the election" can only mean after the last step necessary to a valid election, which is the proclamation or certificate of

the provincial board of canvassers.

The extract of the minutes of the provincial board appearing in the record gives a tabulated statement of the votes cast for the offices of delegate to the Assembly for the first, second, and third Assembly districts, respectively, and for the office of provincial governor, and then concludes with a resolution to the effect that the candidates receiving the highest number of votes for each office (naming the candidate and office in each case) are declared elected. In other words, the board did not, on July 12, as provided by law, (1) make a canvass of all the votes cast in the province, (2) make one statement of all votes cast for each candidate for the Assembly in each Assembly district, (3) make one statement of all the votes cast for provincial officers, and (4) upon the completion of this work determine who was elected to each office. What the board actually did do on July 12 was (1) make a canvass of all the votes for members of the Assembly and for provincial governor, (2) make one statement of all the votes cast for each candidate for the Assembly in each Assembly district, (3) make a statement of all the votes cast for provincial governor, and (4) upon the completion of this work determine who was elected as delegate to the Assembly from each Assembly district, and who was elected provincial governor. It had not terminated its duty as a board of canvassers. The task of compiling the votes cast for the office of third member of the provincial board and announcing the result was still to be undertaken. In announcing the returns for some of the offices before the two statements required of it were made, the board departed from the letter and the spirit of the law. It being a plain provision of section 25 that the two statements in question must be prepared prior to the announcement of the results, it would seem unnecessary for this court to discuss the intention of the legislature in requiring this particular procedure. All the information necessary for a canvass of the votes for each of the offices being shown on the statements furnished by the different municipalities, the most logical procedure would seem to be that indicated by section 25, i. e., a tabulation at one time of all the returns for each office from each municipality. However, it is evident that the provincial board of canvassers had not completed its canvass on July 12. As we have held that the canvass is an integral part of the election, the election was not completed on July 12. The extract from the minutes of the board indicates that it was the intention of the board to take up the work of completing the canvass the following day, July 13. Whether this was the day upon which the election duties of the board were actually completed, the record does not show; but for the purposes of this case we shall assume that it was. This date, then, July 13, was the date upon which the election terminated. The law provides that a protest must be filed within two weeks after the election. (Sec. 27.) The two weeks period in this case, therefore, dates from July 13. The second protest in the present case was filed on July 27. It is insisted that in computing the two weeks the "first day must be included and the last day excluded. Under this theory it is claimed that the protest came too late, having been made on July 27 instead of July 26 as required by law. The word "after" as here used must be understood to mean subsequent to the time of the announcement of the official returns; that is, none of the two weeks period precedes or is coetaneous with the announcement of the results.

"In computing time from or after a certain day, or a given date, or the day on which an act is done, the general rule is to exclude the day of the date, unless a different method of computation is clearly intended, * * * " (38 Cyc. 318.)

"Judicial proceedings generally.-It has been stated generally that when any matter of practice or procedure is required by statute or order of court to be done within a certain number of days, the first day is excluded. * * * " (Id., 321.)

In view of these quotations and the long array of authorities cited in their support, and holding, as we do, that there are no facts in the present case to justify excluding it from the operation of the well-established maxim of law that there is no fraction of a day, we are of the opinion that the second protest of the appellee was filed within the two weeks allowed by law.

3. The fifth assignment of error raises the question as to whether the motion of protest filed on July 27 should date back to June 18, the date of the first motion, as being an amendment of the latter. It is urged that it does, and that the original protest being premature and conferring no jurisdiction on the court to consider the issues sought to be thereby raised, neither does the one filed on July 27. The proposition that a pleading performing the office of an amendment dates back to the date of the filing of the original plea is conceded. But that the name given to a pleading by counsel must govern its effect upon the cause before the court has not been demonstrated and, we think, is not capable of proof.

"The name given to a pleading is not controlling, but its character is always to be determined by its allegations." (31 Cyc, 46, and a long array of authorities.)

The facts, as we have said, concerning the two motions in question are these: The election was held on June 4. The first motion of protest was filed on June 18, nearly a month before the announcement of the official returns by the provincial board of canvassers. It was admitted in paragraph 3 of this motion that the results of the election were not known; and in paragraph 4 it was stated that notwithstanding the lack of this information, if the official returns showed that the protestant had secured a less number of votes than his opponent Altavas, he desired to contest the election by means of this motion (of June 18). On July 27, after the board of canvassers had announced the results of the election, another motion was filed by the appellee which he termed an amendment to the motion filed on June 18. This second motion was accompanied by a formal request that it be admitted in substitution of the motion of June 18. An examination of the second motion shows that it is as a matter of fact a complete motion in itself. It alleges all the necessary jurisdictional facts for the institution of the contest in accordance with section 27; and, in much greater detail than the former motion, indicates the irregularities the contestant relies upon. It has not been contended that the pleading filed on July 27 is not complete in itself. Now, what was the reason of the appellee for filing the two motions? Simply this: He was uncertain whether the court would construe the requirement of section 27 that a protest must be filed within two weeks after the election would be construed by the court to mean two weeks after election day, or two weeks after the official announcement of the returns. As he did not wish to incur the risk of being deprived of his right to protest the election by attempting to determine which way the court would decide this question, he very wisely decided to be prepared. To this end he filed two motions, one of which would be within the two weeks period provided by law for the filing of a protest, no matter which way the court decided the question. We have said that this Supreme Court has definitely settled this question in the cases of *Navarro vs. Veloso* (23 Phil. Rep., 625) and *Manalo vs. Sevilla* (ante, 609). But neither of these cases had been decided when the case at bar arose; and prior to *Navarro vs. Veloso* the question had not been raised in this court. The dilemma in which the appellee found himself was, therefore, certainly not of his own making. The lower court evidently reached the conclusion that the two weeks period commenced to run from the day the ballots were cast, since it took cognizance of the motion and issued orders in the cause prior to the filing of the motion of July 27. The court was clearly in error in so doing. The court should have considered the motion of June 18 as premature and as conferring no jurisdiction whatever upon the court to try the issues sought to be raised. By so doing the appellee would have been advised of the steps necessary to be taken if he desired to contest the election, and would not have been led into the inadvertence of terming his motion of July 27 an "amendment" of his motion of June 18. Under these circumstances, and the motion of protest filed on July 27 being complete in itself and wholly sufficient to confer jurisdiction upon the court to hear the cause without reference to the one filed on June 18, we are clearly of the opinion that it should be considered not as an amendment to the one of June 18, but as an original protest.

4. In support of the sixth alleged error, it is insisted that the court committed a reversible error by directing the commissioners to open the ballots boxes and examine and recount the ballots without first requiring the protestant to make a prima facie showing of fraud or gross irregularities. This contention is based upon the proposition that

there exists a presumption in favor of the legality of the election and the correctness of the returns.

The law provides that upon the institution of the contest the court "shall forthwith cause the registry lists and all ballots used at such election to be brought before it and examined * * *." (Sec. 27.) The filing of the protest and the service of the same upon all candidates voted for gives the court jurisdiction to proceed to a final determination of the case, and having once acquired such jurisdiction the court is expressly empowered to examine all the ballots. The ballots cannot be examined without opening the boxes. The law does not require a prima facie showing other than the allegations in the protest of fraud or irregularities in order to authorize the opening of the boxes. If the parties by agreement accept the returns from any precinct or precincts however, the necessity for the opening of the boxes would cease to exist as to them. In view of the plain provisions of section 27, it is not difficult to reach the conclusion that this alleged error is not well founded.

5. The seventh, eighth, and ninth alleged errors may also be considered together. The facts here pertinent are as follows: The trial of the contest began in the court below on August 10, when the court appointed W. M. Gracey, Sinforsoso Salgado, and Jose M. Albar to examine and recount the ballots. These gentlemen were designated "commissioners." Such designation, of course, added nothing to their powers, but there can be no serious objection to calling them by this name. Some time after the commissioners were appointed, the appellant asked the court to relieve Salgado and appoint one of his own selection. This the court declined to do. On this same day, August 10, the ballot boxes of Dumarao were brought into court and identified, but not opened. There appears to have been no session of the court on the 11th. On the 12th, during the examination of witnesses in reference to the identification of the ballot boxes from another town, counsel for the appellant asked the court if the boxes from Dumarao had been opened and the ballots examined and recounted. The court replied that he had ordered the ballot boxes opened and their contents examined and counted. The same counsel requested the court to permit him or an associate or the appellant and a representative from the other side to be present when the boxes were opened and the ballots examined and recounted by the commissioners. The court denied this request. Counsel insisted upon being granted this privilege and stated his reasons therefor, but the court would not change its ruling. Again, on September 7, the appellant asked the court that, in view of the fact that the appellee had concluded the taking of his testimony, the case be held open for the purpose of allowing him to introduce additional evidence in reference to the rejected ballots, claiming that the court had granted him authority to examine such ballots. The court then stated that it had not authorized the appellee to examine the ballots, saying that the authority to examine the ballots was granted to the commissioners, but that the attorneys in presenting their arguments might examine the ballots for the purpose of aiding them in such arguments. If the parties or either of them ever at any time saw and examined the rejected ballots or any other ballots, the record fails to disclose this fact. The commissioners performed their duties behind closed doors and permitted neither party to be present when the boxes were opened and the ballots recounted.

The correctness of this procedure is vigorously attacked by the appellant.

Section 27 provides in part as follows:

"Such court shall have exclusive and final jurisdiction, except as hereinafter provided, and shall forthwith cause the registry lists and all ballots used at such election to be brought before it and examined, and to appoint the necessary officers therefor and to fix their compensation * * * and to issue its mandamus directed to the board of canvassers to correct its canvass in accordance with the facts as found."

It seems that to refuse to permit the parties to witness the examination and recount of the ballots is purely arbitrary. It is directly opposed to the fundamental principles which govern the introduction of evidence in the courts, and denies pro tanto the right of the parties to a hearing before judgment. However unimpeachable the integrity of the commissioners in this case, we cannot sanction such a practice.

It also seems necessary to disapprove of the scope of the power delegated to the commissioners in this case. Section 27 plainly requires that the court "shall forthwith cause the registration lists and all ballots used at such election to be brought before it and examined." We apprehend that this must be done in open court in the presence of the presiding judge and the interested parties. We do not conceive that there is any grant of judicial discretion here to the officers appointed by the court to determine whether or not a ballot is invalid because improperly executed or because it is marked. These officers have none of the powers of a referee (sec. 138 of the Code of Civil Procedure) or of commissioners in eminent domain proceedings. (Sec. 244, id.) As a matter of fact, there is no reason for terming the persons charged with the duty of opening and counting the ballots "commissioners." The word used in the law is "officers" and the extent of their duties as set forth therein appears to be confined to the mechanical operation of opening the ballots and tabulating the count under the direct supervision of the court. In other words, their duties are merely clerical. If it be urged that an examination and recount of the ballots in the presence of the court would unduly prolong the hearing, especially in a contest over a provincial office where a large number of votes must be counted, we answer that that is an argument to be addressed to the Legislature and not to the courts. It would seem, however, that this objection might easily be overcome by an agreement between the parties to dispense with the attendance of the presiding judge at the actual counting of the ballots. The count could then proceed before the officers appointed by the court and all ballots the validity of which was not disputed by either party could be properly tabulated and disposed of by the officers of the court without the intervention of the court. This would reduce the actual labor of the court to an examination of the relatively small number of the ballots which were objected to by the parties.

The ruling made by the court denying the parties the right to witness the examination and recount of the ballots and to present evidence with reference to the legality of the questioned ballots constitutes reversible error. The record will therefore be returned for a reexamination and recount of the ballots by the court in the presence of the interested parties, or by an officer or officers appointed by the court, also in the presence of the interested parties. If this latter method is pursued, all ballots questioned by either party must be submitted to the court, who will determine the validity of such ballots after the evidence has all been presented. In any case the questioned ballots should be segregated from the valid ballots by precincts and marked exhibits of the respective parties objecting thereto. The evidence presented on the rehearing will be strictly confined to the subject of the legality or validity of the questioned ballots. On the termination of the recount and the presentation of such evidence and the arguments of counsel, the court will, after an examination of the whole record—the old as well as the new testimony—render such judgment as in its opinion the law and the merits of the case warrant. Upon this new hearing, however, the court will not take into consideration the election held in the first precinct of the town of Libacao for the reason that that part of the judgment appealed from rejecting or annulling the election in this precinct is hereby affirmed upon the reasons stated in said judgment.

Judgment will be entered forthwith and the record returned to the court below for the purposes set forth in this decision. No costs will be allowed in this instance. So ordered.

Arellano, C. J., Torres and Moreland, JJ., concur.

CONCURRING IN PART AND DISSENTING IN PART

JOHNSON, J.,

I agree with the result of the majority opinion. I do not agree, however, with the arguments nor the conclusions relating to the time when the protest provided for by law must be made. To my mind the election law has been amended by this decision, by process of judicial legislation, a result which should not be tolerated. The State has

created another body to make and amend laws. Section 27 of Act No. 1582, by virtue of the majority opinion, now reads: "The protest shall be filed two weeks after everything has been done, from the casting of the ballots up to and including the proclamation of the result of the election." It is not understood, under the theory of the majority opinion, why the two weeks should not be counted two weeks after the announcement of the result by the Supreme Court, for the reason that in the present case, the election (using that term in the sense in which it is used in the majority opinion) is not concluded until after the decision by the Supreme Court. No one is elected in the present case until after promulgation of this decision. In the present case the election was held on the 4th day of June; a protest was filed on the 18th day of June; an amended protest was presented on the 27th day of July. In the present case the majority opinion says:

"The lower court evidently reached the conclusion that the two weeks period commenced to run from the day the ballots were cast, since it took cognizance of the motion and issued orders in the cause prior to the filing of the motion of July 27. The court was clearly in error in so doing. The court should have considered the motion of June 18 as premature and as conferring no jurisdiction whatever upon the court to try the issues sought to be raised."

In the case of *Manalo vs. Sevilla* (ante, 609) the election was held on the 4th of June; the protest was made on the 18th of June. In that case,, even though the argument is that the protest should have been made two weeks after the promulgation of the result of the election, it was held that the protest was made in time and that the lower court committed no error in taking jurisdiction of the cause. If the lower court secured "no jurisdiction whatever" in the present case by virtue of the protest of June 18, I am at a loss to understand how the court obtained jurisdiction for the purpose of disposing of the case of *Manalo vs. Sevilla*.

In my opinion the protest filed on June 18 was filed in accordance with the provisions of the law, and the amended protest filed on July 27 did not change the date of the protest. An amendment to a cause of action cannot change the date of the commencement of the action. If, for example, an action is commenced on the last day of the period of prescription, if the complaint is amended thereafter, the amendment does not change the time of the commencement of the action nor permit the defense of prescription. The amendment relates to the date of the original complaint. This rule is so well established and so elementary that we deem it unnecessary to cite authorities in its support.

Act No. 1582 and the principles announced therein are not new provisions of law. Act No. 1582 is patterned after many of the laws of the States of the United States. Many of its provisions are exactly analogous to similar laws in many of the States. Provisions similar to those contained in section 27 have been construed by the courts of last resort in many of the States of the Union and we confidently assert that in every case where the question involved was similar or analogous to the question in the present case it was resolved contrary to the result here reached.

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