THE TOOELE ELECTION CASE.

DECISION OF THE SUPREME COURT.

In the Supreme Court of the Territory of Utah, January term, 1879. F. M. Lyman respondent vs. Enoch F. Martin et al appellants. Appeal from the Third District Court.

This was an application by the respondent to the Third District Court for a writ of mandamus, to compel the appellants, the said Martin being county clerk, and the other defendants constituting the County Court of Tooele County, to canvass the returns of an election held in that county on the 5th day of August, 1878, to fill various offices.

The affidavit shows that the respondent was a candidate voted for at that election to fill each of the following offices, viz.: That of Representative from said county to the next Legislative Assembly, and County Recorder of said county; that none of the defendants were publicly known to have been candidates voted for at said election; that the returns from all the precincts were in the possession of said Martin and members of the County Court on the 9th day of August, 1878; that all the ballot boxes were securely sealed or locked; that envelopes securely and safely sealed containing the lists required by law to be kept, addressed to said clerk, from the precincts named were then and there in the possession of said clerk; that on the day last named, the respondent demanded of the appellants that they examine said returns and canvass the same as required by law, and that they then and there refused to examine and canvass said returns or any of them, either at that time or at any time, etc.

An alternate writ was prayed for which was granted. The appellants demurred to the writ, and upon its being overruled, they answered. The respondent demurred to this answer. The demurrer to the answer was sustained, and a peremptory writ ordered, the appellant electing to stand upon this answer. They now prosecute this appeal.

The first exception in this appeal relates to the overruling of the appellants' demurrer to the alternative writ.

The demurrer was based upon two grounds:

1st. That at the date of the election there was no election law in force.

In support of this ground it is urged that the Legislative Assembly in passing an act approving and adopting the compiled laws of Utah, re-enacted the old law subsequent to the passage of the election law in question, and was therefore a repeal of the latter by implication. The only evidence in support of this proposition is the fact that both acts were approved by the Governor on the same day, and are in the same message from him notifying the Assembly of their approval.

No inference can be drawn from this that the act in relation to the compiled laws was passed subsequent to the passage of the act in relation to elections.

And even if it should positively appear that the act approving and adopting the compiled laws was passed a day, or any number of days, subsequent to the passage of the "Election Bill," it would not have the effect claimed for it by the appellant.

The words of the act referred to are as follows:

"*Be it enacted, &c.*, That the 'Compiled Laws of Utah,' published under the auspices of the special committee, * * * are hereby approved and adopted."

A committee had been appointed by the preceding Legislature, to compile and publish the laws then in force in the Territory. That committee had performed the duty assigned them, and the result of their labors was then before the Legislature, and the act passed simply amounted to an approval of their work. It is plain that the Legislature did not intend that it should have any other or further effect, and in law it did not. It was not a revision of the law that had been authorized, but a compilation only. If the committee had included in the compilation any provision not found among the old laws, one which had never been passed by the Legislature, the legislative action above referred to would not have given it any force or validity as a law.

The second ground of demurrer was "that the election law, approved Feb. 22d, 1878, under which the election was held, was never passed." What is meant by this is, that the *bill* was never passed so as to become a *law*.

To sustain this proposition counsel relies upon the following facts gleaned from the journal entries of the two houses.

The bill was first passed by the Assembly and sent to the Council, where it was passed with certain amendments. On its being returned to the Assembly, that body concurred in all the amendments made by the Council except one. Upon the disagreement as to that, a committee of conference was appointed.

The committee agreed to certain amendments to sections 8 and 9 of the bill, and on the report of the committee on the part of the Assembly, that body concurred in the meandments proposed by the conference committee. The bill being then sent to the Council that body also "adopted" the report of the committee and returned the bill to the assembly for enrollment, it having originated in that body. The next entry in relation to this act is the notice received of its approval by the Governor, in connection with the act in relation to the compiled laws.

Counsel for the appellants claims that after the adoption of the amendments agreed upon by the conference committee, the bill, as amended, should again have been passed by both branches of the legislature.

In this we think he is mistaken. Whatever may be found to the contrary in works upon parliamentary proceedings, such is not the usual custom in legislative bodies.

In looking over the legislative journals of many of the States to which we have had access, as well as the proceedings of Congress, it seems to be the universal custom when there is a disagreement as to amendments to a bill passed by both houses, which has been settled by a conference committee, to concur in the amendments recommended by them.

But it is claimed on the part of the respondent that the act in question is found among the laws of the Twenty-third Session of the Legislature, published by authority as one of the existing laws of the Territory, and is also found in the records of the Secretary, authenticated and approved in the proper manner, and that these facts raise a strong presumption of the existence and regular passage of the law, and that the burden was upon the appellants to overcome this presumption and show the contrary. This proposition is correct. And waiving the question raised and discussed upon the arguments as to the right to look into the journals, a question which we do not decide, the journal entries produced not only fail to rebut this presumption, but affirmatively show that all the necessary steps were taken resulting in the regular passage of the act. There was no error in overruling the appellants' demurrer.

After the demurrer was overruled, the appellants answered, and the respondent demurred to the answer, on the ground that it did not state facts sufficient to constitute a defence, which was sustained and a peremptory writ ordered, the appellants electing, as before stated, to stand upon their answer.

The second exception in the record relates to the action of the court in sustaining this demurrer. And the first point made under this exception is, "that this demurrer reaches back to the first defect in the pleadings, and if the plaintiff's pleading is defective in substance, judgment should be given for respondents in the demurrer to the answer."

This proposition is undoubtedly correct, but the deduction that counsel desires to draw from it are not so clear, viz: that the affidavit is one of the pleadings in the case, as his whole argument on this point is confined to what he deems to be defects in the affidavit. "The alternative writ" and the return thereto are usually regarded as constituting the pleadings in proceedings by mandamus—the writ standing in the place of the declaration or complaint, and the return taking the place of the plea or answer in an ordinary action at law." (State vs. Gracey 11 Nev., 223).

But if we concede that the affidavit is a "pleading" in the case, and it is that, and not the writ, which is to be answered, how will the case stand then?

Counsel for the appellants claim that there are several vital defects in the affidavit, because,

1st. "It is not shown that it is the specified duty of the defendants to canvass the vote, and the election law of 1878 does not enjoin upon them any such duty."

Section 18 of the Act providee that, "On receipt of the ballot boxes and returns of elections, the Clerk of the County Court, in the presence of at least one member of the Court 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 appears therein affecting the result of the election of any candidate, they shall accept said returns as correct." And then follows certain directions as to what shall be done in case the right of anyone voted for, for any office, is in any way effected. And in section 19 directions are given how to proceed in case of any disagreement in the returns in regard to the number of votes cast for any territorial officer, or any officer whose election is effected by the votes of more counties than one. And proceeds: "After the completion of the canvass, said member or members and 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."

There would seem to be no room for doubt but that the statute plainly and *specifically points out* the duty of the clerk and members of the County Court, and just as plainly enjoins upon them the performance of that duty.

The precise language of the objection is that it is not shown that it was the duty of the appellants "to canvass the *vote*." Neither in the affidavit or writ is this asked or commanded to be done. But they are asked and commanded to go *forward and canvass the returns*. In the performance of that duty it may become necessary to canvass the votes in the manner pointed out by the statute.

The second point is that "The election law is void for want of uniformity in this: a different qualification is required of male citizens from what is required of females."

The provisions of the act aimed at by the above objection are found in the affidavit which is required of persons before registration.

The affidavit is as follows:

"I, ——, being first duly sworn, depose and say that I am over twenty-one years of age, and have resided in the Territory of Utah for six months, and in the precinct of —— one month next preceding the date hereof, and (if a male) am a 'native born' or 'naturalized' (as the case may be) citizen of the United States, and a tax-payer in this Territory, (or if a female) I am 'native born' or 'naturalized,' or the 'wife,' 'widow,' or 'daughter' (as the case may be) of a native born or naturalized citizen of the United States."

Upon the argument I understand that the only objection urged to this act was to the clause requiring that males should be tax-payers, which qualification was not required of females. That here was a burden or qualification superimposed upon one class of citizens and not upon the others, and hence the whole act was void; and we are asked to declare it so. This we ought not to do, nor declare any portion of it void, unless some plain provision of the Constitution or laws of Congress are violated.

SEC. 1860 of the United States Revised Statutes gives to the Legislative Assemblies of the Territories power to prescribe the qualifications of voters, subject, however, to certain restrictions, among which are that they must be "citizens of the United States over twenty-one years of age," and that "there shall be no denial of the elective franchise on account of race, color or previous condition of servitude."

The provision in question is not in violation of the above requirements, nor of any express provisions of the Constitution or laws of the United States.

While the exercise of the elective franchise is a privilege rather than a right, yet all regulations upon that subject must be reasonable, uniform and impartial. — (Cooly Const. Lim., p. 602.)

Any provision which should impose upon a particular class of citizens, conditions and requirements not required of all others is void.—(American Law of Elections, Sec. 8.)

This, the provision in question, does, and is in violation of the above mentioned and well settled policy of the law, although not in conflict with any statute.

Is the whole act therefore void? We think not. It is well settled that one portion of a law may be valid and another portion invalid. And if one portion is invalid, the provisions of that part may be disregarded, while full force and effect may be given to such as may not be void.—(Banks vs. Owens, 2 Peters 526. People ex rel., vs. Ball, 46, N. Y., 69.)

The above provision requiring that males *should be* "taxpayers" is the *obnoxious* portion. Striking out that as void and the balance of the act is in no wise affected. There is nothing connected with this or dependent upon it, as to prevent this being done.— (Cooly Const. Lim., p. 178.)

But it is now claimed that there is a further objection to the act, which is covered by the point made. And that is, that the provision requiring a female to swear that she is the "wife" or "daughter" of a native-born or naturalized citizen might permit persons not citizens to vote. As the "wife" or "widow" of a native born or naturalized citizen, is a citizen, the objection must refer solely to such as are daughters of naturalized citizens. If I understand the reason for the objection, it is that a person may be the daughter of a naturalized citizen and yet not herself a citizen, or if her father was naturalized after the daughter arrived at the age of 21 years, and yet this act attempts to give such the right to vote. I do not so understand its provisions.

It will be borne in mind that the act nowhere attempts to fix the qualifications of voters; that is fixed by other provisions of the statute not found in this act, and not altered, amended, or repealed by it. The declared object of the act in question, as expressed in its title, is to provide for the registration of voters and the manner of conducting elections, and in its very first section assumes that the qualifications of voters are fixed by some other statute. For it is there provided that the officers who are charged with the duty of registration shall "carefully inquire as to any and all persons entitled to vote," and "shall ascertain upon what ground such person claims to be a voter, and he shall require each person entitled to vote and desiring to be registered, &c.," to take the oath above quoted. So that before they can take the oath and be registered they must be qualified voters, and to be voters they must be citizens. The fact of being registered does not of itself entitle a person to vote; his or her vote may still be challenged and refused for want of any of the necessary qualifications fixed by this statute. The provision of this act does not affect the necessary qualification, and is not obnoxious to the objection made against it.

It is contended that the demurrer to the answer was improperly sustained *for the reason:*

"1st. Because the alleged demand was denied, and a material issue of fact was thereby presented."

The duty required of the defendants was a public duty, required of them as public officers. It is clearly and specificially pointed out by the statute, and being a public duty, no demand was necessary upon their neglect to perform it, before commencing proceedings to compel its performance. The law makes the demand, and they should have gone forward in the discharge of that duty without any special demand. It was not something the law required to be done on demand. It follows that the allegation that a demand was made was not necessary or material, and its denial raised no issue.

2d. The answer alleged that the defendants passed upon the legality of the returns and rejected them as void.

The proceeding by mandamus is uniformly declared by the courts to be "a civil remedy having all the qualities and attributes of a civil action," and our practice act, section 37, which provides that all the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be there prescribed in this act," refers to the pleadings in cases of mandamus, as well as to the pleadings in other civil actions. (Chamberlin vs. Warburton, Utah 257.)

The sufficiency in the denials in the answer in the case at bar, must then be determined by the same rules, as in other civil actions. Construed by these rules, and in the light of the decisions under them, the answer is evasive, and contains much that is mere statement of legal conclusions.

The allegation that the defendants then and there "*fully* passed upon the said returns, and canvassed the force, effect and legality of said returns * * and "rejected the same as illegal and void and adjourned," *is both* evasive and the statement of legal conclusions. It is not the denial of any fact alleged in *the affidavit.*

It is not only a statement of a legal conclusion, but is the exercise of a judicial function. The defendants had no judicial power; this duty was purely ministerial and extended only to the casting up of the returns and awarding the certificate to the proper persons. (American Law of Elections, p. 64).

The several attempts at denial, and the allegations of the answers taken together, not only do not deny the facts set up in the affidavit, but lead to the conclusion that the appellants *arbitrarily rejected* the returns as an exercise of judicial rather than ministerial functions.

"When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law, and guilty of usurpation. * * * * To permit a mere ministerial officer arbitrarily to reject returns at his mere caprice or pleasure, is to infringe or destroy the rights of parties without notice or opportunity to be heard, a thing which the law abhors and prohibits." (State vs. Sears, 44 Mo., 223.)

The denial in the answer that the ballot boxes "were then and there *locked and securely sealed*, or that the envelopes to be kept were in the possession of the clerk, *securely sealed*, is a mere statement that in their judgment they were not *securely sealed*, without the statement of any facts from which that conclusion was drawn. It is an admission that they were in the possession of the clerk, and were sealed, but in their judgment not securely. No issue was raised by the denial. Not only is there no material issue raised by the denial, but there is no new matter stated which constitutes a defence.

The answer seems to base the whole defence upon the invalidity of the act, although that question had been settled, so far as the proceedings were concerned in that case, in the court below, on the demurrer of the appellants to the writ. Not only so, but the statement in the answers in relation thereto were not sufficient to make it any defence. The assumed *illegality* of the act is not sufficiently set up to raise an issue. The facts from which the Court might draw the inference that the act was void, and not the assumed inference, should have been stated. (People vs. Supervisors, 27 Cal. 655.)

The answer not raising any question as to a matter of fact, the motion for a jury was properly overruled. In *fact*, there was nothing *for* a jury to try. The trial of the issue of law raised by the demurrer completely disposed of the the case, and was a *determination* that there was no fact to try. (C. L., Sect. 1675.)

The judment of the court below is affirmed, with costs.

PHILIP H. EMERSON,
Associate Justice.

JUDGE BOREMAN ON THE TOOELE CASE.

DISSENTING OPINION.

In the Supreme Court of Utah Territory, January Term, 1879. F. M. Lyman, respondent, vs. Enoch F. Martin et al., appellants. Appeal from the Third District Court.

Boreman, Justice, delivered the following opinion, dissenting from the majority of the Court:

The respondent applied to the District Court for a mandamus to compel appellant Martin, Clerk of the County Court of Tooele County, and the other appellants as members of the said Court, to examine and canvass election returns, and declare who were elected. A demurrer to the affidavit (treated as a complaint) was overruled, and a demurrer to the answer was sus-