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Municipal Corporations-Evidence-Constitutional Law

MUNICIPAL CORPORATIONS—EVIDENCE—CONSTITUTIONAL LAW—DELEGATION OF POWERS—Under the city manager law, Acts 1921, p. 594, c. 218, No. 3, the city clerk was required to determine within five days after its filing whether a petition, asking that the question of adoption of city manager government be submitted to the electorate of a city, was signed by at

least twenty per cent of the voters of the city at the last preceding municipal general election. Such a petition was filed in Indianapolis; passed upon; the election held, and voted that city commissioners be elected. This suit is to enjoin the defendant's, the board of election commissioners, from taking any steps to expend funds of the city, etc., for holding such an election for city commissioners. Injunction denied. On appeal, *HELD:* judgment reversed; injunction granted, on the ground that the statute in question is unconstitutional. (Gemmill, C. J., and Martin, J., dissenting.) *Keene v. Remy,* Supreme Court of Indiana, September 25, 1929; 168 N. E. 10.

The court held that the determination of the sufficiency of the petition is a judicial function; that such function may not be delegated; that the court would take judicial notice that the work required of the city clerk personally in examining the petition is a mental and physical impossibility, since under the statute 19,000 signers to the petition were required; and that section 3 "is unworkable, impossible of performance . . . and therefore invalid."

As to this *a priori* demonstration of impossibility, it has been suggested that the clerk might have made the determination required by checking the poll books. It was nowhere averred that he did not perform his task.

But the real issue between the majority and minority is on the question whether the determination of the sufficiency of the petition is a judicial function or an administrative act.

Assuming the function is judicial, the court has support in saying it may not be delegated. *Waldo v. Wallace,* (1859) 12 Ind. 569. But is the act of the clerk in determining whether or not a certain person is a qualified elector a judicial function? The majority says it is "because there must be a finding concerning the qualifications of the petitioner under the constitution on which is based the judgment whether his name shall be counted or not"; that the act cannot be ministerial, for "ministerial acts do not empower a public officer to adjudge upon the matter before him." No case is cited as in concurrence with this reasoning.

It must be frankly conceded to the majority that under a "drily logical" interpretation of judicial power, it is arguable that the function in question is a judicial one. Yet the courts have, by a sound concession to expediency and the needs of modern conditions, set apart a multitude of functions and characterized them as ministerial or quasi-judicial. Such latter functions may be conferred upon certain officers and commissions, acting with such assistants as they deem necessary. The analogous cases to the instant one seem to indicate that the function here is only the same as that exercised by administrative or quasi-judicial officers similarly situated, i. e., to administer a standard, or "rule of conduct" (in this case the constitutional standard of a qualified voter). The minority stated that the clerk "acted as a ministerial, administrative officer, with power to examine the petitions . . . and determine their sufficiency," citing *State v. Roach,* (1910) 230 Mo. 408; 130 S. W. 680, wherein it was held that the Secretary of State, in examining the petition for referendum to see that it is sufficient under the constitution and laws, performs the function of a ministerial officer with the usual discretion lodged in such officer.

In view of other decisions of the Indiana courts it is difficult to follow

the implication of the majority that every act of an officer requiring the exercise of judgment upon the matter before him is a judicial function; and that a ministerial or administrative act is one wherein judgment or discretion is not exercised. *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192, held that under an act requiring a board of examiners to determine whether or not an applicant to practice dentistry meets the statutory requirements, while it means that the board in some degree acts judicially, the board performs no judicial duty within the meaning of the constitution. "An act is none the less ministerial because the person performing it will have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act." *Flourney v. Jeffersonville*, 17 Ind. 169. The discretion of a county superintendent to grant or withhold a teacher's license to an applicant is not an exercise of a judicial function. *Elmore v. Overton*, 104 Ind. 548. It is submitted that the superintendent in such case "adjudges" whether or not the statutory qualifications are met, just as surely as would the clerk in the instant case. And yet this and similar exercises of discretion are held purely ministerial acts. The exercise of such powers as the last preceding, and the powers of the railroad commissions, tax commissions, public service commissions, have been distinguished from judicial powers in that in the latter is involved the power to determine finally the rights as between adverse parties, by a finding which will be *res judicata* unless appealed from. *Bergman v. Kearney*, (1917) 241 Fed. 884. A further illustration of how far the courts have gone in recognizing this distinct class of ministerial functions, is the power given the Secretary of Labor to deport aliens if after a hearing he finds them to be "undesirable residents of the United States." *Mahler v. Eby*, 264 U. S. 32, (1924).

As a ministerial function the clerk would properly determine the sufficiency of the petition by employing assistants to help him. *State v. Dunn*, (1925) 118 Kan. 184, 235 Pac. 132. Such would not be a delegation of his duty under the statute. The clerk would still be the one performing the act, just as a contractor in erecting a house does not delegate authority by employing helpers. Both clerk and contractor remain personally responsible. With such assistants, it would seem that the task imposed upon the clerk under the statute was clearly possible, as contended by the minority.

It should be noted that the minority makes some good procedural points in denying that any objection to the act was available to plaintiffs. It has the support of the cases. 9 R. C. L. 1091; 20 C. J. 181; *Parvin v. Wimberg et al.*, 130 Ind. 561, 130 N. E. 790.

It seems at least questionable whether the court is sound in the points it makes as to the non-amendability of an unconstitutional law; and the contention that impossibility of performance for Indianapolis rendered this law void for lack of uniform operation under Article IV, Section 23, of the Constitution of Indiana. J. V. H.