

as to the validity of the election, it will be necessary to consider certain provisions of the State Constitution and the laws enacted thereunder.

Section 8 of article 4 of the Constitution is as follows: "All elections shall be by secret ballot. Nothing in this section shall be construed to prevent the use of any machine, or mechanical contrivance, for the purpose of receiving and registering the votes cast at any election; providing that secrecy in voting be preserved." If this provision is merely directory, an election held in disregard of its terms will not be set aside, but, if mandatory, a violation of these provisions will void the election, without regard to the motive of the persons guilty of the violation and without any inquiry into the effect of the result of the election.

The question therefore presents itself, is the requirement that elections shall be by secret ballot mandatory, or merely directory?

Section 26 of article 1 of the Constitution is as follows: "The provisions of this Constitution are mandatory and prohibitory, unless by express words, they are declared to be otherwise."

A careful perusal of section 8 fails to disclose any express words declaring the requirements of the section to be otherwise than mandatory and prohibitory. In fact, the words used in section 8 are such as to show clearly and unmistakably that its provisions are mandatory. In incorporating this provision into the Constitution, the framers of that instrument followed the well settled principles of constitutional law. Cooley, in his work on Constitutional Limitations, says "public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged."

We are next brought to a consideration of the provisions of the law under which the election in question was held.

Section 26 of chapter 69 of the Laws of Utah, 1896, provides that after the voter has prepared his ballot, it shall be handed to the judge in charge of the ballot box, who shall immediately write the name of such voter upon the poll list and shall take the ballot of such voter and number it, in ink, in one corner, upon the top thereof, in such manner as to not expose or show how the voter has voted, the same to be numbered in the order in which it shall be received, consecutively so as to permit the corner to be turned and pasted down with mucilage, which shall be done so that the number is not thereafter visible, and the same number shall be recorded by the election judge, or clerk, in the list of voters opposite the name of such voter.

It next became necessary to determine whether this provision for placing numbers on the tally book, opposite the name of the voter, and the corresponding number on the back of the ballot, before it is deposited, violates the right guaranteed to the electors under the Constitution of voting by secret ballot. We are aided in reaching a conclusion upon this particular provision by the decisions of courts where the same provision in the laws of other states have been brought into question.

The supreme court of Indiana, in *Williams vs Stein*, 38 Ind. 89, held such a statute unconstitutional, as violating the secrecy implied in the constitutional provisions that the vote should be by ballot, the court in that case saying: "The secrecy, which is esteemed by all authority to be essential to the free exercise of suffrage, is as much violated by this law as if it had declared that the election should be viva voce."

This same view was taken in *Bribane vs Cleary*, 26 Minn., 107; *Hastings' case*, *Hodgings' (Canada El. cases)*, 704; and *Woodward vs Barsons*, L. R. 10 C. P. 753.

In all of the cases above mentioned, the constitution simply provided that elections should be by ballot, and upon an elaborate review of all the authorities, the conclusion was reached that in this country the ballot implies absolute and inviolable secrecy, and that this doctrine is founded in the highest consideration of public policy, that the term "ballot" implies secrecy and that this mode of voting was adopted mainly to enable each voter to keep secret his vote. Our Constitution goes further than any of these, and provides, not only that elections shall be by ballot, but that they "shall be by secret ballot."

Having reached the conclusion that the provisions of the Constitution requiring that all elections shall be by secret ballot, and that such constitutional provisions are mandatory and prohibitory, and having further determined that the provisions for placing numbers on the ballot and a corresponding number opposite the voter's name destroys the secrecy of the ballot, I am clearly of the opinion that an election held under the provisions of the law above quoted is absolutely invalid, and is, in fact, no election.

I am further requested in the resolutions to advise the board as to its duty in the premises.

All authorities upon the question hold, in clear and unmistakable terms, that boards of canvassers are ministerial officers only, whose duty it is to receive the returns from the various precincts, or counties, as the case may be, and declare the results as shown by the face of the returns. Following these authorities, I would advise this board that you cannot consider any question as to the validity of the election, and that you are to cast up the votes given, from proper documents, and to declare those persons elected who appear from the face of the returns to have the highest number of votes.

Section 27 of Chapter 125 of the Laws of Utah, 1896, concerning elections, requires the clerk of the board, as soon as the result is declared, to enter on the records of said board a statement of such result, which statement must show the whole number of votes cast in the county, the names of the persons voted for, the office to fill which each person was voted for, the number of votes given at each precinct to each of such persons, the number of votes given in the county to each of such persons. And section 28, following, requires that "the board must declare elected the persons having the highest number of votes given for each office to be filled by the votes of a single county or subdivision thereof."

Section 29, following, requires that "the county clerk must immediately make out and deliver to such person (except to the person elected district judge) a certificate of election signed by him and authenticated with his seal."

Your duties, therefore, are clearly defined by statute, and unless you are prevented by the intervention of a court of competent jurisdiction, from performing these duties, the terms of the sections above quoted should be promptly complied with.

Very respectfully submitted,  
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County Attorney for Salt Lake County,  
Utah.

### THE TAX SUSTAINED.

The suit of Lydia Y. Merrill vs John D. Spencer, county tax collector, involving the school tax, has been terminated in the Third district court in favor of the schools and against Mrs. Merrill. Judge Ritchie's opinion ruling on the cause is as follows:

"I have given the case such attention as I have been able to, amid the multitude of other pressing duties. The question seems to turn almost wholly upon the meaning to be given to the word 'maintained' in article 6, section 10 of the Constitution, which reads as follows:

"In cities of the first and second class, the public school system shall be maintained and controlled by the board of education of such cities, separate and apart from the counties to which said cities are located."

"Counsel for the plaintiff maintains that the definition given in Webster's International dictionary, subdivision 4, is the correct one, viz:

"To bear the expense of; to support; to keep up; to supply what is needed."

"The defendants' counsel contends for the definition in subdivision one, 'To hold or keep in any particular state or condition; to keep up; not to suffer to fall or decline; or that in subdivision three, 'To continue, not to suffer or cease to fall.'"

"I have come to the conclusion that it being a matter of considerable doubt as to the correct meaning, the doubt should be resolved in favor of maintaining the present condition of things rather than to assume that the constitutional convention, in framing this provision, intended to make a change. If they did intend a change I think it would have been made clearer than appears in this section."

"If, as the plaintiff contends, the provision means that the public schools of the city shall be supported by the board of education, separate and apart from the schools of the county, and the word 'maintained' should be construed so as to throw upon the city the burden of the support of its own schools, and no other, the logic of the argument would exclude the city from participating in the State school fund, which the plaintiff by no means concedes. I think the proper construction goes to the extent merely of conferring upon the board of education the power of keeping intact the city school system and controlling in part from the county system. The city system gets part of its sustenance from the State fund, and then if its portion of the county fund