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that the courts are hesitant to enlarge the class of purchases for which the husband can be obligated without his consent.

The courts also employ a ratification theory in examining the responsibility of the husband who has not expressly consented to his wife's purchases. These cases have generally involved purchases of substantial or non-necessary items. In applying this theory, the courts reason that the husband ratifies by his silence or inaction his wife's purchases of items which benefit both spouses or, in the language of the courts, the community. There is apparently no requirement that the creditor have intended to obligate the husband, and the husband can thus ratify even a purchase made in the name of his wife. Though the practice seems proper in a situation where the wife actually intended to obligate her husband and he was aware of this fact, the ratification theory may work hardship in a situation where the wife has not intended to obligate her husband and the husband has regarded the obligation as being the wife's alone.

Finally, it is clear that the courts' use of terminology referring to community liability does not enhance an understanding of the basis of the husband's responsibility in those situations where he may be obligated without his consent. The concept of community liability developed during a period when the wife lacked contractual capacity, and the husband's responsibility was grounded upon his consent as evidenced by his authorization of his wife's act. Thus, today, as the wife has contractual capacity and the courts rightly determine the husband's non-consensual responsibility by examining directly the factors which give rise to his liability, it seems undesirable that this analysis be obscured with the language of a now unworkable concept.

George L. Bilbe

ELECTION LAW—THE SECRECY OF THE ABSENTEE BALLOT

The free and fair election is at the core of any democracy, and in the United States the secret ballot is a guiding principle in popular elections. The interest of the general public and the individual voter in preserving the secrecy of the ballot is great. The public interest is inherently contrary to vote buying and other election fraud. Although many of the problems involved in keeping the secrecy of a ballot intact were cured with the ad-

vent of the voting machine, the absentee ballot still remains open to potential violations of secrecy. There are two primary methods by which the secrecy of an absentee ballot may be destroyed. The first is by placing some distinguishing mark on the ballot before it is cast so that it may be identified and linked to the voter after being cast. The second method is by having the ballots counted other than as statutorily provided. The purpose of this Comment is to examine the legislation and jurisprudence surrounding the problems of distinguishing marks and illegal counting of absentee ballots.

Distinguishing Marks on Absentee Ballots

One of the earliest cases involving distinguishing marks was *Turregano v. Whittington*¹ in which some ballots were marked contrary to statutory requirements² and others were slightly mutilated. Some x-marks were placed wholly outside of the space provided for on the ballot. The court in voiding the ballots concluded that the reason for the provision was to insure the casting of uniform, non-distinguishable ballots. It was pointed out that this could only be achieved if it was held to be mandatory.³ It should be noted, however, that there were other ballots which had distinguishing marks which the court apparently felt were not distinguishing enough to cause them to be rendered void. The court, therefore, qualified its heretofore unqualified rule by adding that it sufficed if the voter "honestly attempted to conform to the statute"⁴ and if the illegal mark did "not appear to have been made intentionally."⁵ The court's reasoning was that the average voter was unskilled in the use of the pencil. As authority it gave common law decisions. This "honest attempt" qualification allowed the court to uphold ballots slightly torn and others with pencil marks extending beyond the space provided for the x-mark.

Ten years later, in *Vidrine v. Eldred*,⁶ the definition of what

1. 132 La. 454, 61 So. 525 (1913).

2. La. Acts 1912, No. 198, § 4 required that "Upon receiving his ballot the voter shall . . . designate his choice by stamping or making a cross, in ink, or with a lead pencil, in the voting space to the right of and opposite the name of the candidate he desires to support"

3. *Turregano v. Whittington*, 132 La. 454, 458, 61 So. 525, 526 (1913). The reasoning was adopted from *Hendry v. Democratic Executive Comm.*, 128 La. 465, 54 So. 943 (1909).

4. *Turregano v. Whittington*, 132 La. 454, 458, 61 So. 525, 526 (1913).

5. *Id.*

6. 153 La. 779, 96 So. 566 (1923).

constitutes a distinguishing mark was significantly expanded. Perfection in marking the ballot was not required of the voter, but the language⁷ used is so strong that it seems to repudiate the "honest attempt" exception as outlined in *Turregano*. The court in *Vidrine* said that *any* additional mark capable of identification would spoil a ballot, and the only qualification was that the form of the required x-mark did not have to be perfect. After this decision, it seems that the requirement was not the apparent intention that a superfluous mark was meant to be identifying, but the mere possibility that the mark accomplish that purpose.⁸ *Vidrine* was strictly followed in *Perez v. Cognevich*,⁹ which held that erasures which were readily apparent invalidated a ballot because they were "such as *might* reasonably serve the purpose of marks of identification"¹⁰ (Emphasis added).

The next case was *Bell v. Guenard*,¹¹ significant because it totally ignored the "honest attempt" exception of *Turregano*. The court dealt with the issue of whether a visible erasure on certain ballots was a distinguishing mark. It was argued that it was evident that the erasure was the result of an honest effort to correct a mistake. The court answered that the intent of the voter in making a distinguishing mark was known only to the voter himself and that "[t]he rule . . . which is the correct one to follow is that, if there are such marks or erasures on the ballot as may reasonably serve the purpose of marks of identification, the ballot is spoiled . . ."¹² The court weakened even more the "honest attempt" exception of *Turregano* by declaring that the only other Louisiana case on identical facts was *Hebert v. Landry*¹³ which the court believed to be erroneous. Therefore at this stage of development, the test as to distinguishing marks seemed to be objective, and the subjective intent of the voter in making the distinguishing mark seemed irrelevant.

It was at this point in the jurisprudence that *Courtney v.*

7. *Id.* at 785, 96 So. at 568: "All these votes we reject The law requires that a vote shall be cast by marking with a black lead pencil a cross mark in the square opposite and to the right of the candidate intended to be voted for Any other way of marking a ballot is not allowed and spoils the ballot; and *any additional mark whatsoever* upon the ballot, when made by the voter, spoils the ballot as being capable of identification." (Emphasis added.)

8. See emphasized language in note 7 *supra*.

9. 156 La. 331, 100 So. 444 (1924).

10. *Id.* at 344, 100 So. at 449.

11. 194 La. 956, 195 So. 504 (1940).

12. *Id.* at 971, 195 So. at 509.

13. 193 So. 406 (La. App. 1st Cir. 1940).

*Abels*¹⁴ was decided. The court in *Courtney*, quoting from *Hebert v. Landry*,¹⁵ mentioned above, pointed out that Louisiana Election Law¹⁶ provided a method for marking a ballot,¹⁷ but had no provision relating to what is or is not a marked or spoiled ballot.¹⁸ To remedy this situation, the general law of American jurisdictions, as set out in *Ruling Case Law*,¹⁹ was adopted. The *Ruling* excerpt states that any marks on a ballot, other than those required by the statutes and the jurisprudence,²⁰ must do more than distinguish a particular ballot from another in order to render the ballot spoiled. For example, a few random pencil dots on one ballot would distinguish it from another, but would be insufficient to render it void.²¹ The court concluded that this was the sounder view, and although it admitted the existence of cases to the contrary, it did not name them. No jurisprudence

14. 205 La. 559, 17 So.2d 824 (1944).

15. 193 So. 406 (La. App. 1st Cir. 1940).

16. Title 18 of the Louisiana Revised Statutes.

17. LA. R.S. 18:349, 1074 (1950).

18. The ballots in question were not absentee ballots, but rather the paper ballots used before the advent of the voting machine. However, the law as to marking these ballots applied to absentee ballots, and the law as to the marking of the old paper ballots still applies to the marking of absentee ballots. *Downs v. Pharis*, 122 So.2d 862 (La. App. 3d Cir. 1960).

19. "In *Ruling Case Law*, volume 9, page 1136, under the topic 'Elections,' it is stated:

"A distinguishing mark prohibited by the law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of mark put on a ballot to indicate who cast it, and to furnish means of evading the law as to secrecy. Therefore, not every mark made by a voter on his ballot which may separate and distinguish the particular ballot from other ballots cast at the election will necessarily result in a declaration of invalidity. If it appears from the face of the ballot that the marks or writing were placed thereon as the result of an honest effort on the part of the voter to indicate his choice of a candidate among those to be voted for at the election and that the voter did not thereby pretend or attempt to indicate who voted the ballot, the ballot should not be rejected as to candidates for whom there is a choice expressed, in compliance with the requirements of the statutes.'" *Courtney v. Abels*, 205 La. 559, 565, 17 So.2d 824, 826 (1944).

When this excerpt from *RULING CASE LAW* was cited in *Hebert v. Landry*, 193 So. 406 (La. App. 1st Cir. 1940), the court added this comment at the end of the excerpt: "This general principle prevails in this state under our primary law, as is indicated by the expression of our Supreme Court in *Turregano v. Whittington* . . . where it is said that not all distinguishing marks on a ballot will render such ballot illegal, where no intent is manifested on the part of the voter to distinguish his ballot from the other ballots cast." *Id.* at 408.

20. LA. R.S. 18:349 (1950) requires only that a crossmark, made with a black lead pencil, be placed in the square opposite the name of the candidate to be voted for. The supreme court has said the crossmark may resemble an "x," either in print or in script, but must appear to be a bona fide effort to make a crossmark. *Vidrine v. Eldred*, 153 La. 779, 96 So. 566 (1923).

21. None of the cases cited anywhere in this article held random pencil dots to be sufficient to invalidate a ballot, and this writer's research has discovered no Louisiana case holding otherwise.

was expressly overruled,²² either in whole or in part. The court then held that a marked ballot could be counted valid if it appeared from the entire ballot that the extra marks were the result of a voter's "honest attempt" to cast his ballot; that to constitute a distinguishing mark which will invalidate a ballot, it must appear that the voter intended it as such.²³

Arguments can be made, based on two subsequent cases, that the "honest attempt" exception of *Courtney*²⁴ is not as broad as would appear at first glance. In *State ex rel. Dugas v. Lehman*,²⁵ fifty-one slightly torn ballots were held to be invalid, although it was not certain whether they were torn by the voters who cast them, or by the election officials who counted them. The court held that the ballots were deliberately torn and that the tears constituted distinguishing marks. In answer to defendant's contention that the tears were not "made by the voters but rather by the election officials, the court answered that where there were distinguishing marks on a ballot they would be presumed to have been "made by the respective voters as distinguishing marks."²⁶

In *State ex rel. Harris v. Breithaupt*,²⁷ over three hundred-eighty ballots were held illegal and void, even though it seemed certain that ink spots which caused them to be voided were the result of a leaky ink bottle stored with the ballots. Although the precise issue was whether the ballots were in legal form²⁸ and not whether they were spoiled, the court reviewed the cases which were concerned with spoiled ballots and said that

"[A]ny ballot which bears any distinguishing mark by which it may later be identified cannot be accepted. The rule is well laid down in *Bell v. Guenard* . . . that, if there are such marks or erasures as may reasonably serve as marks of identification, the ballot is spoiled."²⁹

22. This is the nearest the supreme court has come to overruling one of its own cases on distinguishing marks.

23. Note that the excerpt speaks of the apparent intention of the voter to mark the ballot, seemingly ignoring the possibility of the mark being put on the ballot by either the official who provided the ballot or by the commissioner who counted it.

24. See note 19 *supra*.

25. 220 La. 864, 57 So.2d 750 (1952).

26. *Id.* at 875, 57 So.2d at 754.

27. 220 La. 1042, 58 So.2d 332 (1952).

28. The requirements as to how a ballot is to be printed and as to what are to be its contents are not set out in LA. R.S. 18:316 (1950).

29. *State ex rel. Harris v. Breithaupt*, 220 La. 1042, 1050, 58 So.2d 332, 335 (1952).

Breithaupt in no uncertain terms says that the *Bell* rule³⁰ is still valid. That the above quotation is dicta is beyond doubt,³¹ but it has value as insight into the intention and reasoning of the court. The rule was quoted in concluding a review of the jurisprudence on marked ballots, and should receive some deference on that account. Proceeding further, the court said that it drew its conclusions from a reading of *Vidrine*,³² *Bell*,³³ and *Courtney*,³⁴ but chose to quote the *Bell* rule. No mention was made of the "honest attempt" exception of *Courtney*.

The recent courts of appeal decisions have added little or no clarity to the issue of which is the correct rule to follow. The First Circuit in one case³⁵ chose to follow only *Courtney*. The Third Circuit, however, in its two most recent decisions,³⁶ have intermingled both *Bell* (and its predecessors)³⁷ and *Courtney*. While one might therefore conclude that the holdings of all of the aforementioned Supreme Court cases complement one another, it is hoped that the foregoing discussion has shown that there are two fairly distinct lines of cases on marked ballots which do in fact conflict.³⁸

30. See text at note 11 *supra*.

31. *Dupont v. Delacroix*, 160 So.2d 33 (La. App. 1st Cir. 1964), says in dicta that *Courtney* probably overruled *Bell*, despite the language of *Breithaupt*. This contention seems to be based partially on a misreading of *Breithaupt*, and the *Dupont* case has never been followed or cited in this regard in any later case. Cf. *Angelle v. Angelle*, 204 So.2d 581 (La. App. 3d Cir. 1967); *Cusimano v. O'Neill*, 192 So.2d 147 (La. App. 1st Cir. 1966). It is submitted that the contention made in *Dupont* is erroneous.

32. See text at note 6 *supra*.

33. See text at note 11 *supra*.

34. See text at note 14 *supra*.

35. *Dupont v. Delacroix*, 160 So.2d 33 (La. App. 1st Cir. 1964).

36. *Angelle v. Angelle*, 204 So.2d 581 (La. App. 3d Cir. 1967); *Cusimano v. O'Neill*, 192 So.2d 147 (La. App. 1st Cir. 1966).

37. See text at notes 6-12 *supra*.

38. Generally the jurisprudence is as follows: In line with the theory of *Bell v. Guenard*, 194 La. 956, 195 So. 504 (1940), are: *Perez v. Cognevich*, 156 La. 331, 100 So. 444 (1924); *Vidrine v. Eldred*, 153 La. 779, 96 So. 566 (1923); *Hendry v. Democratic Executive Comm.*, 128 La. 465, 54 So. 943 (1911); *State ex rel. Bender v. Delery*, 3 So.2d 204 (Orl. Cir. 1941); *Crooks v. Chevalier*, 156 So. 586 (La. App. 2d Cir. 1934); *Jacobs v. Cutrer*, 17 La. App. 383, 136 So. 119 (2d Cir. 1930); *Owen v. Woods*, 8 La. App. 194 (Orl. Cir. 1928); *Brantley v. Smith*, 6 La. App. 182 (2d Cir. 1927). In line with *Courtney v. Abels*, 205 La. 559, 17 So.2d 824 (1944), are: *Turregano v. Whittington*, 132 La. 454, 61 So. 525 (1913); *Dupont v. Delacroix*, 160 So.2d 33 (La. App. 1st Cir. 1964); *Hebert v. Landry*, 193 So. 406 (La. App. 1st Cir. 1940); *Nolan v. Martin*, 8 La. App. 202 (Orl. Cir. 1928). Cases not dealing with marked ballots but which were nevertheless concerned with the secrecy of the ballot are *Dowling v. Orleans Parish Democratic Comm.*, 235 La. 62, 102 So. 755 (1958), and *Hart v. Picou*, 147 La. 1017, 86 So. 479 (1920). Both of these cases are in line with the objective reasoning of the *Bell* case. Three other cases which can seemingly be used as authority for either the *Bell* rule (see text at note 11 *supra*) or the *Courtney* rule (see text at note 14 *supra*) are *State ex rel. Dugas v. Lehman*, 220 La.

Certain policy considerations can be summoned in support of the *Courtney* rule. The individual's right to vote and have it counted should be zealously guarded by the courts. Also pertinent is the fact that accidental marks can and will be made on absentee ballots. On the other hand, "the law and the courts regard the secrecy of the ballot as sacred"³⁹ and it is arguable that even the slightest, most subtle mark would suffice as a mark by which the ballot could later be identified, if he who sought to identify the ballot knew the type of mark for which he searched, or its location on the ballot. Furthermore, the discretion which the "honest attempt" exception gives to the judge may prove to be a heavy burden on our popularly elected judges.

As can be seen, there are weighty policy considerations on both sides of the issue of which rule would better serve the ends of our election law. If the stricter *Bell* rule is used, then there will most certainly be cases in which the absentee ballots of innocent voters will be thrown out because some distinguishing mark was accidentally made. If the *Courtney* rule is used it would seem that voter fraud would not be discouraged, but rather such a rule would force the fraud to be refined and made more subtle. Those wishing to mark ballots for later identification would have to try to make their distinguishing mark appear to be a simple mistake made by a voter in an "honest attempt" to cast his vote. One should view the alternative in light of the fact that the possibility is slim that the exercise of the right to cast an absentee ballot will be discouraged to the point of abandonment regardless of which rule is chosen. It is submitted that the *Bell* rule should be chosen because by it voter fraud is strongly discouraged because any distinguishing mark would invalidate a ballot, thereby removing one avenue for fraud presently open to those who would violate the secrecy and validity of the ballot.

Finally, it is submitted that the jurisprudence on distinguishing marks is a mass of conflicting authority which could impede an evenhanded administration of justice in election contests.

864, 57 So.2d 750 (1952); *State ex rel. Harris v. Breithaupt*, 220 La. 1042, 58 So.2d 332 (1952); and *Cusimano v. O'Neill*, 192 So. 147 (La. App. 1st Cir. 1966).

Note that *Angelle v. Angelle*, 204 So.2d 581 (La. App. 3d Cir. 1967), is not classified above. It is submitted that the *Angelle* court, after declaring the *Courtney* case to be the fountainhead of marked ballot jurisprudence, did in fact follow the *Bell* line in some instances.

39. *Cusimano v. O'Neill*, 192 So.2d 147, 151 (La. App. 1st Cir. 1966), paraphrasing language found in *Courtney v. Abels*, 205 La. 559, 17 So.2d 824 (1944).

The right to vote is invaluable and should receive the utmost protection. This right would be better protected by choosing a rule which more rigorously protects the secrecy of the ballot and deters voter fraud.

Election Procedure Irregularities

The failure to follow statutory procedure in the counting of absentee ballots is a problem of fairly recent origin in Louisiana election law jurisprudence. However, from the first case, it became entangled with the annulling of elections, a long-standing problem. So that the reader may more fully understand the discussion on improperly counted ballots, a brief overview of election contest procedure and of the jurisprudence on annulling elections will be given.

Louisiana Primary Election Law provides that a candidate may contest an election by claiming that but for irregularities or fraud he would have been nominated.⁴⁰ The petition must set forth the alleged fraud or irregularities in detail,⁴¹ and must show that the results were in fact altered.⁴² A petitioner may ask that he be declared elected, or in the alternative, that the election be declared null and void.⁴³ Practically speaking, suits to annul an election are brought in only two instances: first, when a soundly defeated candidate believes he may have something to gain by dragging the victor through an election contest, and possibly a new election; and secondly, when a narrowly defeated candidate could be declared elected if he could succeed in getting the results of one adverse precinct annulled.⁴⁴

A wealth of jurisprudence⁴⁵ has developed since 1854, the date of the first attempt to annual a Louisiana election.⁴⁶ Some of the allegations of irregularities made by defeated candidates seeking to have elections annulled have been flimsy at best:

40. LA. R.S. 18:364(b)(1950).

41. *Id.*

42. *Lafargue v. Galloway*, 184 La. 707, 167 So. 197 (1936).

43. *Dumestre v. Vincent*, 144 So. 508 (La. App. Orl. Cir. 1932).

44. *E.g.*, in *Womack v. Nettles*, 155 La. 359, 99 So. 290 (1924), plaintiff received 41 votes less than the defendant. Plaintiff sought to have declared void the results of an entire ward which defendant had won by a 64 vote majority. Plaintiff failed, but had he succeeded, he would have been declared winner of the election, having then received 23 more legal votes than his only opponent.

45. For a review of the factual situations presented in some of the more important cases, see *Johnson v. Sewerage Dist. No. 2 of Caddo Parish*, 239 La. 840, 120 So.2d 262 (1960).

46. *City of New Orleans v. De St. Romes*, 9 La. Ann. 573 (1854).

counting of votes not completed within the time limit;⁴⁷ polling place not opened on time;⁴⁸ failure of polling booth to meet exact requirements as to size;⁴⁹ election commissioners not properly sworn.⁵⁰ Obviously it would be manifestly unfair to declare an election null and void on the strength of the above enumerated irregularities because the remedy would be too harsh for the offense. To prevent such an unjust occurrence, the court in *Andrews v. Blackman*⁵¹ formulated the following oft-quoted rule:

"[I]t is the casting of the ballots, by the legally qualified electors, unimpeded by force or fraud, which determines the result The parties concerned in a primary election, as in any other, are the community to be affected, the electors who participate, and the candidates. . . . [I]t would be unreasonable to hold, in the absence of an express provision of law to that effect, that the interest of the community shall be sacrificed, the will of the electors set at naught, and the results . . . defeated, because, in its accomplishment, or after . . . the agents under whose direction the election had been held, have failed to follow each and every formal direction prescribed for their guidance."⁵²

Perhaps the main reason behind the adoption of such a rule, other than those mentioned by the court, is that if such irregularities invalidate elections, then "there will never be a valid election."⁵³

It should be pointed out that this rule was of necessity established in the jurisprudence because of the lack of any similar provision in the statutes. Although the statutes governing Louisiana elections⁵⁴ consistently use the word "shall" in describing the procedure to be followed in conducting an election, very few of the sections make any declaration as to what sanctions result when the provisions are not obeyed.⁵⁵ The courts have adopted

47. *Burton v. Hicks*, 27 La. Ann. 507 (1875); *Landry v. Ozenne*, 194 La. 853, 195 So. 14 (1940).

48. *Endom v. City of Monroe*, 112 La. 779, 36 So. 681 (1904).

49. *Andrews v. Blackman*, 131 La. 355, 59 So. 769 (1912).

50. *Duncan v. Vernon Parish School Bd.*, 226 La. 379, 76 So.2d 403 (1954).

51. 131 La. 355, 59 So. 769 (1912).

52. *Id.* at 364, 59 So. at 772.

53. *Id.* at 366, 59 So. at 772.

54. See, e.g., LA. R.S. 18:1081 (Supp. 1968).

55. LA. R.S. 18:346 (1950), for example, provides that failure to properly seal the anachronistic ballot box will render all votes therein void. LA. R.S. 18:1081 (Supp. 1968), on the other hand, although imposing criminal liability

the rule set out above and apply it consistently whenever they are requested to annul an election because of a procedural irregularity.

Only in a few exceptional cases have defeated candidates been successful in invalidating an election. The most renowned of these was *Hart v. Picou*,⁵⁶ in which an election was annulled because the ballots used were not in the form required by the statute. It was possible that each vote could have been identified with the person who cast it, thereby violating the constitutional provision for secrecy of the ballot.⁵⁷ The court reasoned that because the object of the statute was to "make effective one of the main objects of the Primary Election Law and that is that each voter shall be permitted to cast his ballot secretly,"⁵⁸ the statute must be construed as mandatory, and therefore failure to follow its provisions resulted in the annulling of the election.

Counting Absentee Ballots

Louisiana Election Law provides a method whereby absentee ballots may be counted without anyone knowing who cast them. It has happened in recent years, however, that the statutory counting method has not been strictly followed, with the result that the secrecy of all absentee ballots involved was destroyed when they were so counted.

The question first arose in *Jarreau v. David*,⁵⁹ where absentee ballots had been counted in a manner different from that provided in LA. R.S. 18:1076. The statute provided, in part, that when absentee ballots are taken from their respective envelopes during the procedure of counting, they are to be deposited in the ballot box, without being unfolded or examined. Voting machines had been used in this election, and consequently there was no ballot box at the precinct in question.⁶⁰ The election commissioners therefore proceeded by reading aloud the name

on any election official who refuses or neglects to perform any of the duties provided by Part 1 of the Chapter (the absent voter provisions), makes no provision as to the effect which such a breach of duty shall have on the votes affected thereby.

56. 147 La. 1017, 86 So. 479 (1920).

57. LA. CONST. art. VIII, § 15.

58. *Hart v. Picou*, 147 La. 1017, 1021, 86 So. 479, 480 (1920).

59. 74 So.2d 218 (La. App. 1st Cir. 1954).

60. This touches on perhaps the greatest problem in our election law, *i.e.*, when the statutes on voting machine use were enacted, the provisions in the prior law which were rendered useless were not simultaneously repealed to prevent such problems as arose here.

of each voter to check his registration in that precinct and to check whether he had voted at the precinct in person the day of election. They next tore the identifying flaps off of the envelope, removed the ballot, and, there being no ballot box into which the ballot could be deposited, read aloud the choice of candidates made by the voter—almost immediately after the name of the voter had been read publicly.

Plaintiff sought to have all ballots counted in that manner declared void, because the method of counting completely destroyed the secrecy of each ballot so counted. The court held that the method of counting the absentee ballots was not “such as to prevent a free and honest expression of the will of the voters”⁶¹ citing *Andrews*, and dismissed plaintiff’s petition.

The court should not have applied the *Andrews* rule on these facts. The *Andrews* rule was formulated to cover situations where a procedural technicality had been overlooked and where such irregularity could have no possible effect on the outcome of the election. Prior to *Jarreau*, the use of the rule had been fairly well confined to such situations. In *Jarreau*, a procedural irregularity had destroyed the secrecy of every absentee ballot cast, and the plaintiff sought not to annul the election but to have only those ballots declared void. The purpose of requiring the ballots to be put into a ballot box without permitting them to be examined was to preserve the secrecy of the ballot, and it follows that the statutory provision is mandatory under *Hart v. Picou*,⁶² and, under that decision, the ballots should have been voided.

The validity of the above reasoning was accepted by the supreme court in *Dowling v. Orleans Parish Democratic Committee*,⁶³ decided four years after *Jarreau*. The court said that the holding of *Hart v. Picou* applied to this situation.⁶⁴ The prob-

61. *Jarreau v. David*, 74 So.2d 218, 220 (La. App. 1st Cir. 1954).

62. 147 La. 1017, 86 So. 479 (1920).

63. 235 La. 62, 102 So.2d 755 (1958).

64. “[U]nder present procedure in localities where voting machines are used, there being no ballot box, after the envelope containing the absentee ballot is opened in the presence and view of bystanders and the commissioners supporting opposing candidates, as required by law, and after the signature on the application is compared with the signature on the back of the envelope and on the voter’s registration certificate in the precinct register and found to be genuine, if the applicant has not appeared in person and voted at the election, the ballot is *unfolded, examined* and tabulated by the commissioners to the benefit of the candidate voted for; and each and every absentee ballot is thus identifiable. It is obvious that with such procedure the secrecy of the ballot is meaningless.” *Id.* at 79, 102 So.2d at 761.

lem "presents a ready-made pattern for vote fraud" said the Chief Justice, "and constitutes such a serious situation that the matter addresses itself to the Legislature for prompt correction at its next session."⁶⁵

In 1960 LA. R.S. 18:1076 was amended⁶⁶ and the situation was apparently remedied. The counting procedure was changed so that the commissioners are required to tear the name-bearing flaps from the respective envelopes, "leaving the envelopes sealed and intact."⁶⁷ Then after all flaps are removed from all absentee ballot-containing envelopes, all of the flaps are to be sealed in a large special envelope provided specially for that purpose. After this special envelope is sealed, two commissioners are required to sign the following certification: "We certify that we have sealed this envelope before opening any of the sealed envelopes containing the ballots."⁶⁸ After all of this is done, the anonymous ballot-containing envelopes are to be opened and the ballots counted.

The matter appeared settled until the decision in *Angelle v. Angelle*.⁶⁹ There the absentee ballots in one precinct were counted exactly as they had been counted in *Jarreau*. Plaintiff argued that all ballots so counted were void, having been counted contrary to the provisions of LA. R.S. 18:1076. The court answered by noting that the same problem had arisen in *Jarreau*, and said that they agreed with the *Jarreau* court that the illegal counting was "not such irregularity as would destroy the validity of the election where the electors have had a free and fair opportunity to express their will, and have so expressed it."⁷⁰

Jarreau was decided before the amendment of LA. R.S. 18:1076 and *Angelle* after. The *Jarreau* court was faced with an antiquated statute which did not cover the modern situation. However, the supreme court had pointed out the problem,⁷¹ and the legislature had remedied it.⁷² The amended version of LA. R.S. 18:1076 provided a logical method, consonant with the use of voting machines, by which absentee ballots could be secretly

65. *Id.* at 81, 102 So.2d at 762.

66. La. Acts 1960, No. 254, § 2. The Third Circuit has noted that this amendment was evidently made in response to *Dowling*. *Downs v. Pharis*, 122 So.2d 862 (La. App. 3d Cir. 1960).

67. LA. R.S. 18:1076 (Supp. 1968).

68. *Id.*

69. 204 So.2d 581 (La. App. 3d Cir. 1967).

70. *Id.* at 590.

71. See text at note 64 *supra*.

72. See text at note 66 *supra*.

counted. The amended statute provided in four different places⁷³ that the absentee ballots were to remain sealed inside their respective envelopes until the name-bearing flaps had been safely put away. Admitting the violation, the *Angelle* court said it had no effect because it was "not such irregularity as would destroy the validity of the election." It is conceded that the *Andrews* rule would be sufficient to support that holding if applicable, but as shown before, the supreme court had already made it clear that the exact situation in *Angelle* was outside the purview of the *Andrews* rule. Rather, the situation was to be governed by *Hart v. Picou*, which would demand that LA. R.S. 18:1076 be construed as mandatory because its provisions directly affect the secrecy of the ballot. The holding in *Angelle*, as to LA. R.S. 18:1076, cannot be supported.

Perhaps the holding in *Angelle* can be explained away as the result of a loose interpretation of *Andrews*. In *Andrews* the court said that it would not allow the result of an election to be changed by vitiating the election because of an irregularity which was innocent and had no effect. It does not follow, however, that a court should hesitate to declare invalid ballots, the secrecy of which was violated, for the reason that to do so would change the result of the election. An invalid ballot is an invalid ballot, and its validity should not turn on whether a declaration of invalidity would affect the outcome of the election. This, it is submitted, is what the holding in *Angelle*, erroneously, does.

Other States

At least ten other states have statutes⁷⁴ which provide

73. LA. R.S. 18:1076 (Supp. 1968) provides in part that after it has been determined that the voter has not voted at the polls on election day, "the flap shall be torn from [his absentee ballot-containing] envelope, leaving the envelope sealed and intact. After the proper entries have been made, and all flaps removed, the flaps shall be gathered together and placed in an envelope provided for that purpose, which shall bear the following certification 'We certify that we have sealed this envelope before opening any of the sealed envelopes containing the ballots.'" Spaces for the signatures of two commissioners are provided directly after the certification. The statute then continues: "[a]fter the flaps have been placed in the envelope it shall be securely sealed. The commissioners shall open the sealed envelopes containing the absentee ballots and shall then count the votes thereon and tabulate them"

74. N. Y. ELECTION LAW § 204 (McKinney 1949); CAL. ELECTION CODE §§ 18231-18235 (Deering 1961); PENN. STAT. ANN. 25:3149.7 (Purdon 1965); FLA. STAT. ANN. 9:101.68 (West 1959); DEL. CODE ANN. 15:5516 (West 1953); TEX. ELECTION CODE art. 5.05(6) (Vernon 1951); N. J. STAT. ANN. 19:57-24, 57-31 (1940); MO. STAT. ANN. § 112.060 (Vernon 1959); MASS. ANN. LAWS ch. 54, §§ 94, 105A (1953); ILL. STAT. ANN. ch. 46, § 19-9 (Smith-Hurd 1944).

for a method of counting absentee ballots almost exactly like the present Louisiana method. However, the problem of what is the effect of a failure to follow the statutory system of counting the absentee ballots has rarely arisen.

In an Arkansas case⁷⁵ in which the ballots were counted immediately after the name of the voter was publicly read aloud, the court refused to exclude the ballots. Although the court admitted that the secrecy of each ballot was destroyed, it said that it was required to follow the Arkansas rule that "*nothing* will justify the exclusion of the vote of an entire precinct except the impossibility of ascertaining for whom the majority of the votes were given."⁷⁶ (Emphasis added.)

Additionally, only Texas and California have had cases touching the vote counting problem. In two cases,⁷⁷ the Texas Court of Civil Appeals held that if an absentee ballot were taken out of its anonymous inner envelope immediately after that envelope was taken out of the name-bearing outer envelope, the enclosed ballot would be void because its secrecy had been destroyed.

In a well-reasoned California case,⁷⁸ the election officer who opened the ballots knew how each absentee voter voted; and furthermore, each ballot was put directly back into the envelope which bore the name of the voter. The court voided the ballots, holding that "the secrecy of these particular ballots was destroyed."⁷⁹ It pointed out that a solution had to be drawn from conflicting rules. On one hand it was noted that "courts are reluctant to throw out votes where it can be told for whom the vote was intended and where the irregularity complained of is that of one of the election officials for which the voter is not to blame."⁸⁰ Added to this was the awareness that "courts have been very indulgent respecting the omissions, inadvertencies, and mistakes of officers of elections, lest by exacting of them a technical compliance with the requirements of the law the citizen might be deprived of a sacred right."⁸¹ On the other hand there are "statutes . . . designed to carefully protect the absent

75. *City of Newport v. Smith*, 236 Ark. 626, 367 S.W.2d 742 (1963).

76. *Id.* at 632, 367 S.W.2d at 746.

77. *Brandon v. Quisenberry*, 361 S.W.2d 616 (Tex. Civ. App. 1962); *Mitchell v. Jones*, 361 S.W.2d 224 (Tex. Civ. App. 1962).

78. *Scott v. Kenyon*, 16 Cal.2d 197, 105 P.2d 291 (1940).

79. *Id.* at 201, 105 P.2d at 293.

80. *Id.* at 202, 105 P.2d at 294.

81. *Id.* at 203, 105 P.2d at 294.

voter in his right to a secret ballot, which is the very foundation of our election system."⁸²

Faced with these two valid but conflicting considerations, the court said,

"The law permitting absent voting is carefully drawn to protect the voter in the secrecy of the ballot, and it would be largely useless if such secrecy is not maintained . . . While it is unfortunate that any voter should lose his vote when it can be told for whom he intended to vote, it would be equally or more unfortunate to deprive many others of their vote by holding that a substantial compliance with this law is unnecessary. To so hold would be to destroy, by judicial decision, the secrecy with which the law has surrounded the casting of such ballots."⁸³

The logic and reasoning of the California Supreme Court are quite persuasive and should have even greater applicability where the illegal counting is a fraudulent scheme rather than a mistake. The object of the elaborate election law provisions covering the counting of absentee ballots could only have been intended to protect the secrecy of the absentee ballot and deter voter fraud. A further problem arises in Louisiana resulting from our lack of statutory direction as to what is to be done to ballots counted illegally. California statutory law also had no such provision. However, the California court realized that to void absentee ballots illegally counted has not merely the short-term effect of depriving the voters concerned of their votes but also of preserving the secrecy of the absentee ballot for all voters in all elections to come—by warning both the innocent and the fraudulently motivated election official of the strict sanction applied against illegally counted ballots. It is submitted that the Louisiana jurisprudence should bow to this weightier consideration.

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82. *Id.* at 201, 105 P.2d at 293.

83. *Id.* at 203, 105 P.2d at 294.