

the judges' list, on which is to be written the name of each person voting, by the other judge acting as clerk. This list is to be made up as the voting progresses.

Section 13, Id., provides how the ballot shall be prepared by the voter, to whom it shall be delivered, by whom and under what circumstances deposited; and Section 14, Id., provides that where a person has cast his ballot, the judge having the registry list shall write opposite the name of such person the word "voted," and the other judge acting as clerk shall write upon a list to be made by him the name of such voter, and the number of the vote. The lists here referred to are the same as those mentioned in section 12.

Thus far the act deals almost entirely with the registration of voters, their qualifications and the manner of holding and conducting the elections, and of casting and receiving the ballots. The requisites necessary to constitute an election lawful are clearly and distinctly set forth.

When the ballots have been received and the polls closed, it is incumbent upon the judges to determine the result of the election, and the Legislature has clearly indicated how this shall be done.

Section 15, Id., reads as follows: "As soon as the polls shall be closed the judges of election shall immediately proceed to canvass the votes cast at such election, and continue without adjournment until completed," and then provides that all candidates may be present, either in person or by representative, to witness the canvass, and that when two ballots are found in one envelope only one shall be counted.

The judges must proceed with the canvass immediately after the polls have been closed, and continue without intermission until completed. This provision is mandatory, and is evidently intended to prevent any unlawful interference with the ballots.

Section 16, Id., specifies that the judges, acting as clerks, shall commence the canvass by comparing their respective lists to ascertain the number of votes cast; that is, the registry list and the judges' list, mentioned in section 12. Then the boxes shall be opened, the ballots counted and the judges, acting as clerks, shall each make a list of all persons voted for. It further provides as follows: "The presiding judge shall then proceed to open the ballots and call off therefrom the names of the persons voted for, and the officers they are intended to fill; and the judges, acting as clerks, shall take an account of the same upon their list; and all the ballots shall immediately be returned to the ballot box; and the ballot box shall be locked and securely sealed."

This section gives specific directions how to proceed with the canvass, and what to do with the ballots after the same have been canvassed. Its intentions are mandatory, and the judges cannot intentionally or willfully disobey them without doing violence to their oaths. The list of all the persons voted for which each judge, acting as clerk, is by the terms of the statute required to make, is what is known as the tally list and is distinct from those mentioned in section 12. It is incumbent

upon the judges to lock and securely seal the ballot boxes after the ballots have been returned to them.

Section 17 reads as follows: "After the canvass shall have been completed, the judges of election shall add up and determine the number of votes cast for each person, for the several offices, which result shall be placed on the list made by the judges acting as clerks of the election, and the judges shall thereupon certify to the same, and forward all the lists securely sealed, together with the ballot box, to the clerk of the county court, by a qualified voter of the county, whose ballot before taking the same take and subscribe an oath to the effect that he will deliver the same to the said clerk without unnecessary delay, and that he will use his utmost ability to prevent any interference whatever therewith, by any person whatsoever."

It will be noticed that this section imposes upon the judges the duty to determine the number of votes cast for each candidate for office, place the result upon the lists of the judges acting as clerks, certify the same, and forward all the lists, securely sealed, together with the ballot box, to the clerk of the county court, and they must be so forwarded by a voter under oath, for the law makes this a prerequisite. It was evidently the intention of the Legislature that the delivery by the judges to such "qualified voter" should be a personal delivery, made without delay, and likewise the delivery by him to said clerk, and this to avoid unlawful interference. Any other manner or any other means of forwarding is unwarranted under the law. When all the lists and the ballot box have thus been forwarded to said clerk, by the judges, their authority as such election judges is at an end. Nor have they any further responsibility.

The lists thus forwarded are mentioned as returns in the next section of the act, and there has been much contention on the question as to what lists or documents constitute the election returns. Counsel for the relator appear to maintain that the tally sheet or lists made by the two judges, acting as clerks, while canvassing the vote, alone constitute the returns, while counsel for defendants insist that the registration lists and judges' list mentioned in section 12, together with the tally lists, constitute the returns. I am of the opinion that counsel for the defendants are correct in their view on this question. The legislature evidently intended by the use of the word "all" in the clause, "and forward all the lists securely sealed," to include not only the tally list but also the registry list, and the judges' list, in order that the canvassing board which would have charge of the same thenceforth—i.e., in any proper case, it would become necessary to again canvass the ballots—might be placed in the same position, so far as the lists were concerned, as the judges of election were in when they made the canvass.

I hold therefore that the registry list, the judges' list, and the tally list constitute the returns to be forwarded as directed in this section.

Section 18, Id., reads as follows: "On receipt of the ballot boxes and returns of election, the clerk of the county court, in the presence of at least one

member of the county court, who is not publicly known as a candidate voted for at such election, shall break the seal of the returns, and all candidates may be present as provided in section 15 of this act, and said clerk and member or members of the county court shall carefully examine the returns, and if no irregularity or discrepancy appear therein, affecting the result of the election of any candidate, they shall accept said returns as correct, but if the right of any person voted for, for any office, is in any way affected, then the clerk and said members of the county court shall open the ballots from said precinct and canvass the same, so far as to determine the rights of the person whose office may be affected. They may also cause to appear before them any persons whom they deem proper, and take their testimony in relation to said election, in said precinct." This provision of the law makes it the duty of the clerk of the county court, on receipt of the ballot boxes and returns, to break the seal of the returns, and he must do this in the presence of at least one member of said court and of all candidates who wish to be present, and then such clerk and member or members of said court shall examine the returns and accept them as correct, unless they show such irregularity or discrepancy as will affect the result of the election of any candidate. If such irregularity or discrepancy appear in the returns then, to determine the rights of the candidate whose office may be affected, they "shall open the ballots for said precinct, and canvass the same." Even in such case the opening of the ballots appears to be limited to the precinct wherein such irregularity or discrepancy exists, as shown by the returns. When the returns show a case which renders it necessary for such canvassing board to open the ballots it may summon persons before it to take their testimony in relation to the election. The power to go behind the returns and open the ballot boxes, in proper cases, for the purpose of recounting the ballots, is expressly conferred upon the clerk of the county court and the members thereof.

Section 19, Id., provides as follows: "If there shall be any disagreement in the returns, in regard to the number of votes cast for any territorial officer, or any officer whose election is affected by the votes of more counties than one, then said members of the county court shall canvass the votes, and proceed as herein directed. After the completion of the canvass said member or members and the clerk of the county court shall declare the result thereof, and the clerk of the county court shall immediately make out and transmit a certificate of election to each person elected to any precinct or county office."

It is insisted by counsel for the relator that this section does not authorize the clerk of the county court and members thereof to go behind the returns and canvass the ballots to determine the rights of candidates for territorial offices or of members for the Legislature; that as to such officers and members they can only canvass the returns; and that no such authority is vested in any other board under our election laws. I am unable to adopt this view. The law says, "If there shall be any