THE ELECTION OF TERRITORIAL OFFICERS.

It will be remembered that at the General Election of 1883, the Utah Commissioners issued an order against the election of Territorial officers, announcing that ballots containing votes for such officers would be rejected. We took occasion at the time to show the lack of authority on the part of the Commissioners to rule on that question, and also the error of their position supposing they possessed that authority. For, common sense would say that the presence on a ballot of the name of some person for an office not to be voted for, would not vitiate the vote for those officers to be voted for. So long as the voter plainly designated the offices to be filled and the persons whom he wished to fill them, the presence of any name for any office in addition would make no difference to the validity of his vote for those offices about which there was no dispute. We further showed the fallacy of the opinion of the Commissioners that the Territorial offices were to be filled by the nomination of the Governor and the appointment, with him, of the Legislative Council, and cited the laws of Utah which made those offices elective, and decisions of the Supreme Court of the United States sustaining the validity of those laws.

This year is the time for the election of a number of Territorial officers, and the Territorial Central Committee took steps to have this matter fully discussed, if possible, before the Commissioners, so as to obtain a different ruling. Application was made for a hearing, which was promised, but meanwhile the Commissioners became scattered, some going east and others on a trip to the North. On the return of Commissioners Ramsay and Carlton they were again appealed to, but they wished to wait for the coming of Commissioner Paddock, and thus the matter was put off until to-day, when the counsel for the People's Party waited upon the two gentlemen named, no other Commissioner having yet arrived, and submitted the following brief, which we commend to the attention of the public as a terse, concise, plain and irrefutable argument, on the People's side of this important question. Attention was orally called to the fact that the Commissioners, ruling of 1883 was at variance with that of 1882 in the election for Delegates to Congress. Chairman Ramsay expressed no opinion on the matter, but said the brief would have to be referred to the District Attorney, and promised that a decision should be given as early as possible.

The election takes place next Monday, and every day's delay makes this matter more urgent. As to the right of it we have not the smallest doubt. What the Commissioners shall decide is quite another thing. We wait as patiently as possible for the decision. Here is the argument, presented this morning by Hon. F. S. Richards, of counsel for the People's Party. It is worth reading and deserves thoughtful consideration:

To the Utah Commission:

An order made by the Commission, dated July 2d, 1883, as printed in the volume of reports, rules, etc., of the Commission, is as follows:

"ORDER OF THE COMMISSION,
ADOPTED JULY 2, 1883.

"A communication was received from the Hon. John Sharp, chairman People's Territorial Central Committee, and submitted to the chairman, asking answers to the following questions:

"'Will voting for, at the next general election in this Territory, candidates for the offices of territorial treasurer, auditor of public accounts, superintendent of district schools and commissioners to locate university lands, upon the same ballots with candidates for members of the Legislative Assembly and county and precinct offices, invalidate such ballots entirely: or will such ballots be counted for members of the Legislative Assembly, and for county and precinct offices, and the voting for candidates for territorial offices be treated as surplusage?'

"After careful consideration by the Commission, ordered: That the secretary of the Commission is directed to state in reply thereto, that ballots voted at the coming election (August 6th, 1883), containing the names of candidates for other offices than those designated to be filled by the Commission, will be rejected and not counted for any purpose."

The decision so given is not satisfactory to the person and party presenting the question, and the Commission having expressed a willingness to hear arguments on the subject, in their behalf, we respectfully submit the following views:

As the decision reads, it may have been intended to apply only to the special election of 1883 to fill vacancies; if so, the question now would relate to its extension to the general August election of this year. If, however, the decision was intended as a general rule applicable to all elections in Utah, then the question is should it not be rescinded as an erroneous declaration of law and of principles applicable to the canvass of votes, and the ascertainment of the will of the voters.

We submit that, on the authority of adjudged cases, and in accordance with the universal principles applicable to such cases, the decision is erroneous in respect to any election in Utah, whether general or special. The ultimate authority on such questions is the decisions of the courts, and though we do not find a large number of adjudged cases, those found are harmonious, and we have not been able to find a decision or a dictum sustaining the rule.

There is no statute in Utah materially affecting the question. Section 13, of Chapter Eleven, of the laws of 1878, provides: "Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be filled."

This statute only has the effect to confine the voter to a single ballot, and it will be found that the registration list and the manner of checking the names of voters as they vote, are only applicable to one ballot. In some States a ballot for each separate class of officers may be voted, but in such cases the registration list has to be arranged to check the vote accordingly and show to which boxes the ballots voted belong.

The remainder of the statute is only declaratory of what the voter must do, even without a statute, to declare his intention so the canvassers can ascertain it, and the fact that a vote is by ballot implies that the voter must do, in these respects, all that the statute prescribes.

In Carpenter vs. Ely, 4 Wisconsin, page 420, a ballot had been cast containing the names of two persons for senator. But one senator could be elected. The ballot was formal as to other offices and candidates to fill them. The canvassers rejected the whole ballot, under the following statute.

"Sec. 28.—Every elector shall vote by ballot, in the town or ward where he resides at the time of the election, and each person offering to vote shall deliver his ballot to one of the inspectors, in the presence of the board; the ballot shall be a paper ticket, which shall contain, written or printed, or partly written and partly printed, the names of the persons for whom the elector intends to vote, and shall designate the office to which each person so named is intended by him to be chosen; but no ballot shall contain a greater number of names of persons designated to any office than there are persons to be chosen at the election to fill such office."

The Supreme Court says: "The ballot cast in Magnolia, which was rejected by the town canvassers because it contained the names of two persons for the office of senator, should have been counted for the respondent [a candidate for the office of district attorney]. That ballot was undoubtedly bad, so far as the office of senator was concerned. There was to be but one senator elected at that election in the Magnolia senatorial district while the ballot contained the names of two persons designated for the office, and, as a matter of course, it was impossible to tell who was intended to be voted for. Sec. 28, chap. 6, R. S.

"But the fact that the ballot was not good as to the office of senator, did not necessarily vitiate the whole ballot; it was, with the exception of this circumstance, entirely regular as to the office of district attorney, and other officers upon the ticket, and we can see no valid objection to counting it as to them.

"It frequently happens that an elector, through inadvertence or mistake, casts a ballot which contains the names of more than one person for the same office, while there are a dozen other names upon it, for as many different offices, all regular and proper; and it seems rather a rigorous rule to declare that he shall lose his vote as to all because the ballot is bad in one particular. If he loses his vote as to the office for which his ballot is double, it would seem to be all that public policy, the security of the ballot box or a sound construction of the statute require."

In the People *ex rel. vs.* Holden, 28th California, 124, two ballots had been cast, on each of which the names of candidates and the offices to be filled by them, where three times repeated, but in each repetition the same person was named for the same office. The canvassers counted each as one vote, but it was claimed each was in fact three votes, and under the statute the whole ballot must be rejected. The Court sustained the action of the canvassers, saying:

"It is claimed that these pieces of paper were each three tickets folded together, within the meaning of the thirty-fourth section of the act regulating elections (Wood's Digest, p. 378), which provides that where two tickets are found folded together, they shall both be rejected. In our judgment this point is not well made. The twenty-fourth section defines a ballot to be 'a paper ticket containing the names of the persons for whom the elector intends to vote, and designating the office to which each person so named is so intended by him to be chosen.' Thus a ballot, or a ticket, is a single piece of paper containing the names of the candidates and the offices for which they are running. If the elector were to write the names of the candidates upon his ticket twice or three or more times, he does not thereby make it more than one ticket. So long as there is but a single piece of paper, there can be but one ticket, and if it can be discovered therefrom who are voted for and the offices for which each was intended to be chosen, it must be counted as one ballot notwithstanding the voter may have, through inadvertence or otherwise, repeated the names and offices. Being but one piece of paper, it can be but one ticket, and can only be counted as one vote. Cushing, in his work on the law and practice of legislative assemblies, at page 40, section 106, observes: 'If a ballot happens to have the same name written or printed on it more than once, it is not therefore to be rejected, because as it is but one piece of paper it cannot be counted as more than one vote, and, though the same name is written on it several times, it is yet but one name. Thus where ballots are prepared for distribution in the usual way practised in some of the States—that is, by the name of the candidate being written or printed several times, on the same slip of paper, for the purpose of being cut into separate ballots and being nearly cut apart, but so as to adhere together at one end—and an elector inadvertently puts two votes not entirely separated, into the box, they will be counted as one ballot, unless there are circumstances present which afford a presumption of fraudulent intent, in which case they must either be rejected or the whole ballot set aside."

In Coffey vs. Edmonds, 58th California, 521, a vigilant elector who intended to vote for Hancock and English, not finding their names on his ticket, wrote on it in pencil: "For President—Hancock and English." The ballot was counted for other offices, and the Supreme Court sustained the action.

The Mississippi code provides that "if any ticket shall contain the names of more persons for any office than such elector has a right to vote for, such bollot shall not be counted." Held, that the fact that a ticket contains more names for constable than could be voted for, is no ground for rejecting it as a ballot for assessor.

Perkins vs. Carraway, 59 Miss., 222.
13 U. S. Dig, (N. S.), p. 918, Secs. 5 and 7.

In the People vs. Cook, 8 N. Y. (Court of Appeals), page 67, the votes for State officers were under the separate heading "State," and the statute was like that of Mississippi, just quoted. The contest involved the office of State treasurer. A ballot contained the names of candidates for the State offices under the proper heading, and had at the bottom under the same heading, "For County Judge, Ezra Graves." The Court says: "Whatever effect this might have upon the ballot for county judge, it had none upon other candidates on the State ticket. The statute forbids inserting on the same ballot more than one name for the *same office*."

McCrary, in his work on elections, lays down the same doctrines and principles, at pages 344, 348 and 349.

The negative of the decision of the Commission is not only maintained by all the judicial authority we can find, but the universal principles applicable to elections require the same conclusion.

The object of all election laws should be to enable the voter to express his choice of persons to fill specified offices, with as little formality and technicality as possible, and when his choice of the person for the office is expressed so as to convey his intention to the canvassers with reasonable certainty, the law must be construed liberally to give his intention effect.

"All rules of law," says Judge Cooley, "which are applied to the expression in constitutional form of the popular will, should aim to give effect to the intention of the electors; and any arbitrary rule which is to have any other effect without corresponding benefit, it is a wrong done to the parties who chance to be affected by it, and to the public at large."

McCrary on Elections, p. 341.

"A ballot is to be construed in the light of surrounding circumstances, in the same manner and to the same extent as a written contract. It cannot be contradicted, but it may be explained."

Same, p. 339.

If a ballot expresses the intention of the voter without a reasonable doubt, it is sufficient though technically inaccurate.

56 Iowa, 395.

In revising elections, the Court must give to contested ballots such a construction as will make them valid, if they are capable of it.

45 Iowa, 478.

In Preston vs. Culbertson, 58 California, 198, the polls of a precinct had been opened a short distance, but in plain view from the place appointed by the supervisors.

The Court says: "The important question in election cases is, Have the qualified electors been deprived of a fair opportunity of expressing their preference? Mere irregularities which do not affect the final result should be disregarded."

It is manifest that, if but a single office is to be filled by a single officer, and the ballot contains two or more names for the office, there is no way of ascertaining the intention of the voter as to which of the persons he desires to fill the office. On this point he has expressed no intention, and the defect is incurable. No sufficient guide to his intention can be drawn from the order in which the names stand on the ballot, and to assume that, had he known he could vote for only one he would have selected the first name, is mere conjecture and declaring for him an intention he has not expressed. This rule was held to apply in a case where three names (one the name of a person ineligible) were voted to fill two offices on the ground that there was no evidence the voter knew one was ineligible, and that the canvassers had no power to determine eligibility.

But when the voter properly designates on the ballot offices to be filled and persons to fill them, is his intention in these respects any less certain, or any the less certainly expressed, because he designates on the same ballot offices not elective and persons to fill those offices? If a choice properly expressed is the substance of a ballot, the vote is perfect so far as it relates to offices to be filled.

The result of the decision of the Commission, carried to its consequences, would be alarming. The rule makes every voter judge at his peril what offices are to be filled at any election, and the number of persons lawfully entitled to hold the offices. Cases have arisen where the entire community believed an office was to be filled at a given election and voted accordingly, but the Court finally held that the term of the incumbent had not expired and there was no vacant office to fill. Such a decision, under the rule in question, would make every ballot for every office, cast at that election, void.

The fact that the canvassers had or had not counted them would make no difference. If the ballots were illegal because containing a name for an office not then elective, the canvassers could not make them legal by counting them, and if they were valid in other respects notwithstanding the additional name, they should be counted.

The objection to the decision of the Commission extends notonly to what it announces, but also what it implies. It implies that the canvassing boards appointed by the Commission have the power to determine what offices are elective and may be voted for, and to refuse to count the votes cast for persons to fill any other offices.

We submit that no such power is given to them by statute, and the exercise of such powers is entirely beyond the authority usually given to such boards.

The statute powers of the canvassers are easily found. Section 9 of the Edmunds act, after vacating the election offices in Utah, proceeds: * * * "And each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same, and the issuing of certificates or other evidence of election in said Territory, shall, until other provisions be made by the Legislative Assembly of said Territory, as is hereinafter by this section provided, be performed under the existing laws of the United States and said Territory by proper persons, who shall be appointed to exeeute such offices and perform such duties by a board of five persons, to be appointed by the President," etc.

These provisions are free from all ambiguity. The election offices are vacated, and instead of filling them by election or appointment, the power to fill is vested in the board of five persons. When these appointments are made, the election offices are again filled, and each *and every duty* of the former officers, under the law, at once devolves upon the appointees. From thenceforth the law is the mandatory guide of those officers as fully as if they had been otherwise elected or appointed.

The power of the board of five persons has been exercised, and is at an end, except in one particular. The ocal returns for members of the Legislative Assembly are made to the board, who make the final canvass and certify to the election of those officers. *The appointing power has no direction over the officers* any more than the people would have after an election.

As the act was intended to be temporary, it does not even provide for successive appointments by the board, but on the contrary directs that until the legislature provides otherwise the appointees shall hold. A strict construction would terminate the power immediately on the appointments, but as no provision for ensuing vacancies is made, it may be that the power should, from necessity, be extended to such cases. This is immaterial at present. We assume that the canvassing boards are holding by regular appointment, and merely point *out* that they have no power not conferred by the Utah statute, or by general principles of law in respect to matters in which the statute is silent. The question now does not relate to any matters in Section 9, except the clause relating to the canvass and return of the votes, and as the section refers us to the law as the guide to the canvassers' duties, and does not purport to introduce any new system of laws, or permit either the Commission or its appointees to annul old, or to make any new laws, we must necessarily refer to the Utah statute.

All the provisions of law, relating to the duties of canvassers, are found in Chapter Eleven of the laws of 1878, sections 16 to 22, inclusive. It is only necessary to copy sections 16 and 17, which relates to the precinct canvass, because the subsequent canvasses are only summaries of those returns.

"Sec. 16.—The canvass shall commence by the judges who have acted as clerks of the election comparing their respective lists, and ascertaining from said lists the number of votes cast. The box shall then be opened and the ballots therein taken out and counted by the judges, and the judges, acting as clerks, shall each make a list of all the persons voted for. The presiding judge shall then proceed to open the ballots and call off therefrom the names of the persons voted for, and the offices they are intended to fill; and the judges, acting as clerks, shall take an account of the same upon their lists; and all the ballots shall be immediately returned to the ballot box; and the ballot box shall be locked and securely sealed."

"Sec. 17.—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 lists 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, who shall, 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."

Section 16 specifically provides that the presiding judge shall call *from the ballots* the names of persons voted for and the offices they are intended to fill, and the clerks shall take an account of the same on their lists. The names and offices on the ballot are all the canvassers look to. They are not permitted to make a list of such persons and offices as they think should be on the ballot, or of such persons and offices as some other person may have advised them should be on the ballot. Their duty is to truly set forth what the electors have done, and that ends their whole duty.

Section 17 provides for adding up and determining the *number* of votes cast for each person for the several offices, and that the result shall be placed on the lists, certified and forwarded.

The law makes it the duty of canvassers to show what the electors have done, and nothing else. With the consequences of the vote they are not concerned. Whether the result elects any one, or whether the office voted for exists, or is elective, or the election properly held, are matters to be otherwise determined. If ministerial officers, like canvassers, are judges of matters of law and fact respecting the propriety and effect of the action of the electors, their decision would be final and arrest further inquiry and stop all the election machinery. One desiring to contest an election would be deprived of all means to do so. The omission to count the votes suppresses the fundamental evidence, and it would be impossible to go to every elector and prove how he voted. When the *number of votes* cast for each person for an office is returned and made a record, the evidence necessary to protect the rights of the candidates is preserved. This is just what *the law* commands and what is *intended*. *The effect of the* vote is another matter. This is not only the statute law, but in these respects the statute conforms to usage and principle. Most of the adjudged cases have arisen out of the action of county or state canvassers, whose duty it was to summarize primary returns, but the principles announced are applicable to all canvassing boards, and the reasons for limiting superior boards to mere ministerial duties are much more imperative in respect to the primary boards.

McCrary on Elections, Sec. 81, says: "It is well settled that the duties of canvassing officers are purely ministerial and extend only to the casting up of the votes and awarding the certificate to the person having the highest number. They have no judicial power."

Quoting from 44th Missouri, 223, the author says: "When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law, and is guilty of usurpation."

And again: "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."

The last clause relates to a board canvassing primary returns, and the evil referred to would not be so great or irremediable, after the primary boards had preserved the evidence of the vote, as that of the primary board refusing to count the votes and suppressing the whole evidence of what the electors had done.

The case of Attorney-General vs. Barstow, 4th Wisconsin, involved the title to the office of governor of the State, and speaking of the power of canvassers the Court says: "The canvassing officers are to add up and certify by calculation the number of votes given for any office, they have no discretion to hear and take proof as to frauds, even if it is morally certain that monstrous frauds have been perpetrated."

Quoting from 22d Barbour, 77, McCrary (Sec. 84) cites: "They (the canvassers) are not at liberty to receive evidence of anything outside of the returns themselves; their duty consists in a simple matter of arithmetic."

The author shows that canvassing boards must determine whether the papers presented as returns are in fact such, and of course a primary board would have to determine whether a ballot contained such a designation of persons for certain offices that it was entitled to be counted. These matters must be determined from the face of the papers, and when favorably determined, the remainder of the duties are arithmetical.

The author then shows (Sec. 84) that the doctrine that canvassing boards and return judges are ministerial officers, possessing no discretionary or