

Elections - Secrecy of the Ballot

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Justice McCaleb took the position that the judgments and sentences were null and stated that the majority should not have equated the state's motion with the motion for new trial or the motion in arrest of judgment, as the purpose of the state's motion was to have the null judgments set aside. If an unresponsive verdict is treated as a nullity, then the lapse of procedural delays should not cause such nullities to achieve validity. This latter position was taken in the dissenting opinion of Justice Hamlin. Finally, four of the Justices felt that at least the *sentences* were invalid.¹⁴ Article 527 would appear to indicate that no invalid sentence should be allowed to stand. In view of the result of the case, perhaps the fact that there was an agreement between the state and the defendant, and, by virtue of its own error, the state sought abrogation was of greater significance and consequence than is indicated by the single reference to these facts made in a concurring opinion.¹⁵

Bernard E. Boudreaux, Jr.

ELECTIONS — SECRECY OF THE BALLOT

Plaintiff alleged that secrecy of the ballot was violated at two precincts having 895 of the 20,061 legal votes cast during the 1960 Democratic Primary Election for the office of Judge of the Twenty-first Judicial District. If the vote in these two contested precincts were set aside, petitioner would have had a majority of one vote. In both precincts the voting machines were located in buildings near stairways leading to the second floors. The booths were constructed with open tops permitting someone on the stairway to see into the booth, but the testimony was somewhat contradictory concerning the extent the interior could be seen. At both precincts persons were seen on the stairway at various times during the election. Plaintiff sought to have spe-

14. Chief Justice Fournet stated that the sentences were invalid but that the state's remedy had prescribed. Justice Hawthorne stated that as a matter of law the sentences should be set aside, but held otherwise as a matter of equity. Justices McCaleb and Hamlin dissented as to the result of the case.

15. See in *Work of the Louisiana Supreme Court for the 1959-1960 Term — Criminal Law and Procedure*, 21 LOUISIANA LAW REVIEW 366, 375 (1961), a discussion of the possibility of the state being estopped from alleging invalidity of judgments and sentences because of its own error. On the matter of the binding effect of agreements between prosecuting attorneys and defendants, see *State v. Lopez*, 19 Mo. 254 (1853); *State v. Ward*, 112 W.Va. 552, 165 S.E. 803 (1932); *Annot.*, 85 A.L.R. 1177 (1932); 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 140 (1957); 5 *id.* § 2210.

cific votes voided so that she would be declared the winner. In the alternative she contended that because of an overall pattern of irregularities the election should be annulled and a new one held. The trial court entered judgment for the defendant. On appeal to the court of appeal, *held*, affirmed, per curiam. Votes will not be voided which are cast under conditions which permit nothing more than occasional surveillance, and neither will the election be annulled. *Burch v. McClendon*, 123 So.2d 640 (La. App. 1960).

For purposes of analysis it is convenient to distinguish those cases in which the court determines certain contested votes are void from those in which the whole election is declared invalid. In the former cases the court is in effect participating in the running of the election by redetermining the validity of votes, since a body of election officials charged with supervising the election and ruling on the validity of votes has already determined this identical question.¹ When faced with this type of election contest the courts have required a clear showing by competent evidence that the contested votes were improperly counted or improperly voided before altering the findings of the election officials.² In resolving this type of situation at least three theories have been evolved by the courts. One theory is that in the absence of fraud,³ violation of secrecy by voters or election officials will not necessarily nullify the affected votes.⁴ Another is that secrecy is a personal privilege which may be waived by the individual voter.⁵ Still another is that violation of secrecy by either the elector or the election official will cause the vote to be voided.⁶ No matter which theory the courts follow, there is a

1. LA. R.S. 18:343, 541-721 (1950).

2. *Wright v. Heflin*, 155 La. 765, 99 So. 592 (1924); *Womack v. Nettles*, 155 La. 359, 99 So. 290 (1924); *Reeves v. Dean*, 138 La. 889, 70 So. 871 (1916); *Andrews v. Blackman*, 131 La. 355, 59 So. 769 (1912); *Madere v. Sellers*, 120 La. 812, 45 So. 735 (1908).

3. The term "fraud" as used in election cases generally refers to misconduct designed to influence unduly electors in the casting of their votes or to the actual stealing of votes. *Crooks v. Chevallier*, 156 So. 586 (La. App. 1934).

4. In a case where election officials assisted electors with their ballot without first obtaining the required oath, and in a case where voting booths were not provided, the court held that in the absence of fraud, the voter would not be deprived of the effect of his ballot. *State ex rel. Wahl v. Speer*, 284 Mo. 45, 223 S.W. 655 (1920); *Hope v. Flentge*, 140 Mo. 390, 41 S.W. 1002 (1897).

5. Florida holds that the constitutional provisions for a secret ballot guarantee a personal privilege which may be waived by voter. *McDonald v. Miller*, 90 So.2d 124 (Fla. 1956); *State ex rel. Hutchins v. Tucker*, 106 Fla. 905, 143 So. 754 (1932).

6. The primary purpose and object of the secret ballot system is to insure the independence of the elector. The violation of mandatory statutes designed to provide this secrecy by either officials or electors will cause the vote to be voided.

strong presumption that the finding of the election officials as to the validity of the votes is correct.⁷ When the court determines the validity of certain votes, the election results are modified in accordance with this decision and the necessity for another election is thus avoided.

A different situation exists in the second category where the contestant seeks to have the entire election annulled.⁸ Here the plaintiff is attacking the presumption that the entire election was conducted with regularity sufficient to express the free will of the majority. It would seem that courts are particularly adapted to determining the overall legality of an election by determining if the election was conducted in substantial compliance with the law. The court is not so much running the election or redetermining validity of votes as it is performing the judicial function of preserving from abuse the rights of electors. In weighing the consequences of such irregularities in conducting an election, the court must consider their effect in the light of the essential object, that of insuring an election which manifests the will of the majority of those who voted. Therefore, in each case the court must determine if the irregularity is of sufficient magnitude to require invalidation of the entire election. For example, if the absence of voting booths is proved, it may not establish that secrecy was violated,⁹ but in Louisiana it is a deviation from the provisions of the law.¹⁰ Other provisions of the

Nelson v. Bullard, 155 Minn. 419, 194 N.W. 308 (1923); Board v. Dill, 26 Okla. 104, 110 Pac. 1107 (1910).

7. There exists a prima facie presumption of the regularity and correctness of a judicial district Democratic Executive Committee's official action in promulgating primary election returns and certifying a nominee for office. Lafargue v. Galloway, 184 La. 707, 167 So. 197 (1936). A similar presumption exists in other jurisdictions. See McDonald v. Miller, 90 So.2d 124 (Fla. 1956); State v. Speer, 284 Mo. 45, 223 S.W. 655 (1920); Rampendahl v. Crump, 24 Okla. 873, 105 Pac. 201 (1909).

8. A petition alleging fraud and irregularities so gross as to make it evident that the electors did not have an opportunity to express freely their will would state a cause of action for annulment of the entire election, even though petitioner might not be able to prove that he would have been nominated but for such frauds and irregularities. Lewis v. Democratic Executive Committee, 232 La. 732, 95 So.2d 292 (1957).

In an action to contest an election, the contestant has the right to demand that specific votes be voided, and, in the alternative, that in the event the court finds that the fraud complained of is such that voters were deprived of expression of their will, the primary be declared null and the holding of another contest be ordered. State *ex rel.* Burg v. Folse, 17 So.2d 32 (La. App. 1944).

9. Secrecy of ballot was not violated to an extent requiring votes to be thrown out where in one precinct no election booths were constructed and votes were cast on two school desks located on either side of the election officers at a distance of nine to twelve feet. The vote could not be seen, but clearly the voter could. Jones v. Steele, 275 S.W. 790 (Ky. App. 1925).

10. LA. R.S. 18:326 (1950): "The respective governing authorities, and the commission council of the City of New Orleans, shall cause the polling places to

law are primarily designed to insure expeditious balloting and tabulating of results, and the failure to abide by these provisions likewise is a deviation from the provisions of the law.¹¹

The Louisiana Constitution in Article VIII, Section 15, states, "The Legislature shall provide some plan by which voters may prepare their ballots in secrecy at the polls." Louisiana Revised Statutes 18:326 directs respective governing authorities to provide polling booths in which voters may conveniently and with absolute secrecy mark their ballots.¹² Interpretation of these secrecy requirements has been influenced by the requirement that a candidate in order to contest an election must allege that but for irregularities or fraud he would have won.¹³ Consequently, the Louisiana courts have consistently refused to consider the validity of contested votes where the number of votes challenged was insufficient to alter the results.¹⁴ However, when violations of election laws were so widespread as to constitute a substantial departure from the law that the court felt it impossible to say that the will of the majority had been expressed in a free and honest manner, the election was annulled.¹⁵ Nevertheless, the court of appeal in *Beard v. Henry*¹⁶ in upholding an election stated, "the holding of an election without facilities required by law to afford the electors opportunity to prepare their ballots

be provided with voting shelves and compartments, known as polling booths, in which voters may conveniently with absolute secrecy mark their ballots. These booths shall be similar in character to those required to be used in general elections."

11. *Id.* 18:299-305 (establishing date and place of election); *id.* 18:321 (sample ballots); *id.* 18:691 (cards of instruction); *id.* 18:1165 (mandatory use of voting machines in municipal corporation of more than one hundred and fifty thousand persons).

12. *Id.* 18:326.

13. *Id.* 18:364; *Landry v. Ozenne*, 194 La. 853, 195 So. 14 (1940); *Livaudais v. Leovy*, 193 So. 613 (La. App. 1940); *Crooks v. Chevallier*, 156 So. 586 (La. App. 1934).

14. Alleged violation of secrecy involving forty-eight votes did not state a cause of action where disallowing these votes would not change the results of the election. *Duncan v. Vernon Parish School Board*, 226 La. 379, 76 So.2d 403 (1954). See also *Womach v. Nettles*, 155 La. 359, 99 So. 290 (1924); *Andrews v. Blackman*, 131 La. 355, 59 So. 769 (1912).

15. Failure to use ballots bearing detachable numbered slips as provided by law vitiated each vote cast upon such a ballot. The court stated: "The purpose of these provisions is to make effective one of the main objects of the Primary Election Law, and that is that the voter shall be permitted to cast his ballot secretly, without the possibility of any one else knowing how he voted; the idea being that, in these circumstances, he would come nearer voting his true convictions." *Hart v. Picou*, 147 La. 1017, 1021, 86 So. 479, 480 (1920). An election conducted without booths and with someone other than the voter writing on each ballot and with numerous other irregularities was declared to be in contravention of the law and therefore a nullity. *Williams Cypress Co. v. Police Jury St. Martin Parish*, 129 La. 267, 55 So. 878 (1911).

16. 199 So. 468 (La. App. 1940).

in secrecy is an irregularity only."¹⁷ It should be noted, however, that the plaintiff did not attack the election on the grounds that it was not conducted in substantial compliance with the law and that it therefore failed to register the free will of the electorate. Under this theory the proper remedy to be sought would be the invalidation of the election, not a judgment altering the results so that plaintiff would win.

In the instant case the plaintiff's primary contention¹⁸ was that certain specified votes should be voided because secrecy was lacking when they were cast. Since the court felt that the evidence introduced did not overcome the presumption favoring validity of the votes, her contention was rejected. Violation of secrecy in a few votes with the possibility of violation in other votes was not sufficient to maintain the plaintiff's primary contention. The facts of the case serve to focus attention upon the question of what would be sufficient proof to overcome the presumption of validity and thus have the votes voided for lack of secrecy. Which of the following set of circumstances must a contestant prove in order to be successful: (1) That each contested vote was observed by someone, the voter realized his vote was being observed, and that he therefore altered his vote; (2) that each contested vote was observed by someone, and the voter realized his vote was being observed; (3) that each contested vote was observed by someone; (4) that a systematic surveillance was conducted from a position so located that the observer could see a vote cast and therefore he probably saw the contested vote cast; (5) that occasional surveillance of votes occurred from a position so located that the observer could see a vote cast; (6) that conditions existed so that systematic surveillance could have occurred; or (7) that conditions existed so that occasional surveillance could have occurred? In the instant case proof did not establish that someone was on the stairway throughout the election and therefore did not establish conditions which permitted systematic surveillance. The court merely held that existence of conditions which permit occasional surveillance without more will not justify the voiding of a contested vote. However, in *Beard v. Henry* the court sustained defendant's plea of no cause of action where the plaintiff alleged systematic surveillance and

17. *Id.* at 471.

18. Although plaintiff alleged other irregularities and attacked her opponent's qualifications for failure to pay membership dues to the Louisiana State Bar Association, this note is limited to a consideration of alleged violation of secrecy requirements.

conditions which allowed observers to see votes cast. On the basis of the *Beard* case the proof must exceed that of category four above.¹⁹ The sufficiency of proof in such a case has not yet been ruled on by the Louisiana Supreme Court.

In the alternative plaintiff contended that the election was conducted in a manner which did not substantially comply with the law and thus failed to represent fairly the free will of the majority. In denying the remedy sought, that of annulling the election, the court followed the rule stated in *Duncan v. Vernon Parish School Board*,²⁰ viz., the "court will set aside an election when it is convinced that an injustice has been done due to gross irregularities in the conduct of an election."²¹ However, it would seem that this rule does not supply litigants with an adequate appreciation of what is required of them in order to contest successfully an election in which secrecy has been violated. A consideration of the seven factual situations previously discussed may supply an insight into the actual proof required to attack the validity of an entire election. In *Hart v. Picou*,²² the court annulled an election where a possibility of surveillance of all the ballots was shown, although no actual surveillance was proven. Apparently the proof need not meet the requirements of the first five situations. The instant case establishes that an election will not be annulled under situation seven, that is, where conditions existed so that occasional surveillance could have occurred. On the basis of the few reported cases in which the remedy of annulling the election was sought because of a violation of secrecy, it would seem that the proof must establish that conditions existed which permitted systematic surveillance so that the vote and the identity of the voter could actually be determined. When this remedy of annulling the election is sought it must also be proven that the violation of secrecy pertained to sufficient votes to alter the result of the election.

In an election contest the balancing of public interest may be more effectively achieved by considering each secrecy contest in relation to the remedy sought.²³ If the validity of specific votes

19. *Beard v. Henry*, 199 So. 468 (La. App. 1940). The court stated that since plaintiff did not allege that he had been deprived of a single vote, the votes were deemed valid. Apparently this court considered it necessary to establish that because of the lack of secrecy a vote is altered, or else the vote will not be voided. This lends support to the rule of category one in the text.

20. 226 La. 379, 76 So.2d 403 (1954).

21. *Id.* at 385, 76 So.2d at 405.

22. 147 La. 1017, 86 So. 479 (1920).

23. Even though a violation of an election law has been established, the court

is attacked by a candidate seeking to have himself adjudged winner of an election, it is likely that courts will require exacting proof of injury to the plaintiff before granting the remedy sought. If the contest seeks to protect the public's right to an election which represents the free will of the majority and the remedy sought is that of annulling the election, the court will probably continue to require less exacting proof of secrecy violations in order to sustain a judgment annulling the election. Thus the public has a right to a secret election, but plaintiff does not have a right to be declared winner of an election because his opponent received more non-secret votes than plaintiff received.

Sydney B. Nelson

ESTATE TAX — BUY-SELL AGREEMENTS

A family partnership agreement provided that upon the withdrawal of any partner the remaining partners had the option to purchase his interest at two-thirds of "net value."¹ Failure to exercise this option within twelve months automatically dissolved the partnership. The agreement also provided that upon the death of a partner, the remaining partners had the option to purchase the interest of the decedent for its full "net value." Following the death of two partners, estate tax returns were filed. The partnership interest of each was included in the respective estates at two-thirds of its "net value." The Commissioner assessed a deficiency, basing his valuation upon the full value of each partner's interest in the total net assets of the firm. The deficiency was paid. On suit for a refund, *held*, allowed. The value of the interest for estate tax purposes cannot exceed the value of those interests during the lifetime of the deceased partners. *Land v. United States*, 187 F. Supp. 521 (S.D. Ala. 1960).²

may determine that a more appropriate remedy may be punishment of those who violated the law rather than annulling the election. Support for the remedy of punishing violators is found in the numerous statutes which provide penalties for violation of election laws, some of which are the following: LA. R.S. 18:73, 94, 131, 222, 223, 341, 352, 363, 367, 368, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 560, 562, 563, 565, 566, 570, 587, 588, 589, 634, 733, 735, 736, 737, 738, 1079, 1111, 1194, 1484, 1486 (1950).

1. *Land v. United States*, 187 F. Supp. 521 (S.D. Ala. 1960) (the net value of a partnership interest was to be determined by valuing the assets of the partnership either by agreement among the partners, in accordance with accepted accounting procedures, or, if necessary, through arbitration).

2. On appeal to the Fifth Circuit, COH U.S.T.C. "Court of Appeals Dockets," May 5, 1961.