LEGISLATURE OF 1901.

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# CONTESTED ELECTION CASE

Harvey D. Eaton

vs.

Cyrus W. Davis

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Brief of Law Points

BY

ORVILLE DEWEY BAKER

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HARVEY D. EATON

vs.

CYRUS W. DAVIS.

CONTESTED ELECTION CASE BEFORE HOUSE OF REPRESENTATIVES, A. D. 1901.

## SCHEDULE I.

VOTES CONCEDED BY BOTH SIDES.

| *Eaton.* Total. | No. votes. | Exhibit No. | Ward. | Exhibit No. | *Davis.* No. votes. | Total. |
|---|---|---|---|---|---|---|
| | 122 | | 1 | | 119 | |
| | 134 | | 2 | | 129 | |
| | 139 | | 3 | | 90 | |
| | 140 | | 4 | | 110 | |
| | 150 | | 5 | | 115 | |
| | 109 | | 6 | | 106 | |
| | 69 | | 7 | | 178 | |
| 863 | 863 | | | | 847 | 847 |
| | | | **SCHEDULE II.** | | | |
| | | | IMPERFECT Xs IN SQUARE. | | | |
| | | | (1) "TOMAHAWK" OR "ANCHOR" VOTES. | | | |
| 864 | 1 | 14 | ⋐ in Republican Square. | | | |
| | | | ⋐ in Democratic Square | 32 | 1 | 848 |
| | | | (2) DOUBLE CROSSES. | | | |
| | | | Double X in Dem. Square | 26, 30 | 3 | |
| | | | Double X in Dem. Square | 31 | | 851 |
| | | | **SCHEDULE III.** | | | |
| | | | VOTES BY FIRST NAMES OR INITIALS ONLY. | | | |
| | | | (1) VOTES WHERE IT IS ADMITTED BY BOTH SIDES THAT NO OTHER MAN OF SAME NAME OR INITIALS LIVED IN WATERVILLE AT TIME OF ELECTION. | | | |
| 865 | 1 | 3 | Vote for H. D. Eaton. | | | |

CONTESTED ELECTION CASE—CONTINUED.

**SCHEDULE III—Concluded.**

| *Eaton.* | | | | *Davis.* | | |
|---|---|---|---|---|---|---|
| Total. | No. votes. | Exhibit No. | | Exhibit No. | No. votes. | Total. |
| 865 | | | Brought forward | | | 851 |
| | | | Vote for Cyrus Davis | 2 | | |
| | | | Vote for Cyrus Davis | 13 | | |
| | | | Vote for Cyrus Davis | 14 | | |
| | | | Vote for Cyrus Davis | 23 | 4 | 855 |
| | | | (2) | | | |
| | | | VOTES WHERE IT IS ADMITTED BY BOTH SIDES THAT AT LEAST TWO MEN OF SAME INITIALS WERE LIVING IN WATERVILLE AT TIME OF ELECTION. | | | |
| | | | Vote for C. W. Davis | 1 | | |
| | | | Vote for C. W. Davis | 11 | | |
| | | | Vote for C. W. Davis | 18 | 3 | 858 |
| | | | (*Note.* As to these three votes, no testimony was offered to show who cast them, or for which of the two "C. W. Davis'" they were intended, other than the fact that Cyrus W. Davis was the Democratic candidate.) | | | |
| | | | (3) | | | |
| | | | Vote for "C. Davis." | 12 | 1 | 856 |
| | | | (Note 1. As to this vote, it was admitted that a witness was ready to testify voluntarily, if called, that he cast this vote and intended it for "Cyrus W. Davis", but this testimony was objected to on behalf of Mr. Eaton, as being not legally receivable under the Australian Ballot Law, because, if admitted, it would tend to destroy the secrecy of the ballot, which was the purpose of the Act.) | | | |
| | | | (Note 2. Admitted that there were three "C. Davis'" in Waterville at time of election.) | | | |

CONTESTED ELECTION CASE—CONTINUED.

## SCHEDULE IV.

VOTES WITH DISTINGUISHING MARKS.

| *Eaton.* | | | | *Davis.* | | |
|---|---|---|---|---|---|---|
| Total. | No. votes. | Exhibit No. | | Exhibit No. | No. Votes. | Total. |
| 865 | | | Brought forward | | | 859 |
| | | | (1) VOTES WITH X IN SQUARE AND ALSO OTHER DISTINCT AND SEPARATED MARKS IN SAME SQUARE. | | | |
| 866 | 1 | 1 | X and name of "Isaac Lawrence" written in Rep. Square. | | | |
| | | | X and mark resembling figure 15 written in Dem. Square. | 20 | 1 | 860 |
| 867 | 1 | 1 | ✗✗ in Republican Square. | | | |
| | | | (2) X IN SQUARE, ALSO ERASURES OR INSERTIONS OR BOTH, IN NAMES IN OTHER COLUMNS. | | | |
| 868 | 1 | 2 | X in Dem. Square, name "Cyrus W. Davis" erased and "Harvey D. Eaton" written under it, and name of Eaton also erased in Rep. column. | | | |
| | | | X in Dem. Square, and also name of Eaton erased and "Cyrus W. Davis" inserted in Rep. column. | 4 | 1 | 861 |
| | | | (3) X IN SQUARE, ALSO OTHER Xs OPPOSITE INDIVIDUAL CANDIDATES IN SAME COLUMN. | | | |
| | 1 | 8 | X in Rep. Square, also X against John F. Hill. | | | |
| 870 | 1 | 12 | X in Rep. Square, also X opposite Eaton and others in Rep. column. | | | |
| | | | X in Dem. Square, also X against Davis in Dem. column. | 6 | 1 | 862 |
| | | | (4) X IN SQUARE, AND ALSO "YES" OR "NO" INSTEAD OF X IN AUDITOR COLUMN. | | | |
| 871 | 1 | 10 | X in Rep. Square, also "Yes" in Auditor column. | | | |

CONTESTED ELECTION CASE—CONTINUED.

## SCHEDULE IV—Concluded.

| *Eaton.* | | | | *Davis.* | | |
|---|---|---|---|---|---|---|
| Total. | No. votes. | Exhibit No. | | Exhibit No. | No. votes. | Total. |
| 871 | | | Brought forward | | | 862 |
| 872 | 1 | 11 | X in Rep. Square, also "Yes" in Auditor col. | 5 | | |
| | | | X in Dem. Square, "No" in Auditor column | 9 | | |
| | | | X in Dem. Square, "No" in Auditor column | 28 | 3 | 865 |
| | | | X in Dem. Square, also "Yes" in Auditor column. | 17 | | |
| | | | X in Dem. Square, also "Yes" in Auditor column. | 29 | 2 | 867 |
| | | | (5) ALL OTHER DISTINGUISHING MARKS. | | | |
| 873 | 1 | 4 | X in Rep. Square, all other Squares obliterated with pencil. | | | |
| | | | X in Dem. Square, // in Prohibition Square. | 10 | 1 | |
| | | | X in Dem. Square, word "No" near bottom of ballot. | 16 | 1 | |
| | | | X in Rep. Square, name of Eaton erased and both "Cyrus Davis" and "Cyrus W. Davis" written under. | 27 | 1 | 870 |
| | | | **SCHEDULE V.** | | | |
| | | | MARKS IN SQUARE *NOT* Xs. | | | |
| | | | Oval or robins egg mark in Dem. Square, no other mark. | 7 | | |
| | | | "Yes" in Dem. Square, no other mark. | 15 | | |
| | | | \ in Dem. Square, check opposite Prohibition Square. | 34 | | |
| | | | **SCHEDULE VI.** | | | |
| | | | VOTE FOR TWO OPPOSING CANDIDATES. | | | |
| | | | X in Rep. Square, "Cyrus W. Davis" written under "Harvey D. Eaton for Representative," but Eaton not erased. | 24 | | |

CONTESTED ELECTION CASE—CONTINUED.

## SCHEDULE VII.

ILLEGAL SPLIT.

| *Eaton.* | | | | *Davis.* | | |
|---|---|---|---|---|---|---|
| Total. | No. votes. | Exhibit No. | | Exhibit No. | No. votes. | Total. |
| 873 | | | Brought forward | | | 870 |
| | | | X in Rep. Square, Harvey D. Eaton erased, but name of Davis not inserted under Eaton, only X opposite name of Davis in Dem. column. | 33 | | |

## SCHEDULE VIII.

VOTES WITH NO X IN SQUARE, BUT Xs AT RIGHT, LEFT, OVER, OR THROUGH NAMES OF EATON OR DAVIS, EITHER ALONE OR WITH OTHERS.

| | | | |
|---|---|---|---|
| | | 5 | No X in any Square, but X opposite names of Hill, Leigh and Eaton in Rep. column. |
| | | 6, 7 | No X in any Square, but X opposite each name in Rep. column. |
| | | 13 | No X in any Square, but X against name of Eaton with others in Rep. column. |
| | | | No X in any Square, but X against name of Hill and Gerald in Rep. column, and *through* the name of Davis in Dem. column. 3 |
| | | | No X in any Square, but X against each name in Dem. column. 19 |
| | | | No X in any Square, but X against each Rep. name except Eaton in Rep. column, and X against Davis in Dem. column. 21 25 |
| | | | No X in any Square, one X against each group of condidates in Dem. colomn. 8 |

CONTESTED ELECTION CASE—CONCLUDED.

## SCHEDULE IX.

VOTES WITH NO X ANYWHERE, BUT OTHER INDICATIONS OF INTENTION.

| *Eaton.* | | | | *Davis.* | | |
|---|---|---|---|---|---|---|
| Total. | No. votes. | Exhibit No. | | Exhibit No. | No. votes. | Total. |
| 873 | | | Brought forward | | | 870 |
| | | 7 (b) | Vote with name of Harvey D. Eaton for Representative written in proper blank in Socialist column, no other mark. | | | |
| | | | Vote with Eaton erased, and Davis written under in Rep. column, no other mark. | 22 | | |
| | | 1 (a) | Vote with McFadden's name erased in Rep. column, no other mark. | | | |
| | | 2 (a) | Vote with McFadden erased and Bates inserted in Rep. column, no other mark. | | | |
| | | 7 (a) | Vote with McFadden erased and Bates inserted in Rep. column, no other mark. | | | |
| | | 7 (c) | Vote with Albert Fuller written under name of McFadden, no other mark. | | | |
| | | 13 (a) | Vote with Burleigh and McFadden erased, Gerald and Bates inserted in Rep. column, no other mark. | | | |

# HARVEY D. EATON
VS.
# CYRUS W. DAVIS

## LAW BRIEF BY ORVILLE DEWEY BAKER.

References are all to Schedule numbers as numbered by Mr. Baker in the printed tabulation preceding this brief.

### SCHEDULE II. (1) Ex. E. 1.

TOMAHAWK OR ANCHOR VOTE.

A ballot marked in the proper compartment with a straight line met perpendicularly by another straight line should be allowed.

1883 Jenkins v. Brecken, 7 Can. S. C. 247.

Marking of a ballot with a cross formed like an anchor is valid.

1875 Cameron v. McLennan, 11 Can. Law Journal 163.

"Trifling marks evidently made by accident while making the cross marks do not invalidate the ballot."

1898 People v. Parkhurst, 53 N. Y. Sup. 598.

Where lines cross in slightest degree, as where they can be seen to cross under microscope.

1898 People v. Parkhurst, 53 N. Y. Sup. 598.

Incomplete cross made by one straight line joined by a second straight line at right angles is good.

1898 People v. Parkhurst, 53 N. Y. Sup. 598.

"Any mark, however crude and imperfect in form, if it is apparent that it was honestly intended for a cross mark and for nothing else, must be given effect as such, under Minnesota statute requiring ballots to be marked with a cross."

1895 Pennington v. Hare, 60 Minn. 146.

1884 In Hawkins v. Smith, 8 Can. S. C. 676; L. R. A. page 816,

Held: "Whenever the marking of a ballot evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted."

## SCHEDULE III. (2).

"C. W. DAVIS" VOTES, D. 1, 11, 18.

The legal presumption is that "Cyrus W. Davis" and "C. W. Davis" are two different persons.

1875 Opinions of the Justices, 64 Me. 596.,

where it was held that William H. Smith, W. H. Smith and W. Smith, were three different persons.

Mere evidence that Cyrus W. Davis was the official candidate is not sufficient to overcome this presumption of law, since in the old cases prior to the Australian Ballot, as in the case of William H. Smith and W. H. Smith and W. Smith just cited, the same fact existed and was well known to the Governor and Council and to the court, viz: that William H. Smith was the regular candidate of his party, but that did not change the court's decision, nor rebut the legal presumption that William H. Smith and W. H. Smith and W. Smith were different persons.

But in our case the legal presumption is not only not rebutted by the evidence, but is emphatically confirmed by the admitted fact that there were TWO C. W. Davis's in Waterville at the date of the election, and our Australian Ballot Act, Pub. Laws 1891, Chap. 102, Sec. 27, expressly says that "Where from any reason it is impossible to DETERMINE the voter's choice for the office to be filled, the ballot shall not be counted for such office."

Note that by this provision the name written on the ballot must be so accurate and unambiguous that the choice of the voter can be DETERMINED, i. e., made certain. It is not sufficient that the Legislature can CONJECTURE or GUESS AT the voter's choice.

In case of the four votes for "Cyrus Davis" and the one vote for "H. D. Eaton," the voter's choice IS made certain by the fact that there was only ONE person of the name of Cyrus Davis in Waterville at the time of the election. As to the "C. W. Davis" votes on the contrary, his choice is made necessarily uncertain by the fact that there were at least two of that name then living, and if the voter had desired to vote for Cyrus W. Davis, the official candidate, he had that name written out in full right before him on the ballot, but he chose to vote for a person who had a name different from the official candidate's name.

Moreover, in this class of cases, even before the Australian Ballot Act, our Maine Legislature has refused to count such ballots for an official candidate, even when express affidavit had been made by all the voters who cast those ballots that they intended them for the regular candidate, as shown by the records of the Maine House in case of Gideon A. Hastings and Moses C. Foster, in '71.

But at all events, it is clear that where there were two candidates of the same initial, such votes could not be counted, even before the Australian Ballot Act, EXCEPT BY PROOF FROM THE VERY VOTERS who cast the votes as to their intention.

IN THIS CASE NO SUCH EVIDENCE WAS EVEN OFFERED, nor would it be admissible under the Australian Ballot, if offered, as will be shown under the "C. Davis" vote.

"The County Commissioner Act," so called, R. S. Chap. 78, Sec. 5, has no application here.

(1) Because it expressly applies to the Governor and Council only.

(2) But chiefly because, by the passage of the Australian Ballot Law, the express purpose of which was to make the secrecy of the ballot inviolable, THIS STATUTE WAS REPEALED BY NECESSARY IMPLICATION as repugnant to the Australian Ballot Act.

That the purpose, and the leading purpose, of the Ballot Act was to ensure the inviolable secrecy and purity of the ballot, is expressly decided by our court in

Curran v. Clayton, 86 Maine, 52,

where the court say of our Act of '91:

"Its DISTINGUISHING FEATURE is its careful provision for a secret ballot. The LEADING PURPOSE of it was to give the elector an opportunity to cast his vote in such a manner that no other person would know for what candidate he voted, and thus protect him against all improper influences and enable him to enjoy absolute freedom from restraint and entire independence in the expression of his choice. IT WAS DESIGNED TO SECURE COMPLETE AND INVIOLABLE SECRECY in that respect, and under established rules of construction it should be examined with reference to the mischief to be remedied and the object to be accomplished, and interpreted, if practicable, so as to promote and not destroy the purpose of its enactment."

It is, of course, familiar law that wherever one statute is directly in conflict with a later statute, so that the terms of the two statutes are repugnant, the former is repealed by necessary implication, and in general where a later Act has been passed COVERING THE ENTIRE SUBJECT MATTER, the provisions of such later Act will be held to repeal all earlier provisions on the same subject.

A striking illustration of that is found in

State v. Maine Central Railroad, 90 Me. 267, where our court decided unanimously that the old five thousand dollar remedy by indictment against a railroad for damages was repealed by implication merely by the passage of the Act of 1901, giving a civil remedy under the same circumstances.

## SCHEDULE III. (3).

"C. DAVIS" VOTE, D. 12.

Substantially all the reasons given under the last head touching the "C. W. Davis" votes, apply also to the "C. Davis" vote, only with increased strength, since it is admitted that there were at the time of the election THREE citizens of Waterville by the name of "C." Davis, whereas there were TWO only bearing the name of "C. W. Davis."

As to this one vote, the only additional evidence offered by Mr. Davis was the testimony of a voter that he cast that ballot and intended it for Cyrus W. Davis. This evidence is strenuously objected to on behalf of Mr. Eaton as being inadmissible on grounds of public policy, and it makes no difference whether the witness would testify voluntarily or only under the compulsion of a subpoena. The Australian Ballot Act, as we have already seen, from the express language of our own court, was intended, above all things else, to secure for the ballot inviolable secrecy, and through secrecy, freedom from corruption and possible purchase or intimidation. The whole purpose of the Act in this respect would be utterly defeated if a voter were permitted at all, either voluntarily or involuntarily, in a public inquiry to testify for whom he cast or intended a ballot. It would be as easy to corruptly procure his testimony, either through promise, secret influence or intimidation as to corruptly secure his original vote. The Australian Ballot law necessarily contemplates that the whole subject matter of the voter's choice should be excluded and kept secret from all public inquiry, and while no law can prevent a man telling his neighbor an improper secret as to his vote, public policy can and will secure that improper secret from being inquired into at all in any public or judicial inquiry such as this is.

It is by no means a mere personal privilege, established for the sole benefit of the voter, like the statute of limitations, but is a great measure of public policy adopted for the benefit of the whole State, and unless the Australian law is to be deliberately nullified, the absolute secrecy of the ballot must be kept as inviolable as the secrecy of the jury room.

It is settled and familiar law that no juror will be heard in any court to testify, voluntarily or otherwise, as to what occurred within the jury room, and that on the grounds of high public policy. This is settled by repeated decisions in our own State through opinions drawn by Judge Walton and Judge Libbey (then the only Democratic member of our court). It is also clearly settled by repeated decisions in Massachusetts and in other states, and the reason always given for the rule is that public policy will not permit such evidence to be received.

Baron Alderson in Straker v. Grayon, 7 Dowl, 223,5;
Woodward v. Leavitt, 107 Mass. 460;
Cook v. Castner, 9 Cush. 278;
Commonwealth v. White, 147 Mass. 80;

State v. Pike, 65 Me. 117;
Heffron v. Gallupe, 55 Me. 566;
Trafton v. Pitts, 73 Me. 409.

These decisions are precisely analogous to our case, and are fatal to Mr. Davis' contention as to this vote.

## SCHEDULE IV.

### DISTINGUISHING MARKS.

There are nineteen votes in all which necessarily fall under this head. Eight of them are for Mr. Eaton, being E. 1, 9, 2, 8, 12, 10, 11, and 4. There are eleven votes for Mr. Davis falling under the same head: D. 20, 4, 6, 5, 9, 28, 17, 29, 10, 16, 27.

Each one of these nineteen votes on both sides has a regular cross in the proper square, and the only possible objection to any of them, is that they each contain in addition to the cross, some other peculiar mark which either was or might be used corruptly to identify the ballot. A detailed description of each vote will be found in Schedule IV. They must all stand or fall together, and must all be counted or rejected according to the principle of law established by the committee. Mr. Davis contends through his counsel that under our ballot law, distinguishing marks should be rejected as surplusage, provided there is a cross in some square. If that principle be adopted, then eight of these votes must be counted for Mr. Eaton, and eleven for Mr. Davis.

If, on the other hand, the Committee establish the principle that distinguishing marks would vitiate a ballot, then it is submitted on behalf of Mr. Eaton that all ballots containing such marks on both sides must be rejected and the count stripped clean. It is plain that the whole ballot must be regarded as an entirety, and if the rule of distinguishing marks is to be applied at all, then such marks will be equally fatal to the whole ballot in whatever part of it they occur. Thus, distinguishing marks in the Auditor square, by which the ballot could corruptly be identified, will be as fatal to the vote for candidates as the same distinguishing mark in the candidate square would be fatal to the vote for Auditor. For instance, in case of a contest on the constitutional amendment, no vote, it is submitted, could be counted for or against the amendment if it contained in either party square, the word "yes" in place of the proper cross.

It equally follows that no vote could be counted for candidates which contained in the Auditor square the word "yes" in place of the proper cross, since each alike, as our own court said in

Curran v. Clayton, 86 Me. 42,

"might readily be, and probably would be agreed upon as a distinguishing mark to identify the ballot."

If the rule of distinguishing marks is to be applied at all, it is submitted for Mr. Eaton that the test should be this: that ANY UNAUTHOR-

IZED mark upon the ballot, not necessary to the vote, made in a way or in a place not contemplated by the statute, would constitute a distinguishing mark, PROVIDED ALWAYS that such mark was not a mere irregularity connected with the cross itself in the square, and not a mere pencil scratch which might be made from pure accident in making the proper cross in the square.

The question of the individual voter's intention in making such unauthorized mark should not in any case be inquired into, as in that case you would have no rule at all, but would substitute conjecture for a legal standard.

DISTINGUISHING MARKS GENERALLY WILL VITIATE A BALLOT.

In note in 47 L. R. A., page 820, it is said by the reviewer, after a comparison of all the decisions: "There is a practical agreement that distinguishing marks will render the ballot void; but it is not always easy to tell what is a distinguishing mark."

DISTINGUISHING MARKS ARE EQUALLY FATAL UNDER THE AUSTRALIAN LAW ALTHOUGH NO SPECIAL PROVISION TO THAT EFFECT IS EXPRESSED IN THE ACT.

In Curran v. Clayton, 86 Me. page 52,

our court say: "If it be conceded that the intention of the voter may be correctly inferred from the mark actually made by him in each of these instances, it is STILL A FATAL OBJECTION to the ballot that such an irregular and unauthorized mode of marking it MIGHT READILY BE, and PROBABLY WOULD BE, AGREED UPON WITH THE VOTER AS A DISTINGUISHING MARK to identify the ballot cast by him whenever identification was desired. Such a palpable disregard of the plain requirements of the act strikes at the root of the secret ballot system."

1895 In Parker v. Orr, 158, Ill. 609,

the court say: "A ballot on which a mark or character is used, which, though indicating an intention to vote a particular party ticket or for certain candidates, at the same time serves the purpose of indicating who voted it, thereby furnishing the means to designing persons of evading the law, will be rejected under the Illinois ballot law, although nothing is said in that Act about distinguishing marks." 47 L. R. A. page 820.

WHAT ARE DISTINGUISHING MARKS?

Cross in square with word "against" opposite one candidate, and word "for" against opposing candidate.

1899 Mauch v. Brown (Neb.) 81 N. W. Rep. 313.

Ballot properly marked, but with distinct cross opposite blank line lower down.

1898 Lauer v. Estes, 120 Cal. 652.

A cross under party name with half-circle round it and figure 9 written in another party square.

1894 Atty. Gen. v. Glaser, 102 Mich. 405.

Party cross with letter "H" added.

1899 Mauch v. Brown, (Neb.) 81 N. W. Rep. 313.

Cross with "Cu" above it.

1876 Robertson v. Adamson, 3 Ct. of Sess, 978, Wigmore on Australian Ballot Law, 190.

In writing word "Eaglehan" on ballot.

1893 Spurgin v. Thompson, 37 Neb. 39.

Ballot with cross indiscriminately placed on various parts.

1897 Sweeney v. Hjil, 23 Nev. 409.

Ballot with additional cross in blank space for candidate.

1899 State v. Sadler, (Nev.) 58 Pac. Rep. 284.

Ballot properly marked in square, but having also "Yes" written in another square.

1894 Whittam v. Zahorik, 91 Iowa, 23.

Word "Voted" or "Voted for" after name of candidate.

## SCHEDULE IV. (1) E. 1.

ISAAC LAWRENCE VOTE.

The sole objection to this vote is its distinguishing mark, yet the counsel for Mr. Davis asks that it be rejected, while he also asks that the whole eleven votes on his sides, having also distinguishing marks, be counted for Mr. Davis. We submit that the same rule must be applied to both sides and either all counted or all rejected.

Mr. Davis claims that this vote should be rejected because the Australian Act makes it penal for a voter to divulge the contents of his ballot in the act of voting, but no such reason exists under the Australian Ballot law of Maine, because that law contains no such provision. The sole provision in our law upon the subject is contained in Pub. Laws, 1891, Chap. 102, Sec. 29: "A voter who shall allow his ballot TO BE SEEN by any person with the apparent intention of letting it be known how he is ABOUT TO VOTE, shall be punished, etc."

Now, there is no evidence, or pretense of evidence in this case that Isaac Lawrence "allowed his ballot to be seen" by any one when he was about to vote or afterwards, but, in the absence of evidence, it is conclusively presumed that he deposited his ballot in the ordinary way, folded, and invisible to every one but himself. He is an aged man, well known, of life-long Republican faith, and beyond impeachment as to integrity, and evidently had the impression that he was required to sign his ballot in addition to making the cross, and to sign it within the party square since he wrote the last part of his name, "rence," above the rest in order to get it within the square.

If all other voters who made distinguishing marks on their ballots are to be disfranchised, then he should be with the rest, but not otherwise. He cannot be singled out for disfranchisement.

## SCHEDULE IV. (1).

DOUBLE CROSS VOTE IN REPUBLICAN SQUARE, E. 9.
DEMOCRATIC CROSS WITH MARK RESEMBLING FIGURE 15.

As to these two votes, the most favorable construction for Mr. Davis would be to class them together and either admit both or reject both. Both are conceded to be legal ballots by Mr. Davis' counsel.

FIFTEEN DOLLAR VOTE, D. 20.

Vote with large figure "1" placed thereafter vitiates ballot.

1899 State v. Sadler, (Nev.) Pac. Rep. 284.

Vote with half-circle round cross, figure 9 in another square void.

1894 Atty. Gen. v. Glaser, 102 Mich. 405.

DOUBLE CROSS VOTE, E. 9.

Ballots with two or more crosses in one square should be counted, and are not distinguishing marks.

1896 Houston v. Steele, 98 Ky. 596.

Marking with a double cross opposite candidate, where ballot is otherwise regular in form is not a distinguishing mark.

1897 State v. Fawcett, 17 Wash. 188.

1884 Hawkins v. Smith, 8 Can. S. C. 676.

Two cross marks in square do not vitiate ballot.

1898 People v. Parkhurst, 53 N. Y. Sup. 598.

## SCHEDULE IV. (2).

E. 2, D. 4.

These two votes exactly offset each other on any principle, whether the rule of distinguishing marks is applied or not.

## SCHEDULE IV. (3).

E. 8, 12. D. 6.

The case of People v. Canvassers, 156 N. Y. 36 holds that marking with cross against the name of the same candidate in two different columns is valid, the second marking being surplusage.

On the other hand, in

Atty. Gen. v. Glaser, 102 Mich. 405,

held that ballot with proper cross in square, and also containing various other crosses cannot be counted.

So, a stamp at or in a square, opposite which is no candidate's name, is a distinguishing mark, and cannot be counted.

1893 Sego v. Stoddard, 136 Ind. 297, 47 L. R. A. 824.

All three of these votes are conceded by Mr. Davis' counsel to be legally countable.

## SCHEDULE IV. (5).

E. 4.

Vote with cross in Rep. square and the other three squares obliterated with pencil.

It is plain that the only possible objection to this vote is distinguishing marks, and it must be either counted or rejected with the other eighteen votes under the same head.

The counsel for Mr. Davis urges that this vote should be rejected not because it has distinguishing marks, but because it is impossible to determine from the vote the intention of the voter. This suggestion, we submit, does not appeal to common sense. Of all the ballots in the case on both sides, this one, we submit, contains the most emphatic evidence of the voter's intention to vote the Republican ticket. He not only made the proper cross in the Republican square, and in the "Yes" square under the Auditor vote, but he emphasized his Republican intent by obliterating each one of the three other party squares, and also by obliterating the "no" square for Auditor. Unless all votes are to be rejected for distinguishing marks, there is no vote in the case which contains so emphatic evidence of the voter's intent. He expressed his Republican view doubly, first by properly marking the Republican ticket, and second, by carefully obliterating all other tickets.

## SCHEDULE V.

### VOTES WITH MARKS OTHER THAN CROSSES IN PROPER SQUARE.

ROBIN'S EGG VOTE, D. 7.

This vote has no cross in the square, and NO ATTEMPT TO MAKE A CROSS, but a deliberate attempt, fully executed, to make a mark ENTIRELY DIFFERENT FROM THE CROSS required by the statute.

Now it is settled law in this State, and in every other state where the Australian Ballot Law is in force, that the particular mark commanded by the statute is INDISPENSABLE to the validity of every ballot, and that no other mark whatever can be substituted for it.

This was settled in our own State in

Curran v. Clayton, 86 Me. 52,

where all marks other than the cross were rejected as illegal, and again, and emphatically, in a later case,

Waterman v. Cunningham, 89 Me. 298,

where the opinion was drawn by the sole Democratic judge now upon the bench, Judge Strout, and he used these words: "To entitle the vote to be counted, THE CROSS (X) MUST BE MADE at the place desig-

nated by the statute. * * * * No other mode is allowed by the statute. Its provisions are plain and specific, and if not followed, the vote cannot be counted."

A somewhat exhaustive examination of the authorities warrants the belief that no single case can be found (and certainly none is cited by the counsel for Mr. Davis) where a court has ever held that any mark in the square which was distinctly NOT A CROSS could be counted.

For a few of the leading cases upon this point, see

1897 Oatman v. Fox, 104 Mich. 652,
1896 Martin v. Miles, 46 Neb. 772,
1895 McKittrick v. Pardee, 8 S. D. 39,
1890 In re vote marks, 17 R. I. 812.

Beside these general decisions, the courts have had occasion to pass on almost every conceivable substitute for a cross which a voter could make, and every substitute has been uniformly rejected. A few of these decisions will be cited a little later under this same Schedule V.

Especially have the courts uniformly held that a ROUND "O" or OVAL in any form could not be counted as a substitute for a cross.

1900 People v. Bourke, 63 N. Y. Sup. 906.
1899 State v. Sadler, 58 Pac. Rep. 284.
1874 Haswell v. Stewart, 1 Ct. of Sess. 925; 2 O'Malley & H. 215; Wigmore, page 190.
1876 Grant v. McCallum, 12 Can. Law Journal, 113.

The distinguishing test is thus clearly stated by the court in

1894 Hawkins v. Smith, 8 Can. S. C. 676:

"If the mark INDICATES NO DESIGN OF COMPLYING WITH THE LAW, but on the contrary, A CLEAR INTENT NOT TO MARK WITH A CROSS as the law directs, as by making a straight line OR A ROUND 'O,' such non-compliance renders the ballot null."

NOR DOES IT MAKE THE LEAST DIFFERENCE WHETHER THE OVAL MARK HERE WAS MADE BY THE DEMOCRATIC BALLOT CLERK OR BY THE VOTER HIMSELF.

No one of the decisions cited on the other side holds to the contrary, OR MAKES THE CROSS IN THE SQUARE A WHIT LESS INDISPENSABLE TO AN ASSISTED BALLOT THAN TO ANY OTHER. These decisions apply solely, as will be seen from the language and limitations expressly stated in the cases, to NON-ESSENTIAL acts, details not made by the statute indispensable to the validity of the ballot. It is submitted that no case has been, or can be, found, holding that the cross in the square is not equally indispensable to the assisted, as to the unassisted ballot. The language of our statute itself, Australian Ballot Act, Sec. 24, is decisive upon this point. The Act does not say that all UNASSISTED ballots shall be marked with a cross in the proper square, but it says that ALL BALLOTS, i. e. whether assisted or unassisted, shall be so marked.

Section 26, permitting the voter to receive assistance, permits him simply to make the indispensable cross in the square, under certain conditions, THROUGH AN AGENT (the ballot clerk) instead of making it personally; and it is universal and elementary law that THE PRINCIPAL IS RESPONSIBLE FOR THE ACTS OF HIS AGENT the same as for his personal acts. The decisions cited on the other side are absolutely in harmony with this principle. They relate exclusively to acts and duties to be done by the clerk as an independent officer, and NEVER TO DUTIES IMPOSED BY THE ACT ON THE VOTER PERSONALLY AND PERFORMED BY THE CLERK SIMPLY AS HIS AGENT.

To illustrate, the law, Sec. 26, requires that the ballot clerks "shall certify on the outside of such ballot that the same was marked by them, or by the voter with their assistance." Now such a requirement is clearly an independent duty imposed on the ballot clerks alone, and not on the voter. It is no part of the voter's duty, and in performing it, the ballot clerks do not act as the voter's agents.

Therefore this provision is clearly directory only, and if the ballot clerks do not properly perform this duty, as for instance, if they certify ON THE INSIDE, instead of THE OUTSIDE of the ballot, the ballot would be clearly good, as indeed it MIGHT be even without any certificate, on proof of the fact that the voter was actually assisted.

On the other hand, if the ballot clerks attempt to prepare the ballot FOR THE VOTER, as by erasing or marking in names of candidates, or by making the indispensable cross in the square, they do these things SOLELY FOR THE VOTER AND AS HIS AGENTS, and the voter is conclusively bound either by their acts or by their omissions. For instance, suppose the ballot clerks negligently FAIL TO MAKE A CROSS AT ALL in any square, but make the cross in some other place, or negligently leave the ballot blank as to crosses, it is too plain for argument that such ballot cannot be counted.

Nor does it matter in the least what implement or tool is used to make the indispensable cross, whether it be the butt end of a lead pencil or the butt end of a voting stamp, or the cork of some convenient bottle. The sole test is, whatever the implement used—IS THE INDISPENSABLE CROSS MARK MADE. If it is, the ballot must be counted, if not, it must be rejected.

Furthermore, in this particular case the voter himself is the one primarily at fault, and this particular ballot never became, under our law, a legally assisted ballot at all.

By the Ballot Act of 1891 the voter was permitted to apply to a single ballot clerk for assistance, but in the law of 1893, Sec. 26, this permission was expressly struck out, and the only possible condition under which a voter could cast an assisted ballot was that he should "receive the assistance in the marking of his ballot" of TWO of the election clerks; SUCH

CLERKS SHALL NOT REPRESENT ONE AND THE SAME POLITICAL PARTY, and THEY shall certify that the ballot was so marked by them."

Now, the voter in question received the assistance of ONE clerk alone, and that the Democratic clerk. He violated the express command of the statute that his assistants should not both represent one and the same political party, and it is SUBMITTED THAT THIS BALLOT NEVER BECAME A LEGAL BALLOT AT ALL, because the voter never complied with the indispensable CONDITION PRECEDENT prescribed by the statute, as a matter of public policy, for a legally assisted ballot, namely: that the assistance should not be given by two clerks (still less by one alone) BOTH OF THE SAME POLITICAL FAITH.

## SCHEDULE V.

VOTE WITH WORD "YES" IN DEMOCRATIC SQUARE, D. 15.

This vote is not claimed by Mr. Davis' counsel as being a legal ballot, and the decisions are perfectly unanimous concerning it.

Writing a word instead of employing a cross as required by statute invalidates the ballot so marked.

1895 Dennis v. Caughlin, 22 Nev. 447,

1895 Langford v. Gebhart, 130 Mo. 621.

"Yes" written in proper place against name of one candidate, and "No" against another for same place, nullifies the ballot for that office.

1895 Langford v. Gebhart, 130 Mo. 621.

Writing word "Democratic" in square in place of cross cannot be counted.

1895 Parker v. Orr, 158 Ill. 609.

## SCHEDULE V.

Vote with straight line under Dem. square and also check mark against Prohibition square. D. 34.

Straight line or single line cannot be counted as cross.

1894 Atty. Gen. v. Glaser, 102 Mich. 405.

Many other cases cited in 47 L. R. A. page 816.

Perpendicular or vertical lines instead of cross cannot be counted.

1899 State v. Sadler, (Nev.) 58 Pac. Rep. 284.

Straight line drawn diagonally across square cannot be counted.

1893 Curran v. Clayton, 86 Me. 42.

Diagonal line cannot be counted.

1895 Vallier v. Brakke, 7 S. D. 343. Same held in

1899 Gill v. Shurtleff, 183 Ill. 440.

But in the second place, this vote must be rejected on another and independent ground. It is a double vote, a vote equally good for two parties, the Democratic and the Prohibition. The check mark opposite the Prohibition square is more nearly a cross than the single line in the Democratic square, and taking the two marks together, the result is absolute confusion as to which party, if either, the voter intended to vote for.

## SCHEDULE VI.

VOTE FOR TWO OPPOSING CANDIDATES. D. 34.

Cross in Rep. square, "Cyrus W. Davis" written under Harvey D. Eaton for Representative, but Eaton not erased.

It is plain that this vote cannot be counted for either candidate, but is an attempt to vote for both, and it is properly not claimed as legal by Mr. Davis' counsel.

## SCHEDULE VII.

ILLEGAL SPLIT TICKET, D. 33.

Cross in Republican square, Harvey D. Eaton erased, but name of Davis not inserted under Eaton as statute requires, but only cross opposite Davis in Democratic column.

This vote is not claimed by Mr. Davis, and plainly cannot be. It is governed conclusively by the express language of the statute, Sec. 24. That section provides one way and only one, in which a voter may split his ticket, namely: by erasing the name of one candidate, and in addition, writing in the name of some other candidate "UNDER THE NAME SO ERASED." This provision has been expressly construed by our own court in the opinion of Judge Strout, 89 Me. 298, and it is there held that it is absolutely indispensable that this provision of the statute should be strictly complied with, or else that vote cannot be counted.

## SCHEDULES VIII. AND IX.

are made up wholly of votes without any cross or pretended cross in any square. They are not claimed by Mr. Davis' counsel as in any respects legal ballots, and it is so absolutely plain that they cannot be counted under the ballot law and decisions in our own State and in all other states, that discussion would be wasted upon them.

## RESUME.

I close with this plain review or summary of the whole case. If you grant the conceded votes alone, which strips the whole matter down to absolutely undebatable and regular votes, admitted by both sides to have been legally cast, Mr. Eaton is elected by a vote of 863 to 847, a plurality of 16. If you count all the imperfect crosses, including the anchor votes on both sides, he is elected by a vote of 864 to 851, a plurality of 13. If you pass next to the distinguishing mark schedule, and if you count them all in on both sides, he is elected by a vote of 872 to 862, a plurality of 10. If you reject them all, he is elected by a clear plurality of 13 instead of 10. If you then pass to the initial schedules and count the Cyrus Davis votes, all of them, and the one H. D. Eaton vote, Mr. Eaton is elected by a vote of 873 to 866. If you count in the 3 C. W. Davis votes, Mr. Eaton is still elected by a vote of 873 to 869. If you count in the one C. Davis vote, he is elected by a vote of 873 to 870, and if you even pass into the schedule where there is no cross whatever and no pretence of a cross, and give them the "robin's egg vote," Mr. Eaton still stands elected the member from Waterville by a vote of 873 to 871; and no man can take out from that list one solitary vote without taking out more votes upon the other side on the same principle. Now apply whatever principle you will. There is no stage in all this count where the Davis vote has even tied Mr. Eaton; cut off this count at any stage or at the end of any schedule, adopt one principle or the other principle, count in or count out, Mr. Eaton stands elected. And I beg to know, Gentlemen of the Committee, why he should be staid of his seat, why the electors of Waterville should be deprived of the man of their choice? Much confusion has been introduced here, much waste of words; but I pray to know if you ever saw, so far as the count was concerned, a contested election case, where, by the adoption of either principle, at any stage of it, if you cut it off after any one of the schedules or every one of the schedules, where you find one candidate always elected and the other not?