

thirteen fraudulent votes and give effect to the legal or unimpeached votes cast at this election. We find no error in this. We also find that this court as well as the court below had jurisdiction under sections 8757 and 8765, C. L., 1888.

23 Pac. Rep., 183.

The ninth finding of fact, as to the vote at South Cottonwood Precinct, and the conclusion thereon, present a more difficult question for determination. The statute provided for a hearing before a deputy registration officer of objections to the right to vote of any persons registered.

Section 246, page 321, 1st compiled laws of 1888, provides among other things * * * "If, upon such hearing, the justice (by construction deputy registrar) shall find that the persons objected to are not qualified voters, he shall within three days prior to the election transmit a certified list of the names of all such unqualified persons to the judges of election, and such judges shall strike such names from the registry list before the opening of the polls."

Section 3751, compiled laws of Utah, 1888, reads as follows:

"No irregularity or improper conduct in the proceedings of the judges or any of them is such misconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes."

See *Russell vs. McDowell* (Cal.) 23, Pac. Rep., p. 183.

These statutes should be construed with reference to the laws of the United States, applicable to this subject.

The trial court took testimony and made its findings as above given. It appears from the findings of fact (from which the contestant only appeals) that the names of fifteen qualified voters of South Cottonwood Precinct had, prior to the day of election, been properly upon the registration list of such precinct—that on the morning of the election these names had been stricken from such list by the judges of election, in accordance with the direction of the deputy registration officer of that precinct, after a notice and hearing had been given each of them. That such determination of the deputy registrar was erroneous and illegal—the said fifteen persons being qualified voters. That each of said fifteen persons presented themselves at the polling place on the day of election and claimed the right to vote, and tendered the judges a ballot containing the name of the contestant for the aforesaid office, together with an affidavit, as required by the act of Congress of March 3rd, 1887, and that they were refused, for the reason that their names had been so stricken from the registration list.

The question presented here is, whether the judges of election should have received, or, in any event, counted these 15 votes, so tendered for the contestant, notwithstanding their names had been illegally and erroneously stricken from the list of voters, no challenge being interposed as provided in sec. 251, vol. 1, c. 8, 1888. It is apparent that if these votes had been received or counted for the contestant,

the result of the election would have been different, and the contestant, under the findings, would then have received eight majority over the vote of Mr. Allen, the contestee. The authorities bearing upon this question are somewhat uncertain and conflicting, depending largely upon the statutes of different States.

Bearing upon this question, we find in *Payne on election*, sec. 499, the following general proposition:

"Honest voters may lose their votes through the criminal misconduct of dishonest officers of election. While it is well settled that the mere neglect to comply with directory requirements of the law, or the performance of duty in a mistaken manner, without bad faith or injurious results, will not justify the rejection of an entire poll, it is equally well settled that when the proceedings are so tarnished by fraudulent, negligent or improper conduct on the part of the officers, that the result of the election is rendered unreliable, the entire returns will be rejected and the parties left to make such proof as they may of the votes legally cast for them." But when fraud on the part of the officers of election is established, the poll will not be rejected unless it shall prove to be impossible to purge it of the fraud.

In other words, the illegal fraudulent rejection of a sufficient number of qualified electors in a precinct which, if they had voted, would have changed the result of the election, was held to void the election in that precinct.

Penner vs. Bennett, 21 Ohio State, 431.

17th Florida, R. 707.

People vs. Coats, 31 Ark., 111.

Phelps vs. Schroeder, 26 Ohio, 558.

State vs. Baker, 38 Wis., 71.

6 Am. Enc. of Law, 292, 423, 431; 364, 334.

McCrery on Elec., sec. 423, 539, 476, 119th N. Y., 175.

Floyd vs. Sullivan, 24 Pac. Rep., 218, 227.

Russell vs. McDonell, 23 Pac. Rep., 183.

People vs. Bell, 8 N. Y. S., 254.

State vs. O'Day, 28th N. W. Rep., 642, 71 N. C., 475.

People vs. Kennedy, 21 Am. Rep., 465.

Seiler vs. Chapman, 54 Mo., 502.

I am unable to see the difference in the degree of fraud or misconduct presented by a case where the election officers illegally and wrongfully strike the name of a qualified voter from the registry list, or in which they illegally and fraudulently place the names of illegal voters on the registry list. In the latter case it is held to be misconduct in the officers.

While a disregard of a mandatory provision in a statute as to the conduct of an election will ordinarily void an election, it is generally well settled that neglect or disregard of a directory provision of a statute designed to prevent fraudulent voting followed by actual fraud of that character, sufficient in extent to throw doubt on the true result of the election, is ground for rejecting the entire vote of a precinct, providing there were no means of purging the poll.

Officers of election are like all other persons, presumed to know the law, and their deliberate neglect to do their

duty, or their illegal, wrongful and fraudulent performance of the duty imposed upon them, to register and permit all persons having such qualifications to vote, calls for explanations on their part. In this case it is conceded by contestee's counsel that no evidence of justification was offered before the court below to explain or justify the acts of the election officers. This omission cast suspicion upon their integrity, and with the testimony before the court was presumably sufficient *prima facie* to make out a case of erroneous and illegal conduct on their part, as found by the court trial.

The case of *Russell vs. McDowell* (California), reported in 23 Pac. rep. 183, fully sustains this doctrine and also gives construction to Sec. 3751, Comp. Laws, 1888, which is similar to the California statute.

The object of the registry law is to preserve the purity of the ballot box and to guard against abuses to the elective franchise, and not to prevent any qualified elector from voting or unnecessarily to hinder or impair his privilege. This right should not be impaired by the regulation. It must be a regulation, not a destruction, of the right.

Atty.-Genl. vs. School, 78 Mich., 545.

People vs. Allen, 58 Penn., 338.

Davis vs. Kennedy, 49 Wis., 555.

Warden vs. Ry. Board, 72 Mich., 398.

People vs. Gordon Estate, 5 Cal., 285.

Webster vs. Byrne, 34 Cal., 273.

So it has been held that the exclusion of legal voters through error in judgment (but not fraud) will not defeat an election, because it cannot be known with certainty afterwards how the excluded electors would have voted, and it would be dangerous to receive and rely upon the voters' subsequent statements as to their intention, when unfortunately such intention was imperfectly expressed, after it is ascertained precisely what effect their votes would have upon the result.

Cooley's Con. Lim. p. 780—626.

Newcome vs. Kirley, 3 B Mon. 515.

"If, however, the inspectors of election shall exclude legal voters, not because of honest error in judgment, but wilfully or corruptly, and to an extent that affects the result, or if legal voters are intimidated and prevented from voting, or for any other reasons, the electors have not had opportunity for the expression of their sentiment through the ballot box, the election should be set aside altogether, as having failed in the purpose for which it was called."

Cooley's Con. Lim. 621.

41 Kansas, 111.

Pennor vs. Bennett, 21 Ohio St., 4 El.

Phelps vs. Schroeder, 26 Ohio St., 589.

Bell vs. Snyder, 4 Con. El. Cases, 247.

McCary Am. Law of El., Sec. 11.

State vs. Jefferson Co. Com., 17 Florida, 707.

People vs. Bell, 23 N. E. Rep., 533.

People vs. Thatcher, 55 N. W., 534.

Payne on El., sec. 513—598.

People vs. Pease, 27 N. Y., 63.

59 Am. Dec., 470; 23 Am. Dec., 648;

2 Am. Dec., 437.

A proper rule in such cases is that any irregularity in conducting an election which does not deprive a qualified elector of his vote, or admit a disqualified person to vote, or cast uncertainty on the result, should be overlooked in trying title to an office.