# CURRENT EVENTS

OF GENERAL LEGAL INTEREST.

The Supreme Court of Pennsylvania is nothing if not original. Its last and most startling performance has been to create a new canon of constitutional construction, which has hitherto escaped the ingenuity of the sages of the law, that of the "policy" of the constitution. In the decision of the question raised as to the constitutionality of the provision in the statute of that state creating the Superior Court, that in all elections for judges of that court no voter shall cast his ballot for more than six candidates, this is made one of the controlling factors. In answer to the objection that the enumeration in the constitution of certain offices for which only a limited vote can be cast excludes all others not named, the learned judge who delivered the opinion says, if the papers are to be trusted, "the limited voting plan was recognized and adopted in the constitution, because it was deemed wise that as to offices non-partisan in character, or which at least should be, the minority party ought to have representation, and this could only be attained by limiting voting. Does the expression of this thing necessarily exclude other things not expressed? As the same reasons for the plan exist as to like offices thereafter created, is it not a necessary deduction that a like plan like that expressed should be followed? *Does not the whole spirit of the constitution plainly so imply*, while there is not a word indicating that such plan as to other or new courts is forbidden? In the cases specified the constitution is mandatory. It says to the legislature, in thus enumerating them, Thou shalt prescribe the limited voting plan. *In the cases not enumerated it is discretionary.*"

**The right of a Legislature to limit the suffrage**

This is wide of the real question, which is not whether the constitution takes away the power of passing such a law from the legislature, but whether the legislature has been granted

that power, in the face of a constitutional provision that "all elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage:" Const. Pa. Art. I, § 5. Such a provision has always been held to create in the qualified citizens of the commonwealth a vested right to the exercise of the suffrage, subject to no restrictions on that right except those prescribed by the sovereign people, acting through the medium of a constitutional convention.

Is such an election as that prescribed in the statute "free and equal?" It is not free, for the voter cannot vote for all the officers to be elected. This objection cannot be pushed aside by claiming, as has been done, that the "election" for Superior Court judges is one and indivisible, for such is not the case.

In order that an election of two or more candidates should be a unit, it is necessary that the ticket on which their names appear should be elected or defeated as a whole; and, if this is not the case, but the individual candidates are elected according to the votes cast, then there is practically an election for each candidate, and a refusal to permit the voter to vote for each is a violation of the constitutional provision. Further, the constitution expressly provides that a voter shall have the right to vote at all elections, (Art. VIII, § 1;) and if this does not mean for every candidate at an election, it means nothing. For, if it be possible for the legislature to declare that no person shall vote for "more than" any number of candidates for an office, it is equally within its power to prescribe that he shall not vote for "more than" one or more officers to be elected at an election; or, in other words, that if sheriff, assemblyman, prothonotary, recorder, &c., are all to be elected, as they frequently are, at one time, the legislature can limit the voter to casting his ballot for but one of those officers. If the power exists for one purpose, it must for all.

The Supreme Court does not advert to this latter phase of the question; but notice how glibly the court glides over the objection that the constitution means that the voter shall have a right to vote for every candidate.

"No sound reason has been urged in the argument why we should enlarge the scope of the words 'shall be entitled to vote at all elections,' by practically adding also for every candidate or a group of candidates for the same office. The constitution does not say so, and has never been interpreted so to mean. It clearly appears that the interpretation put upon the language of the constitution by those who lived at the time it was framed and adopted was the same as that put upon like language in 1874 by the Legislature of 1895; that the interpretation put upon the constitution of 1838 was acquiesced in by the bar, the courts and the legislature for a period of thirty-five years until the adoption of the Constitution of 1874; that, in two other instances, offices of the highest importance, jury commissioners and delegates to a constitutional convention, were, by legislative enactment, filled on the limited voting plan."

It does not follow, however, as the learned judge assumes, that because an unconstitutional act has not been called in question, that it can be thereby made constitutional. Mere acquiescence in two instances of the kind is not that evidence of long-continued interpretation which is necessary to establish a canon of constitutional construction.

Again, it is also beyond question that such an election as that prescribed by the act under discussion is not "equal." In the State of Pennsylvania there are, roughly speaking, 500,000 voters of the dominant party, and 400,000 of the minority. By the system adopted, these latter votes are given but one-sixth of the voting power possessed by the majority. It would be hard to imagine a clearer case of inequality. But the court seems to have no difficulty in practically construing "equal" to mean "unequal;" and so this little objection does not even halt it for a moment.

This act is also, for the reason above stated, an "interference" with the right of the voter to cast his vote at an election. It will be objected that the provision of the constitution does not apply to a law passed by the legislature, limiting the right of suffrage, but to interference with an elector at the polls. Yet the legislature is a "civil power," and if it pass a law forbid-

ding any class of citizens to vote, it would be as effectual an "interference" with the freedom of the election as the action of any body of police or armed force could possibly be. True, it would violate another provision of the constitution; but that would not make it any the less a violation of this.

It is, therefore, hardly open to question that the electors possess a vested right to vote for every candidate at an election, unless they have surrendered that right; and it is equally beyond doubt that the provision of the act cited is an infringement of that right. The whole question, accordingly, turns on the power of the legislature to enact such a provision, which it has at least no *prima facie* right to enact. This right is demonstrated by the court by the simple assertion that the right to establish limited voting is, in all cases not enumerated in the constitution, discretionary with that body; and that assumption is supported by the following supposititious reasoning, "whatever the people have not by their constitution restrained themselves from doing, they, through their representatives in the legislature may do. This latter body represents their will just as completely as in a constitutional convention. In all matters left open by the written constitution of the use the people may make of this unrestrained power, it is not the business of the courts to inquire." This is begging the question, which is simply, as said before, whether the legislature possesses the power to pass such a law. It needs more than a simple assertion of this right to establish it; and yet this is all that the opinion of the court, stripped of its verbiage, and reduced to intelligible language, amounts to.

It may not be amiss to call attention to the peculiar see-saw motion of this court on the general question of constitutionality. It is not many years since it went as far west as California to find a precedent for deciding a mechanics' lien law unconstitutional, and when it did find it, was not deterred from using it by the fact that it rested on a differently worded statute, and had no proper application to the case then in hand. This difficulty was got over by the masterly use of the principle that the legislature cannot interfere with the inherent right of a man to make his own contracts. But this inherent right

is protected by no constitutional provision of which the writer is aware, although one is often cited to support it; and is no more inherent than the right of suffrage. Now, however, the court has disregarded a precisely similar case (*State* v. *Constantine*, 42 Ohio St. 437), in its eagerness to hold the law now in question constitutional. All of which goes to show that the "wavering balance" is not exactly "right adjusted."

In justice to them, however, it must be added that Chief Justice STERRETT and Justice WILLIAMS dissented.

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