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AMERICAN SECRET BALLOT DECISIONS.

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THAT the ballot, which for years has been used in every election district in this country, except for general elections in Kentucky,¹ was employed in order to secure secrecy, and that its use implied secrecy, has been repeatedly decided by our courts,² while the benefit which this secrecy conferred upon the individual voter and the community at large has often been dwelt upon by text-writers.³ The theory of the old form of ballot was that the voter prepared or

¹ By the new constitution of Kentucky *viva voce* voting at general elections is abolished, and all elections are by ballot. It is in curious contrast to the conservatism which retained *viva voce* voting for so long that the first American secret ballot law, a very effective adaptation of the Australian system, was the Louisville election law of February 24, 1888, under which the first American election by secret ballot took place December 4, 1888.

² See *Jones v. Glidewell*, 53 Ark., 161; *Williams v. Stein*, 38 Ind., 89; *People v. Cicott*, 16 Mich., 283; *Common Council v. Rush*, 82 Id., 532; *Brisbin v. Cleary*, 26 Minn., 107; *Commonwealth v. Wcelper*, 3 S. & R. (Pa.), 29, 37; *Kneass' Case*, 2 Pars. Eq. (Pa.), 553, 585; *Temple v. Mead*, 4 Vt., 535, 541; *State v. Hilmantel*, 23 Wis., 422.

³ See Cooley's Const. Lims. (6th Ed.), 760.

provided it himself, so that he alone knew its contents, but the inevitable assumption by party organizations of the task of preparing and distributing the printed ballots used has for many decades done away with almost every vestige of actual secrecy, all legal theory to the contrary notwithstanding.

The so-called Australian ballot laws, adopted during the past five years by all but nine States and three territories of the Union, have merely given at last to the old doctrine of the secret ballot a practical application that it has too long lacked. The methods, however, which these statutes provide for the conduct of elections, involve developments of election law new to this country, and some of them without legal precedent anywhere. Those provisions which have been adopted directly from the law of Great Britain and her colonies may be construed in the light of the decisions of the British and colonial courts, but such matters as the restrictions of the right to nominate, the functions of political parties in regard to nominations, or the system, provided in several States, of either voting a "straight ticket" by a single mark, or marking each candidate's name separately, are not merely new, but, being either of home manufacture or continental importation, raise questions which cannot be decided by reference to any reported cases whatever.

Considering the vast territory and the number of independent jurisdictions into which the secret ballot system has been almost simultaneously introduced, and the new uses to which it has been applied, it is but natural that many legal questions should have arisen in both the classes of cases above mentioned. That the volume of litigation has not been greater testifies to the general popular understanding of the secret ballot system and the determination to secure all the benefits of a proper enforcement of the spirit of the new laws as well as of their letter. It is noticeable, too, that the number of cases would have been less but for those provisions which needlessly vary from the

Australian system proper, and which have always been most strongly objected to by the advocates of ballot reform.¹

The legal questions which have arisen can be properly understood, and the decisions intelligently considered, only in the light of existing facts in regard to American elections, facts so familiar that their importance is often overlooked, but which must, nevertheless, be noticed with some detail in the following pages. The practical effect of similar laws elsewhere in remedying the evils which the American secret ballot acts were designed to cure must also be borne in mind, and to the influence of these considerations upon the courts is due the fact that their decisions have been, to a remarkable degree, uniform, wise and tending to uphold the effective working of these laws.

The opinions delivered clearly show that the laws have invariably been approached in a favorable and not a hostile spirit. Thus, in *State v. Black*,² in New Jersey, REED, J., after an interesting sketch of the rise and object of the ballot reform movement, said: "Now, I think this recapitulation of the purposes and results of the class of acts of which our own is a specimen has a pertinency to the questions mooted in this case; for I think that any provision in such an act which is likely to bring about a result which conduces to the purity of popular elections should receive a favorable consideration. It is, of course, true that if the effect of any provision is to shut off the voter from the ballot box, such provision must fall before the constitutional guaranty of the right to vote. But in measuring cases of mere inconvenience, expense or senti-

¹ For cases under these provisions see *Eaton v. Brown* (Cal.), 31 Pac. Rep.; *Talcott v. Philbrick*, 59 Conn., 472; *Fields v. Osborne*, 60 Conn., 544; *State v. Walsh* (Conn.), 25 Atl. Rep., 1; *Fisher v. Dudley*, 74 Md., 242; *People v. Board of Canvassers*, 129 N. Y., 395; *People v. Shaw*, 133 N. Y., 493; *People v. Kaiser*, 25 Abb., N. C. (N. Y.), 462; *People v. Person*, 19 N. Y. Supp., 297; *De Walt v. Bartley*, 146 Pa., 529; *McKee's Rocks Election*, 1 Dist. Rep. (Pa.), 240.

² 24 Atl. Rep., 489. Similar references to ballot-reform history in the interpretation of the law occur in *State v. Russell* (Neb.), 51 N. W. Rep., 465.

ment, the existence of a salutary purpose, and the likelihood of the provision tending to accomplish that purpose, must weigh greatly in determining the reasonableness of the statutory regulation."

The Supreme Court of Missouri has taken similar ground, saying: "This 'ballot reform law' was intended to improve the methods for giving expression to the popular will in the choice of public officers. It should be construed so as to promote, not to destroy, the great objects in view in its passage."¹ And this language is but re-echoed by the words of the Supreme Court of Pennsylvania: "The law itself may be regarded in the light of an attempt on the part of the people to secure a pure, free and unintimidated ballot. Every presumption is in favor of the constitutionality of the law."²

The questions which have called for decision may be grouped into three classes, as they respectively concern nominations, the form and use of the ballot, and errors of public officers.

I. Cases in Regard to Nominations.—The most important cases of this class are those which have involved the right of a legislature to regulate nominations, and the right of a convention or other meeting to make nominations in behalf of a political party.

In considering the limits of a legislature's right to regulate nominations no aid can be obtained from foreign decisions, as in England (where, indeed, the "omnipotence" of Parliament would, in any case, have prevented the question from arising) and the colonies it has never been sought to limit the right of nomination further than by a property qualification for holding office or the requirement of a money deposit with each nomination, to be forfeited if the candidate fail to receive a specified percentage of the vote. Apart from these restrictions, which are not universal, a nomination is made in the British dominions by a paper filed by one proposer and one or a very few

¹ Bowers v. Smith, 20 S. W. Rep., 101.

² De Walt v. Bartley, 146 Pa., 529.

seconders. In America, however, the great number of the elective offices has almost necessarily made the making of nominations a sort of business by itself, while the fact that party spirit and the expense involved by the open-ballot system have for years made a party nomination essential to success in the case of every important office, and greatly conducive thereto in all cases, has given such a nomination a privileged character, something more than the mere suggestion that Mr. A or Mr. B is a person whom certain citizens would like to see chosen by the free and independent electors. Most of our legislatures have clearly been dominated by a conviction that the field of nominations was one where the party leaders might indeed rush in but which the ordinary citizen must fear to tread. Should nominations be made easy, outside the leading party organizations, the ballots might not only be inconveniently increased in size, but the importance of the "regular" candidates might be diminished. Accordingly, almost all the American secret ballot laws provide that organized political parties may make their nominations by the easy method of filing a certificate, while unorganized aggregations of citizens, even if they assemble in a public meeting, can nominate only by obtaining a number of signatures to a nomination paper, the number required being in some States fairly reasonable, in others so large as to make such nominations almost impossible. The difficulty of nominating by this method is also increased in some States by requiring all the signers to acknowledge, or even swear to, their signatures.

A legislature's power to regulate nominations must have some limits, and these must be conterminous with the free and convenient exercise of the right of suffrage by the voter. Under the Australian system legal nomination is almost a prerequisite of election, as only the names of those candidates who have been legally nominated can be printed on the ballots, and these alone can be conveniently voted for. The right to vote, which may be defined as the right to declare a preference for any one legally qualified to hold

the office to be filled whom the voter may choose, and this on substantially equal terms with every other voter, necessarily includes, therefore, under this system, the right to designate the candidate of one's choice, so that his name may be printed on the ballots, for thus only can the voter declare his preference on substantially equal terms with every other voter. Clearly the right to nominate cannot be impaired without affecting the right to vote.

Although no instance is recorded of nominations so numerous as to make the ballot too large for practical use, such a contingency is possible, and can be lawfully guarded against by legislation. Accordingly, it has properly been held in Michigan that to require that a candidate be placed in nomination by electors of his district, and that such nomination be so made as "to represent the wishes of a respectable portion of the electors," does not deny the legal right of any elector to announce either himself or any one else as a candidate, but merely places reasonable restrictions upon the privilege of bringing the candidate before the voters by the convenient method of having his name printed on the official ballots at public expense. "Any one," said the Court, "has the right to announce himself as a candidate, but if all persons who should so announce themselves as candidates are of right to have their names printed upon the ballot, it is evident that the purposes of the law might be frustrated by filling the ballot with the names of independent candidates for such office. The law does not deny to any person the right to be voted for upon the ballot, but, in cases where the person is not the nominee of a convention called for the purpose of making nominations, the person can be voted for by writing his name upon the ballot in the blank required to be preserved for that purpose in the ballot."¹ As such blank spaces are provided for by every secret ballot law, no voter is limited in his choice to the candidates officially nominated,² but may

¹ *Chateau v. Jacob*, 88 Mich., 170.

² *Bowers v. Smith* (Mo.), 20 S. W. Rep., 101; *Price v. Lush*, 16 Mont., 61.

insert other names by writing or any other means that the language of the law permits.¹

In the Michigan case above cited, the Court did not say what would constitute a "respectable portion" of the electors nor at what point the respectability might become exclusiveness, but simply held that the Michigan law, authorizing "the names of the candidates nominated by the regularly called conventions of any party" to be printed on the ballots, a *mandamus* to compel the printing of a name could not issue when it did not "appear that the relator was selected by an assemblage or meeting of electors of his ward," language apparently used as equivalent to the statutory words, "the regularly called conventions of any party."

In most States the right to make legal nominations is rather more restricted than it is in Michigan. In Pennsylvania, for instance, a certificate of nomination can be filed only by a political party which has at the previous election cast 3 per cent. of the total vote, while the number of qualified electors who must sign a nomination paper for the State at large is fixed at one-half of 1 per cent. of the largest vote cast at the last election for any officer elected in the State, and in other cases the number is 3 per cent. of the largest vote cast at the last election for any officer elected in the district for which the nomination is made. It has there been held that the provision restricting the right to nominate by certificate to political parties of the size above mentioned was but a reasonable regulation in regard to the printing of the ballots, not interfering with the rights of the citizen as a voter, nor imposing any inconvenience upon him.² Whether the restrictions in regard to nomination by signatures were reasonable or not was not decided, no attempt to raise the question having been made.

In New Jersey 5 per cent. of the vote is required for the party nomination, while the number of signatures required is fixed at 1 per cent. of the vote for State offices,

¹ *De Walt v. Bartley*, 146 Pa., 529.

² *Ibid.*

and 5 per cent. for other offices, but with a maximum of 200 in any case. The Supreme Court has there held that while "these regulations may not be the wisest that could have been adopted, still they are regulations which do not seriously impair the right of any citizen to vote. They are intended to restrict the number of party tickets within reasonable limits, while at the same time permitting any body of citizens whose number is sufficient to give importance to a concerted political movement to organize as a party." ¹

The above decisions are the only ones which have as yet been rendered in regard to a legislature's power to restrict the right to nominate, as *People v. Rice*,² merely interprets the obscure language of a minor provision of the New York Act of 1890, under which 250 signatures were required for a county or district nomination paper, unless any portion of the district were in New York or Kings Counties, or New York city or Brooklyn, in which case 100 signatures sufficed. These decisions uphold the power of restriction as necessary to the carrying out of the system of official ballots, but they do not indicate the limits of that power, limits which unquestionably exist. In the New Jersey case the comparatively reasonable number of signatures needed for a nomination by that means modified to some extent the effect of the rather high percentage required for a party nomination, whereas in the Pennsylvania case, as already stated, the reasonableness of the restrictions upon the former method was not passed upon. In most States the restrictions seem so reasonable as to prevent any serious attempt to break them down, but it is possible that under the less liberal laws of California, New York, Pennsylvania, and perhaps a few other States, an application for a *mandamus*, accompanied by proof of inability to nominate by either method, might result in a decision that the legislature had exercised its power oppressively, and that its restrictions were therefore void.

¹ *State v. Black*, 24 Atl. Rep., 489.

² 25 Abb. N. C. (N. Y.), 460.

All the American ballot reform laws recognize political parties and their properly-organized conventions or caucuses as a part of the machinery by which elections are carried on. To these bodies certain important privileges in regard to nominations are given, privileges sometimes contended for by rival claimants of the party title. In Delaware such contentions are not likely to arise, as the statute defines a political party as an organization of *bona fide* citizens and voters of any county (to the number of at least one hundred in any county in which it exists) "which shall, by means of a convention, primary meeting or otherwise, nominate candidates for public offices to be filled by the people"¹ at any general or special election within the State; but in other States the courts have had to decide between contestants.

In States where legal nominations can be made by any political party, the only question that can arise is as to whether the party whose members undertake to make nominations really exists as a party. Thus in a Connecticut case² it appeared that in a certain town a regular Republican caucus was called and organized and it then voted to adjourn. Thereupon some Democrats who were present, but had not participated, acted with the fifty Republicans present in organizing a citizens' caucus and nominating a citizens' ticket, composed of candidates from both parties. A collection was taken to pay for printing the tickets.³ No committees were appointed to carry out the purposes of the caucus, nor steps taken to effect a permanent organization of a citizens' party, or to provide for its further existence. The Republican chairman had the tickets printed and placed in the booths, and the Republican party issued no tickets, though the Democratic party did. Occasionally, in previous years, tickets known as "citizens'" tickets had been used in that town. On

¹ Delaware laws, 1891, ch. 37, § 3.

² *Fields v. Osborne*, 60 Conn., 544.

³ In Connecticut the ballots are printed by the party organizations, on official paper, and enclosed in official envelopes by the voters. This system is far less practical and effective than that of official ballots.

these facts the Court held that a citizens' party had existed in that town at the time of that election.

In Michigan any party may make nominations by a "regularly called convention." It has there been held that where a regular call resulted in the holding of two conventions of a certain party, the board of election commissioners could not refuse to receive and print the names of either set of candidates. "We do not consider," said the Court, "that it is the province of the board of election commissioners to determine which convention represented the regular nominating convention of the party; but that it is the duty of said board to print and place upon the ballots the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions held to nominate city officers, and that the names so certified to them in each list shall be embraced in the ticket so printed; and that it is their duty, further, if the same name of a party shall be certified by each of two committees, that the name so certified shall be printed without further addition or distinctive designation than such as is contained in the certificates furnished."¹ Had the candidates of either convention sought to prevent the names of the others from being printed on the ballots, on account of irregularities in their nomination, a decision between them would, perhaps, have been made, but since there seems to have been no attempt to show that either convention was not "regularly called," in conformity with the statute, and properly conducted as well, the decision reached seems correct, for, if "regularly called," both conventions had apparently the same right to nominate candidates as if they had represented different parties. Confusion might arise from the dual use of the party name, but, in theory of law party names are not elected to office.

In Colorado it is held that by the statute the Secretary of State can only hear objections as to matters of form, so that if a convention splits he cannot decide which faction

¹ Shields v. Jacob, 88 Mich., 164.

is entitled to represent the party, but must certify both sets of candidates, and allow them the same party name.¹

Where the case requires it a court will decide which of two rival conventions is the regular convention of the party, or whether, in point of fact, the proceedings of either convention were sufficiently lawful to sustain the nominations which it has undertaken to make. Thus it has been held that the delegates from two counties, being a minority of the whole convention of three counties, cannot meet by themselves and make nominations.² It has, indeed, been contended that "a political convention is a law unto itself, and that whatever methods it adopts for its own government are conclusive and cannot be made the subject of judicial inquiry." Although this contention may be true to a certain extent, yet, as was said in a New York case,³ "when the duty is cast upon courts and judges of determining the regularity and fairness of political methods, those methods must be subjected to the same tests as would those of any other body of men whose good faith is questioned, and no court or judge would be justified in sustaining them when found to be inconsistent with that degree of sound morals which must characterize an ordinary affair of business, even though they be recognized and approved by senatorial and State conventions of the same political organizations."

The Supreme Court of Missouri has expressed the same view in the following words: "The same consideration which should induce courts of justice to maintain the purity of the ballot box when the final vote is taken should equally operate with them to promote honesty and prevent and condemn fraud when a preliminary vote is taken or a nominating convention held. There can be no difference in principle in its application to the various situations mentioned; and though it is said that 'the Decalogue has no place in politics,' yet when the tribunals of

¹ *People v. District Court*, 31 Pac. Rep., 339.

² *State v. Weir* (Wash.), 31 Pac. Rep., 417.

³ *In re Woodworth*, 16 N. Y. Supp., 147.

the country are appealed to in matters having political complexion and bearing, when they once acquire jurisdiction of such matters in a proper way, they will administer justice, promote honest dealing and condemn fraud precisely as they do when administering the law in cases sounding in damages or sounding in contract."¹

In New York the proceedings at primary meetings are regulated by law, and hence the question whether a nomination was made by "an organized assemblage of voters or delegates representing a political party," involves farther questions as to the regularity of the nominating conventions and of the caucuses which elected the delegates. Other things being equal, the decision will be in favor of a caucus at which all the provisions of the law as to primary meetings were observed as against one where the law was disregarded, and also in favor of the more numerously attended caucus.² A decision as to the regularity of a caucus, if not appealed from, must be respected, and no recognition by any authority in the party can change the status of a caucus which has been decided not to have been an assemblage representing the party.³ Where a certificate of nomination shows on its face that the convention was composed of delegates who did not receive the requisite number of votes at the primary meeting, it cannot be validated by any central committee of the party, as the statute gives no such committee any supervisory power of the proceedings of caucuses and conventions.⁴ Manifestly illegal acts of the party authorities can, of course, confer no rights upon political assemblies or their members, and if it be attempted to exclude authorized delegates from a meeting and to pack it with unauthorized persons, and a quorum of the authorized delegates proceed to meet elsewhere, they will be regarded as the regular body.⁵ It has further been held in New York that where a call for a primary meeting

¹ *State v. Lesueur*, 103 Mo., 263.

² *In re Woodworth*, 16 N. Y. Supp., 147.

³ *Ibid.*

⁴ *Matter of Cowie*, 25 Abb. N. C. (N. Y.), 455.

⁵ *In re Woodworth*, 16 N. Y. Supp., 147.

of members of a certain party has been publicly posted, and a ticket nominated and duly certified and filed, an objection that such meeting was an irregular body, not the regular party, is frivolous; that no matter what the body of voters may have called themselves, if a ticket be nominated and filed according to law, the candidates' names should be printed.¹ It has been held in Missouri that an agreement between opposing candidates for a nomination to submit their claims to the decision of a committee of their party is binding on them by way of estoppel,² but this results from the general doctrine of estoppel rather than from the provisions of the statute in regard to nominations.

The Pennsylvania statute requires certificates of nomination to be filed by conventions, primary meetings, etc., held "under the rules of" political parties. Under this it has been held that if the party rules empower any committee to decide between rival conventions or other assemblages, and the question comes before the committee in the manner provided by the rule, the Court will sustain the committee's decision,³ but unless the question be so brought before such committee its action cannot affect the matter, and the Court will decide which assemblage, if either, was regularly held.⁴

Irregularities in the election of some of the delegates to a nominating convention regularly called and held, or of some of the ward committees that have certified the credentials of delegates to such convention, will not invalidate a nomination made thereat, especially if such irregularities have since been validated under the party rules.⁵ Also minor failures to comply with the party rules in the procedure at a convention are immaterial, if no fraud be intended, nor any voter embarrassed, and such irregularity were not caused by the action of the candidate nominated,

¹ *People v. Ryan*, 60 Hun. (N. Y.), 398.

² *State v. Lesueur*, 103 Mo., 263.

³ *Donahue's Nomination*, 2 Dist. Rep. (Pa.), 5.

⁴ *Dailey's Case*, 1 Dist. Rep. (Pa.), 764.

⁵ *Ker's Nomination*, 2 Dist. Rep. (Pa.), 14.

nor in his interest, and no change in the ultimate result be proved to have been wrought thereby.¹

Decisions have been rendered on various other points in regard to nominations as follows: The requirements of a secret ballot law as to the time of filing nomination certificates or papers and as to their form are mandatory, and a certificate or paper not in proper form, or presented after the time, should be refused,² unless it is for an office which has become vacant after the time for making legal nominations has elapsed, so that compliance with the requirement as to time was impossible.³ A provision for allowing the names of candidates to be substituted in the place of such as have died or withdrawn since their nomination does not authorize the curing of defects in nominations already made, nor the supplying of nominations when none were properly made within the time allowed.⁴ Though the duties of the officers with whom nomination certificates have been filed are ministerial they have authority to pass on their sufficiency as to matters appearing on their face (*e. g.*, as to whether they are acknowledged or not) before allowing them to be filed.⁵ Whether a political party has polled the requisite percentage of votes to entitle it to nominate as a party is a question of fact, to be decided by the proper court on objections duly filed,⁶ and no objection to a nomination will be entertained unless duly filed.⁷ A "nomination paper" may consist of separate but similar papers containing signatures, provided each such paper be in proper form and the signatures thereon duly verified.⁸ A

¹ Little's Nomination, 1 Dist. Rep. (Pa.), 806.

² Lucas v. Ringsrud (S. Dak.), 53 N. W. Rep., 426. The time is computed by the ordinary legal rule, so that "at least—days before the day of the election" excludes the day of the election and includes the first day of the period: Certificates of Nomination, 1 Dist. Rep. (Pa.), 760.

³ Clay's Nomination, 2 Dist. Rep. (Pa.), 19.

⁴ Lucas v. Ringsrud (S. Dak.), 53 N. W. Rep., 426.

⁵ State v. Lesueur, 103 Mo., 263.

⁶ Robbins v. Harrity, 2 Dist. Rep. (Pa.), 163.

⁷ Van Storch's Nomination, 2 Dist. Rep. (Pa.), 7; Robbins v. Harrity, *supra*.

⁸ King's Nomination, 1 Dist. Rep. (Pa.), 807.

percentage of the votes cast for an officer elected in a district at the last election must be based upon the vote cast for an officer elected by and for that district, not upon the vote cast in that district for a State officer.¹ After election the validity of nominations can be inquired into only by proceedings in the nature of a contest, not by the board of canvassers, whose duty is merely to canvass the returns as presented.²

II. Cases in Regard to the Form and Use of the Ballot.

—In the form and use of the ballot a marked difference exists between those laws which have adopted the Australian arrangement and those which have adopted the Belgian. The former require the names of all candidates for an office to be printed, with their proper political designations, under the title of the office, in the order either of their surnames or of their parties, and the name of each candidate voted for is marked separately. The latter provide that the names of all the candidates nominated by the same political party shall be printed in a column under the party name, and that a mark against that name shall be equivalent to a vote for every candidate of the party. In three States³ the names are arranged by the former method, but may be voted for by the latter, the party names being placed by themselves at the top of the ballot. The only reason for the Belgian arrangement is that it enables those who desire to vote a straight party ticket to do so with the greatest possible ease; and as this privilege is usually confined by law to the supporters of a party entitled to nominate by certificate, to the exclusion of the supporters of candidates nominated by papers signed by citizens, and cannot possibly be enjoyed by those who wish to vote independently of party, very strong arguments can be brought against it as affecting injuriously the rights of the citizen, his exercise of due consideration in voting, and even the

¹ King's Nomination, 1 Dist. Rep. (Pa.), 807.

² State v. Board of Canvassers (Mont.), 31 Pac. Rep., 536.

³ Arkansas, North Dakota and Oregon. The law was the same in California, until declared unconstitutional in *Eaton v. Brown*, *infra*.

secrecy of the ballot. On the first of these grounds the very important California case of *Eaton v. Brown*,¹ a case of absolutely first impression, was recently decided. The privileges given to political parties by the ballot law of that State had led to the forming of an organization called the "Citizens' Non-partisan Party," which nominated candidates and sought to compel the printing of their names under the party title, so that they could all be voted for by a single mark. The Court refused the *mandamus*, but granted in effect more than the relators sought, for the provision for voting by a single mark was declared "unconstitutional and wholly void." "It is," said the Court, "an attempt to discriminate against classes of voters, and its effect, if allowed to be valid, would be to subject such classes to the alternative of partial disfranchisement or to the casting of their votes upon more burdensome conditions than others no better entitled, under the fundamental law, to the free and untrammelled exercise of the right of suffrage. We hold that this provision destroys the just and equal and uniform operation which in an election law, of all others, is demanded no less by the express terms of our fundamental law than by the genius and spirit of our institutions. It is, therefore, void and inoperative. There should be no party designations printed at the head of the tickets, because there can be no voting by stamping such designation. Voters can only express their choice by placing a stamp opposite the name of their candidate for each office, or by writing the name of a candidate in the blank space left therefor, except only in the case of presidential electors, who may, under the law, be voted for in groups by a single impression of the stamp."

The California law was one of four which adopted the mixed system above mentioned, and it was further peculiar in providing that if a party's name were marked on a ballot, a vote for any candidate of another party would invalidate the whole ballot, and not merely as regarded the particular

¹ 31 Pac. Rep., 250.

office, but the principle involved would have been the same even without such a provision. The decision could be used as a precedent not only in Arkansas, North Dakota and Oregon, where the form of the ballot is precisely as in California, but also in at least twelve other States where the party-column arrangement is used. The importance of this case cannot be overestimated, and it accords with the highest principles of constitutional law and the most comprehensive views of public policy.

The provisions regulating the modes of marking a ballot differ somewhat in the different States, and some provisions are so worded to be mandatory, while others are directory only. The provisions of the Indiana statute, requiring the marks to be stamped on certain squares, has been held mandatory, and no other mode of marking is allowed;¹ whereas in Rhode Island, while a cross alone can be used, and it must be placed in the margin to the right of the candidate's name, it need not be placed within the square printed for the purpose of receiving it.² In Nebraska the requirement that the marks shall be made with ink has been held directory merely, so that a mark made with a pencil is a sufficient compliance with it in the absence of fraud, and if the ballot be in other respects valid.³

If the ballot is to be absolutely secret no one should be allowed to see it during the process of marking, except the voter himself. Strict application of this rule would disfranchise all voters who, from blindness or other bodily infirmity, are physically unable to mark their ballots unaided, and it would also greatly inconvenience those who can not read. Assistance in the marking, even at the expense of strict secrecy, is allowed for physical causes in all secret ballot laws, and the same exception is usually made in the case of illiterates, unless they are excluded

¹ *Parvin v. Wimberg*, 30 N. E. Rep., 790.

² *In re Vote Marks*, 21 Atl. Rep., 942.

³ *State v. Russell*, 51 N. W. Rep., 465. The same doctrine is seen in *Rutledge v. Crawford*, 91 Cal., 526, a case under the old law.

from voting altogether by an educational qualification for the suffrage. On the question of whether such exception is necessary the authorities are divided. It is held in Kentucky,¹ where the bill of rights declares that "elections shall be free and equal," that a law requiring voters to mark their ballots alone and unaided is inoperative to the extent that it "deprives illiterate persons of the opportunity and means of freely and intelligibly voting, for they have the right to avail themselves of whatever reasonable aid and information may be necessary to enable them to cast their ballots understandingly, and cannot be legally deprived of it."

The Constitution of Tennessee resembles that of Kentucky in requiring that elections shall be "free and equal," but another article adds the proviso that the legislature shall have power to enact laws "to secure the freedom of elections and the purity of the ballot box." Under this proviso it was held that a law which did not allow illiterates to be helped in voting was not unconstitutional. "The purpose of the law before us," said the Court, "is to require the voter to cast his own ballot, to do away, as far as possible, with the illegal practice of voting oftener than once existing in some quarters of the State, and to defeat bribery, duress and corruption at the polls. The law is plain and simple in its provisions. Every voter, however illiterate, can always find a friend to himself, or some one candidate, who will read and explain the law and the manner of its observance. Ballots and cards of instruction are always at hand. The names of candidates are printed, and with little effort the unlettered voter can soon become as well acquainted with the printed name of his candidate as with his face, and with easy readiness place his cross opposite that name and fold his ticket as required. The argument of inconvenience is as nothing compared to the rights

¹ *Rogers v. Jacob*, 88 Ky., 502. The same decision would probably have been rendered in Michigan (see *Common Council v. Rush*, 82 Mich., 532), where, however, owing to a difference in the law, this precise point did not arise.

intended to be protected by that inconvenience. The inconvenience to a part of the community must yield to the good of the whole."¹ This decision, as already stated, was based on the express grant of power to the legislature to protect the freedom and purity of the ballot, but this freedom and purity were in effect required already by the bill of rights, and a legislature's power to enforce the bill of rights needs no express grant. Hence, that grant seems not to be essential to the decision, which may, therefore, be understood as squarely opposed to that rendered in Kentucky, and as placing the secrecy of the ballot above the convenience of illiterates, even where no educational qualification for the suffrage exists, a doctrine apparently recognized also in Mississippi² before the present educational qualification took effect.

Any violation of the legal requirements of secrecy necessarily vitiates the ballots affected thereby. Thus in Mississippi³ a petition for a contest averred that in a certain district an election officer had marked ballots for certain illiterate voters who were not blind or physically disabled, so that they did not even know for whom they were voting. The evidence offered in support of this averment was not admitted, and a demurrer to the petition was sustained. On appeal the Supreme Court reversed this judgment and remanded the case, saying, "The evidence of London and others, if true, stamps the returns from that box as false and fraudulent. The petition in effect charged that forty-one votes were illegally cast at Brunswick, which by collusion with election officers were received and counted for the appellee, and the excluded evidence went directly and specifically to the support of this charge. The demurrer should have been overruled and the evidence should have been received. Whatever the true interpretation of Sections 241 and 242 of the new Constitution, and of the election ordinance of the convention may be, it is certain that

¹ Cook v. State, 90 Tenn., 407.

² Sproule v. Fredericks, 11 So. Rep., 472.

³ *Ibid.*

neither was designed, in whole or in part, to make the electors the mere creatures for registering the will and choice of the officers of the election. It is clear that the conversion of these officers into partisan managers and political bosses was not the purpose of the convention or ordinance." While the Court laid particular stress on the fact that the illegal marking had been done by an election officer, the gist of the decision clearly is that ballots marked in violation of the secrecy required by the law are illegal, and should not be counted, a conclusion which has also been reached in Michigan in a case where voters had marked their ballots in the presence of other persons.¹

Under the Australian arrangement, described above, the ballot is regarded in England as containing "a list of the candidates and not a list of their nominations," so that each candidate's name appears once only,² even if he receives more than one nomination; but it has been thought otherwise in Nebraska,³ while in Maryland, under the Belgian system of printing the names in party columns, the name must appear in a different column for each nomination.⁴

Under the unique New York statute a separate ballot is printed for each independent candidate, unless his supporters select the names of candidates for other offices to appear with his on the ballots.⁵

The question of what constitutes such a distinguishing mark upon a ballot as to infringe the provisions which forbid the use of ballots so marked as to be capable of identification has arisen in a few cases. In New York, where separate party ballots are used, the outside also of all those used at the same voting place must be alike in order to preserve the secrecy of their contents. It has there been held that the endorsement for another voting place than that at which they are used is "a distinguishing mark on the outside" of

¹ *Atty.-Gen. v. McQuade*, 53 N. W. Rep., 944. See *McQuade v. Fergusson*, 51 Id., 1073.

² *Northcote v. Pulsford*, L. R., 10 C. P., 476.

³ *State v. Stein*, 53 N. W. Rep., 999.

⁴ *Fisher v. Dudley*, 74 Md., 242.

⁵ *People v. Kaiser*, 25 Ab. N. C. (N. Y.), 462.

the ballots, and hence that ballots so endorsed cannot be counted.¹ The fact that the error was that of certain officials was held immaterial by the majority of the Court, on the ground that it was the voters' duty to see that their ballots were properly endorsed, but in a dissenting opinion it was forcibly urged that the names of the candidates being the same as on the proper ballots, the form of endorsement was unlikely to attract a voter's attention, and also that the error of the officers in issuing and receiving the wrong ballots ought not to disfranchise the voters. This point will be considered below.

The use of a paster with a name not on the official ballot does not constitute a distinguishing mark upon the ballots upon which it is used,² but the erasure of a particular name on the ballot or paster and the writing of another name in its place is a distinguishing mark if so intended, and the facts requisite to condemn a ballot because so marked may be proved by any competent evidence, either that of the voter himself, or of any person who has marked it, or by other evidence against their testimony.³

The word "for," preceding the title of an office, is not a distinguishing mark in Connecticut if used on all the ballots of a particular party at a given voting place,⁴ but it might be so if used in some ballots of that party only.⁵

A person who is familiar with the construction of the machinery of a patent ballot box may testify as an expert that in his opinion the marks on a ballot might have been made by such machinery rather than by the voter.⁶

III. Cases in Regard to the Errors of Public Officers.
—The results of official neglect in the use of ballots at another voting place than that for which they were endorsed

¹ *People v. Board of Canvassers*, 129 N. Y., 395.

² *People v. Shaw*, 133 N. Y., 493.

³ *People v. Board of Supervisors* (N. Y.), 32 N. E. Rep., 242.

⁴ *Fields v. Osborne*, 60 Conn., 544; *State v. Walsh* (Conn.), 25 Atl. Rep., 1.

⁵ *Fields v. Osborne*, 60 Conn., 544.

⁶ *Convery v. Conger*, 53 N. J. L., 468.

are in New York, as already noticed in the case of *People v. Board of Canvassers*,¹ cast upon the voters who use them, and this because such ballots are not properly endorsed for the voting places where they are used, as well as for the effect of the endorsement as a distinguishing mark. This doctrine, which has been criticised in other States,² is extremely technical, and there is much force in the dissenting remark of PECKHAM, J., that "to utterly disfranchise hundreds of innocent legal voters because the employee or messenger of some public officer made a mistake like the one in question, seems to me to work a burlesque on the ballot act and its construction." Inasmuch as the object of an election is to obtain a free expression of the choice of the voters, and there was no evidence that the use of the wrongly endorsed ballots hindered this free expression or affects the secrecy of the ballot, their rejection certainly defeated the lawful intention of the voters in that particular case.

The case of *Talcott v. Philbrick*,³ in Connecticut, somewhat resembles *People v. Board of Canvassers*, though it did not involve the error of any public officer. The Connecticut law provides that the ballots which are printed and placed in the booths by the party organizations shall contain the name of the political party issuing them. In a certain town where it had long been customary to elect local officers on a "citizens' ticket," certain ballots which had the heading "citizens" were printed and voted. It appeared that no "citizens' party" existed, and that the ballots had been printed by the Republican committee, but that they were not prepared fraudulently nor to deceive the voters, and that no such result had been produced by them. A majority of the Court held, however, that they

¹ 129 N. Y., 395.

² *Bowers v. Smith* (Mo.), 20 S. W. Rep., 101 (where it was said "Such a construction of a law as would permit the disfranchisement of large bodies of voters because of an error of a single official should never be adopted where the language in question is fairly susceptible of any other"): *State v. Russell* (Neb.), 51 N. W. Rep., 465.

³ 59 Conn., 472.

could not be counted because they did not contain, as required by the law, the name of the party that had caused them to be printed, although as pointed out in a dissenting opinion the voters had obtained them in the place where the law directed that ballots should be obtained.

The New York and Connecticut cases may have correctly interpreted the legislative intent, but they forcibly illustrate the peril to voters from departure from the essentials of the true Australian system. Had official ballots been used in Connecticut such a case as *Talcott v. Philbrick* could not have arisen, while had the blanket ballot been used in New York the error could not have been (as it was perhaps intended to be) so limited as to affect the voters of one party only, and as all the ballots used would have had the same endorsement, it could not have been claimed that an error in the endorsement would affect the secrecy.

In New Jersey it was held, in *State v. Black*,¹ that the risk of the rejection of votes on account of official neglect or error in the printing of the ballots, without fault of the voter, is no argument against the constitutionality of the law, the Court seeming to admit that such neglect or error would invalidate the ballots. In Colorado errors in a party emblem or in the position of a candidate's name must be objected to before the election, and if not corrected then they will be treated as immaterial.² The honest mistake of election officers, in endorsing ballots in the wrong place, has been held immaterial in Indiana.³

It has been held in Montana that where a successful candidate has not really been entitled to have his name printed on the ballot because of some defect in his nomination, his election was invalid, and a judgment to quash the statement of contest should be reversed.⁴ In Missouri, however, the fact that the names of certain candidates were

¹ 24 Atl. Rep., 489.

² *Allen v. Glynn*, 29 Pac. Rep., 690.

³ *Parvin v. Wimberg*, 30 N. E. Rep., 790.

⁴ *Price v. Lush*, 10 Mont., 61.

unlawfully printed on the ballots used in a certain election district was held to be no reason for throwing out the votes cast in that district in a contest between other candidates, whose names were lawfully printed.¹ The majority of the Court considered that as the law did not declare that the illegal addition of names to the ballot would vitiate the election, it must be treated as an irregularity which, if it were free from fraud and did not interfere with a fair expression of the will of the voters, should be disregarded, the contestant not having availed himself at the proper time before the election, of his right, under the law, to object to the addition of the names and to have the error corrected. "Having regard," said the Court, "to the spirit and purpose of the Missouri statute, and to the general principles governing the treatment of popular elections by the courts in this country, we think it should be held that, where a candidate for public office causes no timely objection to be made before the election, he should be regarded as having waived all objections that may exist to the presence on the official ballot of the names of nominees not properly entitled to be there."

In the same opinion the decision in *Price v. Lush*² was objected to as misapplying the English cases and as overlooking the provision in the Montana statute, similar to the Missouri provision, for the correction of errors in the ballot before the election. The first criticism is well founded, for the English law as to objections to nominations (35 and 36 Vict., ch. 33, sched. 1, § 13; extended to municipal elections by 38 and 39 Vict., ch. 40, § 1), provided that the decision of the returning officer disallowing an objection is final, but that his decision allowing it is subject to reversal on petition questioning the election or return. Hence such cases as *Price v. Lush*³ and *Bowers v. Smith*,⁴ involving the illegal printing of names on the

¹ *Bowers v. Smith*, 17 N. W. Rep., 761; 20 S. W. Rep., 101.

² 10 Mont., 61.

³ *Ibid.*

⁴ 20 S. W. Rep., 101.

ballots, could not have occurred in England. The second criticism seems valid also, but there is this important difference between *Price v. Lush* and *Bowers v. Smith*, that in the former the name illegally printed was that of the contestee himself, while in the latter the names were those of third parties.

The cases on official errors suggest the advisability of adding a new provision to the secret ballot laws. The chance of serious errors in the official ballots, or in the conduct of an election in other respects, may be remote, but it should be provided for. As such errors must occur, if at all, without the fault of the voters who use the ballots, the statute should guard against the possibility of such errors resulting in practical disfranchisement. Under the old ballot laws any error in a ballot was regarded as arising by the voter's own fault, and defective ballots were properly rejected from the count. Hence in a contest the candidate who was proved to have received the greatest number of lawful ballots was declared elected. Such a rule must work unjustly where, as in *People v. Board of Canvassers*,¹ the error is not due to the action of the voters themselves, and hence the statutes should provide, as is partly done in that of Pennsylvania,² that where the result of the entire election for any office be proved to have been affected, actually or probably, by an error in the ballots or in any other feature of the election, without the fault of the voters themselves, the election for that office shall be declared void, and a new election for such office shall be held without delay.

Philadelphia, January, 1893.

¹ 129 N. Y., 395.

² Act of June 19, 1891, § 30; *Purd. Dig. Supp.* 2493, pl. 63.