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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

James V. Lacy, *et al.*, Plaintiffs and Petitioners; vs. **City and County of San Francisco**, *et al.*, Defendants and Respondents.	Case No.: CPF-22-517714 **Memorandum of Points and Authorities in Support of Motion for Writ of Mandate** Calendar Preference Elec. Code § 13314; CCP § 35 Action Filed: Mar. 14, 2022 Trial Date: Not Set **Hearing** Date: Jul. 28, 2022 Time: 9:30 a.m. Dept. 302

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POINTS AND AUTHORITIES

The issue here is whether San Francisco may permissibly allow noncitizens to vote in elections for the San Francisco Unified School District (SFUSD). It may not because the California Constitution limits voting rights to United States citizens, and that constitutional provision controls every public election in the State.

Even if the Constitution were ambiguous on the question of noncitizen voting, the City's authority as a charter city does not allow it to deviate from controlling state law because school district elections are not municipal affairs subject to a charter city's plenary powers. And, even if they were, the citizenship requirement for voting is a subject of statewide concern that precludes a charter city's deviation. Additionally, authority that gives charter cities the right to determine the time, place, and manner of school district elections within their boundaries, does not allow San Francisco's ordinance because determining voter qualifications is different from permissibly regulating the time, place, and manner of an election.

For these reasons, San Francisco may not allow noncitizens to vote in its school district elections. Therefore, a writ of mandate should issue to prohibit the City and its Elections Official from counting votes cast by persons who do not satisfy the citizenship requirement.

LOCAL AUTHORITIES

This memorandum refers to several local authorities, including a San Francisco ordinance and provisions of San Francisco's Charter and Elections Code. The full text of those provisions is provided in the concurrently filed Requests for Judicial Notice as follows:

- Ordinance No. 206-21 (RJN No. 1);
- Article XIII of the Charter, relating to elections (RJN No. 2);
- Article X of the Elections Code (§ 1000 *et seq*.), relating to noncitizen voting in school board elections (RJN No. 3); and
- All other Elections Code provisions cited in this memorandum (RJN No. 4).

STATEMENT OF CASE

San Francisco is both a charter city and county. (Cal. Const., art 11, § 3, subd. (a); see also Cal. Const., art. 11, § 6 [authorizing consolidation].)[1] The rights and powers of a charter city are similar to but slightly different from those of a charter county. (Compare Cal. Const., art. 11, § 4 [charter counties] with § 5 [charter cities].) However, when a charter city's powers conflict with a charter county's, the charter city powers control. (Cal. Const., art. 11, § 6, subd. (b).) While these constitutional provisions were added in 1970, they were a restatement of constitutional law in place at that time. (Cal. Const., art. 11, § 13.)

In 2016, San Francisco voters approved a charter amendment, adding section 13.111 to the City's charter to allow certain noncitizens to vote in school board elections through November 2022. (S.F. Mun. Elec. Code § 1000 enacted by S.F. Ord. No. 206-21, § 1.) Specifically, the charter amendment extended voting rights to San Francisco residents who are parents, legal guardians, or caregivers of children residing in SFUSD regardless of citizenship. (S.F. Charter, § 13.111, subd. (a)(1).) The Charter amendment gave the Board of Supervisors authority to extend the noncitizen voting authorization beyond 2022. (*Id*. at subd. (a)(2).) On November 2, 2021, the Board of Supervisors for the City and County of San Francisco adopted Ordinance Number 206-21. This ordinance amended Article X of the City's Elections Code, amending and adding to that Code to extend the noncitizen right to vote beyond 2022 without expiration (S.F. Ord. No. 206-21, §§ 1, 3; see also S.F. Mun. Elec. Code, art. X.) San Francisco's Mayor approved the ordinance on December 12, 2021. (S.F. Ord. No. 206-21.) It became effective on January 13, 2022. (S.F. Ord. No. 206-21, § 3, subd. (a).)

[1] In this memorandum, Petitioners discuss provisions of articles IX and XI, 9 and 11, of the California Constitution. While Roman numerals are typically used to refer to articles of the California Constitution this is not always the case. (See, *e.g.*, *Martin v. Bd. of Election Comrs. of S.F.* (1974) 126 Cal.404 [Supreme Court opinion using Arabic numerals for articles of the Constitution]; but see Cal. Style Manual (4th ed. 2000) § 2.1 [calling for Roman numerals].) For clarity, because the Roman numerals IX and XI are so similar, Petitioners will use the Arabic numerals (*e.g.*, 9 and 11) when referring to the California Constitution. Petitioners will use Roman numerals in all other appropriate circumstances, *e.g.*, articles of the San Francisco Charter or Elections Code.

This was, at least, the fourth attempt to extend voting rights to noncitizens in San Francisco. (See Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections* (2005) 93 Cal. L. Rev. 271.) A 2004 measure to create a noncitizen right to vote in school district elections failed. (Cf. *id*. at pp. 272, 274.) A similar proposal in 1996 "withered away." (*Id*. at p. 275.) Also in 1996, there was a citizen's initiative to establish a noncitizen voting right for *all* San Francisco elections. (*Ibid*.) The San Francisco City Attorney's Office challenged that measure, *before* proponents circulated sufficient signatures to qualify it for the ballot, and a judge of this court struck it down early in the initiative process, ruling "that a change in voting rights requires an amendment to the state constitution." (*Id*. at pp. 275-276.)

Petitioners are unaware of any challenge to charter section 13.111 when it was enacted in 2016. However, on March 14, 2022, Petitioners filed suit contesting the validity of that section and Ordinance No. 206-21, seeking orders prohibiting the City and its Elections Official from counting noncitizen votes in SFUSD elections. At issue in this motion are Petitioners' causes of action for writ of mandate under California Elections Code section 13314 and Code of Civil Procedure section 1085. The parties stipulated to an extended briefing schedule and the July 28, 2022 hearing date. (Order, filed May 27, 2022.) If not decided on July 28, 2022, the parties request a decision as soon as possible prior to September 1, 2022 to provide guidance in advance of the November general election. (Morgan Decl., ¶ 5.)

ARGUMENT

I. The California Constitution Limits Voting Rights to United States Citizens.

The California Constitution provides: "A United States citizen 18 years of age and resident in this State may vote." (Cal. Const., art. 2, § 2.) California courts have routinely held that a person's right to vote depends on whether he or she has met the basic constitutional requirement. (See, *e.g.*, *Arapajolu v. McMenamin* (1952) 113 Cal.App.2d 824, 831; *San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 767.) Indeed, the negative implication of the framers' use of "may vote" is that anyone not listed *may not* vote.

Legislative enactments are consistent with this interpretation. In every possible respect, the Elections Code unambiguously declares that United States citizenship is required to vote anywhere in the state. (Elec. Code §§ 2101, 2300; see also *id*. at § 321.) Noncitizens do not have the right to vote and are not permitted to vote. There are potential criminal penalties if they do. (See Elec. Code §§ 18100, 18500, 18561; see also *People v. Rodriguez* (1973) 35 Cal.App.3d 900.) Therefore, noncitizens do not have the right for their vote to be counted. (Cal. Const., art. 2, § 2.5.) This is consistent with California law going back to the state's earliest days. (See, *e.g.*, *Bourland v. Hildreth* (1864) 26 Cal. 161, 164-165; see also *Padilla v. Allison* (1974) 38 Cal.App.3d 784 accord. *Sugarman v. Dougall* (1973) 413 U.S. 634, 648-649 [a state's citizenship requirement for voting does not violate U.S. Constitution].)

As a charter city, San Francisco has certain powers that are not held by general law cities. Those powers do not give it the right to violate section 2 of article 2 of the State Constitution and extend voting rights to noncitizens. (*Harder v. Denton* (1935) 9 Cal.App.2d 607, 608 [charter provisions that violate Constitution are void].) Before the City may allow noncitizens to vote in city elections, it must first amend the California Constitution.

II. Writ Relief is Appropriate.

Two statutes authorize the writ relief Petitioners request. Specific to elections, California Elections Code section 13314 authorizes writ relief to prevent errors in the conduct of an election. Traditional mandate authorizes relief more generally. (Code Civ. Proc. § 1085 *et seq*.)

A. The Elections Code allows a writ of mandate to prevent errors in the conduct of an election.

Under section 13314 of the Elections Code, "[a]n elector may seek a writ of mandate alleging that … any neglect of duty has occurred, or is about to occur." (*Id*. at subd. (a)(1).) "A peremptory writ of mandate shall issue only upon proof of both of the following: [¶] (A) That the error, omission, or neglect is in violation of this code or the Constitution. [¶] (B) That issuance of the writ will not substantially interfere with the conduct of the election." (Elec. Code § 13314, subd. (a)(2).)

Petitioner Michael Denny is an elector in the City and County of San Francisco and the SFUSD. (Denny Decl., ¶ 2; see also Elec. Code § 321 [definition of "elector".) He has standing under section 13314 and alleges that the Election Official's anticipated acceptance of noncitizen votes in the election for SFUSD is a neglect of duty that is about to occur (see Elec. Code § 320; Ed. Code § 5503 [county elections official charged with administering school district elections]; see also S.F. Charter § 13.104). It is a neglect of the Official's duty to accept only those votes that are cast by United States citizens. (See, *e.g.*, Elec. Code § 2300; Cal. Const., art. 2, § 2.) The Elections Official's acceptance of noncitizen votes will violate both the California Constitution and the Elections Code.

Additionally, a writ of mandate will not substantially interfere with the conduct of the election. For one, the Elections Official must necessarily do something to segregate noncitizen ballots from citizen ballots because citizen ballots will (presumably) include every other contest on the ballot and noncitizen ballots will be limited to the SFUSD election because noncitizens are not purportedly allowed to vote for anything else. This means that the Elections Official may be prohibited from counting those ballots at anytime prior to the election's certification in late November. However, an order from this Court before September 1, ideally by the end of July, will avoid the time and expense of continued planning for noncitizen voting in the SFUSD election, where the Election Official's order to print ballots will be placed by September 1. (Morgan Decl., ¶¶ 5-7.) Statutory priority under Elections Code section 13314 should ensure an order early enough to minimize any interference in the conduct of the election and save San Francisco taxpayers the substantial costs associated with printing and mailing ballots that cannot lawfully be cast.

B. Traditional mandate authorizes writ relief to prevent constitutional violations.

The traditional mandate remedy is set forth in section 1085 of the Code of Civil Procedure. Under this section, courts may issue a writ of mandate to "any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (*Id.* at subd. (b).) As to this Court, as used in section 1085, the City and County of San Francisco is an inferior board and John Arntz is

an inferior person. As discussed herein, both the City and its Elections Official have a duty arising from their office, trust, or station, to comply with California law. If state law prohibits noncitizens from voting, then Respondents may not allow noncitizens to vote in their elections.

A writ of mandate "must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." (Code Civ. Proc. § 1086.) The petition is verified. There is no other plain, speedy, or adequate remedy in the ordinary course of law. Damages are not appropriate, and a decision is necessary in the next few weeks to avoid the wasteful expense of printing ballots that should never be counted. No other remedy, even if adequate is sufficiently speedy to preclude writ relief. Indeed, mandate is the correct remedy "for compelling an officer to conduct an election according to law," and "[i]t is also an appropriate vehicle for challenging the constitutionality of statutes and official acts. (*Hoffman v. State Bar of Cal.* (2003) 113 Cal.App.4th 630, 639.) Moreover, section 35 of the Code of Civil Procedure establishes statutory priority for a section 1085 writ.

Petitioners are beneficially interested. Petitioner Michael Denny is a voter, elector, and taxpayer in the City and County of San Francisco. (Denny Decl. ¶¶ 2-5.) Like every other voter in the City, his right to vote is diluted by the City's illegal extension of voting rights to noncitizens, and he pays taxes that will pay for the illegal ballots and the counting of those illegal ballots. On this basis, Petitioners United States Justice Foundation and California Public Policy Foundation claim membership standing to establish their beneficial interest on behalf of similarly situated individuals in the City and County of San Francisco. (Lacy Decl., ¶¶ 4-5.)

However, an individual's beneficial interest goes beyond the boundaries of the City and County of San Francisco. School districts are agencies of the state; they not a distinct and independent body politic. (*Cal. Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 (*Hayes*).) Indeed, school district funding is allocated by the state's general fund, and all school property is held by school districts in trust for the state. (*Id.* at p. 1525; see also *San Diego Unified Sch. Dist. v. Yee* (2018) 30 Cal.App.5th 723, 727.) To this end, every resident and taxpayer in the state is beneficially interested in the actions of every school district in the state, because they are

residents and taxpayers of the state itself. For this reason, all four petitioners are beneficially interested in this action. (See Denny Decl., ¶ 3; Lacy Decl., ¶¶ 2-5.)

Irrespective of any specific beneficial interest, Plaintiffs also have public interest standing, an exception to the ordinary rule that allows for "citizen actions to require governmental officials to follow the law." (See, *e.g.*, *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 440.)[2] This exception applies "where the question is one of public right and the object … is to procure the enforcement of a public duty." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166 (*Plastic Bag Coalition*) [cleaned up].) In such cases, "the plaintiff need not show that [s/he] has any legal or special interest in the result, since it is sufficient that [s/he] is interested as a citizen in having the laws executed and the duty in question enforced." (*Ibid*.) This guarantees citizens "the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Ibid* quoting *Green v. Obledo* (1981) 29 Cal.3d 126, 144; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1116-1117 [citizens interested in having the laws executed].) Here, state law limits voting rights to United States citizens and the City and County of San Francisco ordinance allowing noncitizens to vote in SFUSD elections defeats the purpose of that law. Therefore, any member of the public has standing to challenge the ordinance in question.

III. A Charter City's Home Rule Powers Do Not Allow it to Extend Voting Rights to Noncitizens.

"Under the state Constitution, the ordinances of charter cities supersede state law with respect to 'municipal affairs,' but state law is supreme with respect to matters of 'statewide concern.'" (*State Building & Construction Trades Council of Cal. v. City of Vista* (2012) 54 Cal.4th 547, 552 [citations omitted] (*Vista*); see also Cal. Const., art. 11, § 5; *Cal. Fed. Savings & Loan Assn. v. City of L.A.* (1991) 54 Cal.3d 1, 17 (*Cal. Fed. Savings*).) Originally "enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large," this home rule doctrine goes back more than 100 years and "give[s] that municipality the

[2] The concepts of "public interest standing" or "citizen standing" are interchangeable and are different terms that mean the same thing. (See *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 913.)

exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs." (*Vista* at pp. 555-556 citing *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394-398 & *Fragley v. Pehlan* (1899) 126 Cal. 383, 387.) As discussed below, even if the Constitution might allow the Legislature to extend voting rights to noncitizens, the charter city home rule doctrine is not so broad that San Francisco may do so on its own. On this subject, state law limiting voting rights to United States citizens reigns supreme.

There is a four-part framework to determine whether a matter falls within a charter city's home rule authority. At page 556 of the opinion, the *Vista* court restated the four-part test first laid out in *California Federal Savings, supra*, 54 Cal.3d 1. (*Vista, supra*, 54 Cal.4th at p. 556 citing *Cal. Fed. Savings* at pp. 16-24.) First, does the city ordinance regulate a "municipal affair." (See *Cal. Fed. Savings* at p. 16.) Second, is there an "actual conflict" between state and local law. (See *ibid*.) Third, does the state law address a matter of "statewide concern." (See *id*. at p. 17.) Fourth, is the law "reasonably related to resolution of that concern and narrowly tailored" to avoid unnecessary interference in local governance." (See *id.* at p. 24.) After applying this framework, if the Court concludes that limiting voting rights to United States citizens is a statewide concern and the applicable state law is reasonably related to that purpose, then the San Francisco ordinance allowing noncitizen voting in SFUSD elections is no longer a "municipal affair" and state law with that limitation does not violate the City's home rule power. (*Vista* at 556; *Cal. Fed. Savings* at 17.) Upon this conclusion, the City's Election Official may not allow noncitizens to vote in SFUSD elections.

A. School district elections are not a "municipal affair."

On the first factor, Plaintiffs recognize that the "conduct of city elections" is, admittedly, a core charter city power, *i.e.*, it is among four powers that the Constitution expressly states are municipal affairs. (Cal. Const., art. 11, § 5, subd. (b)(3); *City of Redondo Beach v. Padilla* (2020) 46 Cal.App.5th 902, 910; *Johnson v. Bradley* (1992) 4 Cal.4th 389, 398.) However, having plenary authority over the conduct of *city elections* is different from having any authority over the conduct of *school elections*. Indeed, because school districts operate separately from cities, school district affairs are not typically municipal affairs. (*Madsen v. Oakland Unified Sch. Dist.* (1975) 45

Cal.App.3d 574, 578; see also *Cal. Teachers Assn. v. Hayes, supra*, 5 Cal.App.4th at p. 1524 [school districts are agencies of the state].)

To foreshadow another issue, a separate constitutional provision gives charter cities the power to provide "for the manner in which" school board members are elected. (Cal. Const., art. 9, § 16.) But this does not include the power to determine voter qualifications. (Ed. Code § 5390.) Regardless, because this issue is separate from a charter city's section 5 "home rule" power, it is considered separately in section IV, below.

Returning to the home rule question, because school elections are not municipal affairs, elections for SFUSD are subject to the state's general laws without possibility of alteration by the City's charter. (*City of San Mateo v. Railroad Commission* (1937) 9 Cal.2d 1, 7; see also *Lansing v. Board of Ed. of City and County of S.F.* (1935) 7 Cal.App.2d 211 [SFUSD is a political subdivision of the state, separate and distinct from the City/County].) This should be the end of the analysis because the existence of a "municipal affair" is a prerequisite for a charter city's home rule power (Cal. Const., art. 11, § 5.). However, the other three factors weigh against San Francisco's charter and ordinance as well.

B. <u>There is a conflict between the San Francisco Charter and state law.</u>

This part of the framework is easy. In addition to section 2 of article 2 of the California Constitution, multiple provisions of the Elections Code limit voting rights only to United States citizens.

- Section 321(a): "Elector" "means a person who is a United States citizen 18 years of age or older and … is a resident of an election precinct in this state on or before the day of an election."
- Section 2300: This is California's Voter Bill of Rights. It provides that a "valid registered voter means a United States citizen who is a resident in this state …." (See also Elec. Code §§ 2000, 2101 [restating the same requirement].)
- Section 7209: Political party central committees may allow noncitizens to serve on the committee, if permitted by the committee's bylaws and the potential member would otherwise qualify except for the citizenship requirement. These

private committees can establish their own rules in a way that San Francisco may not.

- Section 331: A "new citizen" is one who is otherwise qualified as an elector but for their citizenship status when the person will become a United States citizen after the 15th day prior to an election. New citizens, as used in the Elections Code, become citizens one to 14 days prior to an election and may register and vote in that election *if* they register at the election official's office. (Elec. Code § 3500.) Persons who become citizens on or after election day may not vote. (*Ibid.*)
- Section 16100: Allows an election contest when unlawful votes are cast. (See also *Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153 [nullifying an election when, among other defects, votes were cast by noncitizens].)
- Sections 18100, 18500, 18561: There are criminal penalties for unlawful voting.
- Section 2106: Voter registration programs must inform voters that only United States citizens may register to vote.

Considering the depth of this requirement throughout the Constitution and Elections Code, in differing contexts, the San Francisco ordinance allowing noncitizens vote in school elections plainly conflicts with state law.

C. <u>The San Francisco ordinance at issue legislates on issues of statewide concern.</u>

1. Education is a statewide concern.

As a general principle, education is a statewide concern. (*Madsen, supra*, 45 Cal.App.3d at p. 578; *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 152.) Education only becomes a municipal affair "when the city acts in promotion and not in derogation of the purposes of the state." (*Madsen* at 579; *Berkeley Sch. Dist. v. City of Berkeley* (1956) 141 Cal.App.2d 841.) The current purpose of the state is to limit voting rights to noncitizens, so allowing noncitizens to vote in school district elections derogates the purposes of the state even if San Francisco might have a different purpose.

2. Establishment of voter qualifications is a statewide concern.

To put it simply, the requirements at issue have been in place for a long time. (See, *e.g.*, *Bourland, supra*, 26 Cal. 161, 164-165 [1864 case discussing Constitution of 1849].) Modernly, the current requirement has existed in substantially the same form since 1972 (Cal. Const., art. 2, § 2) and the 1994 reworking of the Elections Code (*Pini v. Fenley* (2017) 9 Cal.App.5th 67, 75 [In 1994, the Legislature repealed and replaced the Elections Code]; *Persky v. Bushey* (2018) 21 Cal.App.5th 810, 826 [purpose of 1994 repeal/replace was to reorganize the Code without making substantive changes]; see also Stats. 1994, ch. 920 ["existing law" defines elector as, *inter alia*, United States citizens]).

While recent developments have eased registration requirements (compare Stats. 1994, ch. 920, § 2 [electors must register 29 days prior to election] with Stats. 2003, ch. 810, § 3 [shorted deadline to 15 days]; see also Stats. 2018, ch. 113, § 1 [same day registration]; Stats. 2020, ch. 320 [felons may now vote]), the Legislature has never abolished its requirement for United States citizenship. Indeed, when the Legislature enacted the state's Voter Bill of Rights in 2003, it was noted that the legislation *restated* that all voters must be United States citizens. (Stats. 2003, ch. 425 [Legislative Counsel's Digest].) This might have been 20 years ago, but in the context of the state's 172-year history, where noncitizens have never had the right to vote, it is comparatively modern.

D. State law requiring United States citizenship for voting is sufficiently tailored to the relevant statewide concerns.

The statewide concern is that the right to vote in California elections should be reserved for United States citizens. Courts have never deviated from a conclusion that this is a reasonable condition on the right to vote. (See *People v. Rodriguez, supra*, 900, 902; *Padilla v. Allison, supra*, 38 Cal.App.3d 784, 786.) The state laws in question limit voter registration and voting to United States citizens. When comparing these laws to the underlying concern, it is hard to imagine a law more reasonably related to the concern.

By the same token, it seems impossible to consider how a law could be more narrowly tailored to the statewide concern. Again, if voting is a right reserved for United States citizens,

then the most narrowly tailor law to effectuating that purpose is to prohibit noncitizens from registering to vote. It is so simple it has worked for over 100 years.

IV. Other Authorities Giving Charter Cities Some Authority Over School Districts Do Not Allow San Francisco's Ordinance.

The charter city powers described above are found in article 11 of the State Constitution, Local Government. As to charter cities, section 16 of article 9 provides additional powers relating to education. Under this section, charter cites may provide "for the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards." (See also Cal. Const., art. 9, § 3.3 [counties have similar power as to county boards of education].) Relevant here, the San Francisco ordinance is valid only if establishing noncitizen voting rights is encompassed within providing for "*the manner in which*, the times at which, and the terms for which" school board members are elected.

The Education Code provides additional guidance. Section 5390 of that Code provides that, in school district elections, "the qualifications of voters, the procedure to be followed by voters and precinct board members in the polling places on election day, and the equipment and supplies to be furnished each polling place shall be governed by those provisions of the Elections Code applicable to statewide elections." As discussed above, those Elections Code provisions require that all voters be United States citizens.

Charter section 13.111 describes its authorization for noncitizen voting as relating to the "manner of election." Based on this, it is presumed that the City will try to justify the ordinance based more on section 16 of article 9 than on section 5 of article 11. Petitioners reach this conclusion because "manner of election" appears both in the charter and article 11, section 16 but not article 9, section 5.

Allowing a city to provide for the "manner of election" means that the city "may provide by law the usual, ordinary, or necessary details required for the holding of the election." (*People ex rel. Devine v. Elkus* (1922) 59 Cal.App. 396, 405 (*Elkus*).) But it does not allow cities to define voter qualifications. (*Ibid.*) The Supreme Court opinion in *Libertarian Party v. Eu* (1980) 28

Cal.3d 535, 543 comports with this view because it recognizes that the "time, place, and manner of elections" is different from "the registration of voters." Thus, if San Francisco has the power to regulate the manner of SFUSD elections, it does not have the power to regulate the qualification of voters in that election unless that power has been expressly conferred. (See *Nielsen v. Richards* (1924) 69 Cal.App. 553, 538.)

The distinction between a time, place, and manner regulation on the conduct of an election and voter qualifications is also found in the United States Constitution. Section 4 of Article 1 addresses the time, place, and manner of congressional elections: it shall be prescribed by state legislatures, subject to congressional regulation. (U.S. Const., art. I, § 4, cl. 1.) Section 2 addresses voter qualifications: federal electors shall have the same qualifications of the most numerous branch of the state legislature. (U.S. Const., art. I, § 2, cl. 1.) The distinction was, of course, deliberate. (See *Ariz. v. Inter Tribal Council of Ariz., Inc.* (2013) 570 U.S. 1, 29-30 (dis. opn. of Thomas, J.); see also *Bullock v. Carter* (1972) 405 U.S. 134, 140-141 [separate consideration of manner of election and voter qualifications].)

Elkus considered this in the context of elections for Sacramento City Council, where Sacramento's charter had adopted a proportional representation system and the court had to decide whether that system complied with former section 8 1/2 of article 11 which allowed charter cities to provide for the "manner in which" and "the method by which" their officers shall be elected. (*Elkus* at 404.) Sacramento's proportional representation system at the time appears to be an early form of ranked choice voting[3] but that scheme counted only one choice for each voter even though there were multiple at large seats up for election. (*Id.* at pp. 397-398.) The court struck down this scheme, seeming to compare the denial of voters' right to vote for as many candidates as there were available seats as if it was a determination of voter qualifications

[3] For background, general principles of ranked choice voting and one perspective on the subject are described in the 2016 Cumberland Law Review article, *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, by Andrew Spencer, *et al*. (46 Cumb. L.Rev. 377.) *Elkus* only summarized the Sacramento system, which *Wattles v. Upjohn* (1920) 211 Mich. 514 [179 N.W. 335] described in more detail. (*Elkus, supra*, 59 Cal.App. at p. 397.) (The full text of this out-of-state case is attached to the Appendix).

(*i.e.*, voters who had a vote counted for one candidate were no longer qualified to vote for other candidates). (Cf. *Id*. at pp. 404-406.) This was a problem because the authority to direct the "time and manner" of an election "does not involve the power to determine who shall constitute the electorate." (*Id*. at p. 404.)

The instant case is more clear. The *Elkus* analysis of a complicated scheme is unnecessary because the San Francisco ordinance directly determines voter qualifications. As *Elkus* makes clear, whatever powers San Francisco has over the manner of an election does not give it to the power to determine who shall constitute the electorate. And that is what charter section 13.111 and Elections Code article X do.

If establishing voter qualifications is not the same as providing for the manner of election, what does it mean to provide for the manner of election? Citing to *Coffin v. Bd. of Election Comrs.* (1893) 97 Mich. 188, 194 [56 N.W. 567, 569][4] *Elkus, supra*, explained: "The word 'manner,' it is true, is one of large signification, but it is clear that it cannot exceed the subject to which it belongs. It relates to the word 'elected.'" (59 Cal.App. at p. 404.) When empowered to regulate the manner of an election, a body simply has the power for "the details for the holding of such election." (*Coffin* at p. 194.)

On this point, it is helpful to refer back to the San Francisco Elections Code and Charter. That Code establishes election dates (S.F. Mun. Elec. Code § 120); regulates the candidate nomination process (*id*. at § 200 *et seq*.); regulates the production of ballots, including provisions to include Chinese translations (*id*. at § 401) and pay for postage to return absentee ballots (*id*. at § 410); provides a voter information pamphlet that is different from state law (*id*. at § 500); and more. Charter provisions also relate to the manner in electing SFUSD board members. (See S.F. Charter, §§ 13.101(a)(5), 13.101.5, 13.102.) These are the details of the election, and they relate not only to its time and place but also to the manner in which it is conducted. Section 16 of article 9 gives the City the power to enact these regulations, but it does not give it the power to determine voter qualifications.

[4] The full text of this out-of-state case is attached to the Appendix.

CONCLUSION

Put simply, as discussed above, anyone voting in California must be a United States citizen. This requirement is found throughout the Elections Code because it is a requirement of statewide concern if not a constitutional mandate. If San Francisco wishes to extend voting rights to noncitizens in school district elections, it must wait for a constitutional amendment that allows it to do so. Therefore, a writ of mandate should issue directing the City's Elections Official to follow the state law and prohibit him from counting votes cast by anyone other than United States citizens.

DATE: June 10, 2022

Respectfully Submitted,
LAW OFFICE OF CHAD D. MORGAN

By: /s/
Chad D. Morgan Esq.
Attorney for All Petitioners

APPENDIX

1. **Coffin v. Bd. of Election Comrs. (1983) 97 Mich. 188**
2. **Wattles v. Upjohn (1920) 211 Mich. 514**

97 Mich. 188
Supreme Court of Michigan.

COFFIN et al.
v.
BOARD OF ELECTION COM'RS OF CITY OF DETROIT.
KENNEDY et al.
v.
PINGREE et al.

Oct. 24, 1893.

Synopsis
Applications for mandamus on the relation of Mary Stuart Coffin and Mary E. Burnett against the board of election commissioners of the city of Detroit, and on the relation of Edward H. Kennedy and Henry S. Patton against Hazen S. Pingree, Charles R. Foster, and the common council of the city of Detroit. Application denied in first case; granted in second case.

Attorneys and Law Firms

****567 *189** John Atkinson, Henry A. Haigh, John B. Corliss, and Thomas T. Leete, Jr., for petitioners. A. A. Ellis, Atty. Gen., Edwin F. Conely, and James H. Pound, for respondents.

Opinion

McGRATH, J.

These proceedings are instituted to test the validity of Act No. 138 of the Laws of 1893, which is as follows: "Section 1. The people of the state of Michigan enact that in all school, village and city elections hereafter held in this state, women who are able to read the constitution of the state of Michigan, printed in the English language, shall be allowed to vote for all school, village and city officers, and on all questions pertaining to school, village and city regulations on the same terms and conditions prescribed by law for male citizens. Before any woman shall be registered as a voter the board of registration shall require her to read, and she shall read, in the presence of said board, at least one section of the constitution of this state in the English language. Sec. 2. All laws of this state prescribing the qualifications of voters at school, village and city elections therein, shall apply to women, and women who are able to read the constitution of Michigan, as above provided, shall enjoy all the rights and privileges and immunities and be subject to all the penalties prescribed for voters at such elections. Sec. 3. Women who are entitled to vote under the preceding sections of this act shall be subject to all laws relating to the registration of voters and be liable to all penalties attached to the violation of such laws, and their names shall be received and registered by the various boards of registration at the time and in the manner required by law for other voters."

The general rule is that the source of all authority to vote at popular elections is the constitution; that the electorate is constituted by the fundamental law; and that the qualifications of electors must be uniform throughout the state. Mr. Madison, in the Federalist, No. 52, says: ***190** "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government." In Attorney General v. Detroit Common Council, 58 Mich. 213, 216, 24 N. W. Rep. 887, Mr. Justice Campbell says: "As the right of voting is the same everywhere, it is obvious that the conditions regulating the manner of exercising it must be the same in substance everywhere. * * * It cannot be lawful to create substantial or serious differences in the fundamental rights of citizens in different localities, in the exercise of their voting franchises." In Cooley's Constitutional Limitations (page 599) it is said: "Wherever the constitution has prescribed the qualifications of electors they cannot be changed or added to by the legislature, or otherwise than by an amendment of the constitution." In McCafferty v. Guyer, 59 Pa. St. 109, Strong, J., says: "It has always been understood that the legislature has no power to confer the elective franchise upon

other classes than those to whom it is given by the constitution, for the description of those entitled is regarded as excluding all others." Section 1 of article 7 of the constitution provides who shall be electors and entitled to vote, and is, according to its terms, applicable "in all elections." To empower the legislature to confer the elective franchise upon classes of persons other than those named, some other provision must be pointed out which confers that authority in express terms or by necessary implication. The only provisions to which we are cited are sections 13 and 14 of article 15, which are as follows: "Sec. 13. The legislature shall provide for the incorporation and organization of cities and villages. Sec. 14. Judicial officers of cities and villages shall ***191** be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." In support of the act in question, it is contended that the sections last quoted empower the legislature to provide qualifications for voters in village and city elections, and Belles v. Burr, 76 Mich. 1, 43 N. W. Rep. 24; Wheeler v. Brady, 15 Kan. 26; State v. Cones, 15 Neb. 444, 19 N. W. Rep. 682; Opinion of the Justices, 115 Mass. 602; Plummer v. Yost, (Ill. Sup.) 33 N. E. Rep. 191,–are relied upon to support this contention. These cases involved the validity of acts conferring upon females the right to vote for school district officers, under constitutions which, like our own, name no school district officer, do not prescribe or suggest ****568** how such officers shall be chosen, but in express terms relegate to the legislature the duty of providing for and establishing a system of primary schools. In Belles v. Burr, Mr. Justice Champlin reviewed at length the legislation in respect to the qualifications of voters at school district meetings, under the constitution of 1835, and says: "Viewing the question historically, it is apparent that for fifty years it has never been considered that the qualifications of voters at school district meetings must be identical with those prescribed in the constitution as qualifications of electors entitled to vote under that instrument. The authority granted by the constitution to the legislature to establish a common or primary school system carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school districts, to define their powers and duties, their term of office, and how and by whom they should be chosen. School districts are regarded as municipal corporations. *** * *** As such they preceded the constitution, and were recognized by that instrument. But no officer of the school district is mentioned or recognized by that instrument. The reason is that the whole primary school system was confided to the legislature, and it cannot be said that the officers of school districts, chosen pursuant to the system adopted by the legislature, are constitutional officers. The constitution provided for no municipal subdivisions smaller than towns, ***192** except cities and villages, and it authorized the legislature to incorporate these. While it must be conceded that no person can vote for the election of any officer mentioned in the constitution unless he possesses the qualifications of an elector prescribed by the instrument, it does not follow that none but such electors can vote for officers which the legislature has the right to provide for, to carry out the educational purpose declared in that instrument." Mr. Justice Campbell, in a dissenting opinion, insisted that the question was not whether relator was entitled to vote at a school meeting; that a school meeting under the control of school authorities was entirely separate and distinct from a popular election; that the clause of the act then under consideration must be construed as extending the additional qualifications to voting at school meetings; that district school government in cities had been adjusted to city conditions; that the powers exercised by city school boards were analogous to those of township inspectors, although more extensive; that these city boards had been made by the constitution the correlative bodies to the township boards, and that school inspectors were recognized constitutional officers. Mr. Justice Morse recognizes the point upon which the court divided when he says: "I cannot find in the present case that the trustees of the union school district of Flint are made school inspectors in the sense that they are named in the constitution. If they were, I should hold that Mrs. Belles was not entitled to vote for them." Mr. Justice Campbell then proceeds to discuss, not the question as to whether the legislature has the power to enlarge or restrict the qualifications of voters at district school meetings, but whether that power exists as to popular elections for officers of cities and villages, the existence of whom are within the contemplation of the constitution. He says: "The power of local administration and regulation which may be allowed to cities and counties is vested in these ***193** corporations as such, and it cannot authorize the legislature to change the right of suffrage. *** * *** Cities have elected judges and justices who cannot be in office without election, and who perform functions precisely like those elsewhere. The city is represented on the board of supervisors, who are, except in Wayne county, the same everywhere. The city ward is the constitutional place of election. To import into the constitution power to enlarge suffrage for one officer must reach all officers. When an election for any local officer is required by law, the constitution declares who shall be qualified to act as electors." The majority in that case held that the constitution of 1835, as well as that of 1850, had in terms authorized the legislature to construct a primary school system, and that for years antedating the present constitution the legislature had construed a similar provision as conferring the power to determine the qualifications of voters for district school officers.

The legislature had for many years prior to the adoption of the present constitution exercised the power of providing for the incorporation of cities and villages, and, in the exercise of that power, had in each instance determined what officers should be elected, and what appointed, and the time and manner of both election and appointment. The question of municipal government has long exercised thoughtful minds, and the propriety of an educational qualification or a property qualification and of female suffrage have been much discussed; yet this is the first instance in which the legislature has attempted to extend the right of suffrage to persons other than those named in the constitution. Many of the charters granted for the incorporation of cities and villages contain no reference whatever to the qualifications of voters. The power to provide for the incorporation of cities is not unlike that given for the organization of counties, and ***194** the authority to direct the time and manner in which judicial officers shall be elected and the other officers elected or appointed does not involve the power to determine who shall constitute the electorate. The word "manner," it is true, is one of large signification, but it is clear that it cannot exceed the subject it belongs to. It relates to the word "elected." The constitution had already provided for electors, and, when it provides that an officer shall be ****569** elected, it certainly contemplates an election by the electorate which it has constituted. No other election is known to the constitution, and, when it provides that the legislature may direct the manner in which an officer shall be elected, it simply empowers the legislature to provide the details for the holding of such election. The machinery of government differs in its details in cities, villages, and townships, and there must necessarily be differences in methods and officers to administer the election laws. In People v. English, (Ill. Sup.) 29 N. E. Rep. 678, relator claimed the right to vote for a county superintendent of schools. The constitution of that state provided that "there may be a county superintendent of schools in each county, whose qualifications, powers, duties, compensation, term of office and time and manner of election shall be prescribed by law." The court says: "The constitution having made provision for such officer and for his 'election,' and having prescribed in another article and section the qualifications essential to entitle a person to vote at 'any election,' it must be presumed that it was and is the true intent and meaning of that instrument that no person should have the right to vote for such officer who does not possess such qualifications. *** * *** The word 'manner' is usually defined as meaning way of performing or exercising, method, custom, habitual practice, etc. It indicates merely that the legislature may provide by law the usual, ordinary, or necessary details required for the holding of an election." In the case of People v. Hurlbut, 24 Mich. 44, which involved the power of the legislature to appoint the members of certain boards in the city of Detroit, this very provision (section 14, art. 15) of the constitution was under consideration, and in very exhaustive opinions by Justices Christiancy, Campbell, and Cooley, was given a construction which is opposed to that contended for in support of the act in question here. Mr. Justice Christiancy there says: "In respect to the election the inference is very strong and satisfactory that it was intended to be only an election by the electors of the locality. This accords with the meaning of the term as generally used in the constitution, in reference not only to the state at large, but in reference to the local organization of counties, towns, and districts; and, cities and villages being local organizations for like governmental purposes, it is difficult, if not impossible, to resist the conclusion that, when this section [section 14, art. 15] of the constitution declares that 'judicial officers of the cities and villages shall be elected,' an election by the electors of such localities was intended, as this was precisely the principle adopted by the constitution in reference to all other judicial officers, and there is no reasonable ground for saying that the election of other officers mentioned in the immediate context was to be of a different character. And it may be said with certainty that, wherever in the constitution the election of an officer is provided for, it means an election by the electors of the state, if it be a state officer, or of the district or political division for which he is to be elected, unless the constitution itself, as to any particular election, provides otherwise." Mr. Justice Cooley, in the same case, says: "That instrument provides [article 15, § 14] that 'judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct.' It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the constitution, and it may well be asked what there is to localize the elections any more than the appointments. ***196** The answer must be that in examining the whole instrument a general intent is found pervading it which clearly indicates that these elections are to be by local voters, and not by the legislature or by the people of a larger territory than that immediately concerned. I think, also, that, when the constitution is examined in the light of previous and contemporaneous history, the general intent requires, in language equally clear and imperative, that the choice of the other corporate officers shall be made in some form, either directly or indirectly, by the corporators themselves." It follows that the act in question is invalid; that the mandamus in the first-named case must be denied, and the writ of prohibition granted in the case last named. The other justices concurred.

MONTGOMERY, J. I concur in the conclusion reached by Mr. Justice McGRATH that the provisions of section 14, art. 15, by necessary implication, require that officers who may be made elective under the provisions of this section must be chosen by electors having the qualifications prescribed in section 1, art. 7, of the constitution. The history of the proceedings of the convention of 1850 leads me irresistibly to the conclusion that such was the intention of the members of that convention. As first reported by the committee on the organization of the government of cities and villages, this section read as follows: "All judicial officers of cities and villages shall be elected at such time and in such manner as the legislature may direct; all other officers of such cities and villages shall be elected by the electors thereof or appointed by such authorities thereof as the legislature shall designate for that purpose." See Convention Debates 1850, p. 326. The article, in this form, was ordered engrossed for a third reading. Id. 596. The journal of the convention shows that on the 31st day of July the article on cities and villages, which included the sections above quoted, was read a third time, passed, and, ****570** under the rule, referred to ***197** the committee on arrangement and phraseology. Journal of Convention, 312. When reported back by the committee on phraseology, the section read as follows: "Officers of cities and villages shall be elected at such times and in such manner as the legislature may direct." The section was thereupon, on motion of Mr. McClelland, amended by inserting the word "judicial" at the commencement of the section, and the words "all other officers shall be elected or appointed" after "elected," in the second line of the section. It is very clear that the purpose of the amendment was to correct the omission of the provision permitting the appointment of officers to be provided for, and it is very significant that, if the committee intended by the change in phraseology to omit the provision that elective officers should be chosen by the electors of municipalities, no member of the convention discovered that such was the effect of their report. The inference is plain that the convention deemed the provisions of section 1, art. 7, defining the qualifications of electors "in all elections," applicable to elections which might be held under this section. That the proceedings of the convention may be examined for the purpose of ascertaining the probable intention of the framers of the constitution is well settled. See People v. Blodgett, 13 Mich. 127.

All Citations

97 Mich. 188, 56 N.W. 567, 21 L.R.A. 662

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APPENDIX 2

211 Mich. 514
Supreme Court of Michigan.

WATTLES, Pros. Atty.,
v.
UPJOHN et al.

No. 100.
|
Sept. 30, 1920.

Synopsis
Error to Circuit Court, Kalamazoo County; Jesse H. Root, Judge.

Information in the nature of quo warranto by Stephen H. Wattles, Prosecuting Attorney, on the relation of William Johnson, against William E. Upjohn and others. Judgment of ouster, and defendants bring error. Affirmed.

Argued before MOORE, C. J., and STEERE, BROOKE, FELLOWS, STONE, CLARK, and BIRD, JJ.

Attorneys and Law Firms

****335** ***515** Marvin J. Schaberg, of Kalamazoo, for appellants.

Mason & Sharpe, of Kalamazoo, for appellee.

Thomas R. White and Albert B. Maris, both of Philadelphia, Pa., amici curiae.

Opinion

STEERE, J.

The primary purpose of this proceeding, as emphasized in the arguments and briefs of counsel, is to test the validity of ****336** the voting system for electing members of the governing body of the city of Kalamazoo under a recently adopted charter. The motives which are somewhat discussed we regard as wholly immaterial. The controversy was brought before the circuit court of Kalamazoo county by an information in the nature of quo warranto, filed by the prosecuting attorney on the relation of one Johnson, an alderman of the city under its preceding charter, ***516** against the mayor and commissioners elected pursuant to the provisions of the present charter to test their right to such offices. It is also contended that the proceeding resultantly involves the validity of the entire present charter of the city. Counsel for plaintiff concede defendants were 'regularly elected as commissioners in so far as their election could be regular under this charter.'

From 1838 to 1883 Kalamazoo was incorporated as a village. In the latter years it was incorporated as a city. From then until 1918 it continued as a city incorporated under special acts of the Legislature. In February, 1918, the electors adopted a new charter under the so-called home rule provisions of the Constitution and supplemental legislation. Details of proceedings to that end need not be reviewed, as it is conceded all prescribed steps leading up to the adoption of the present charter were regularly taken, and that in so far as a charter could be legally adopted with the claimed invalid provisions in it, every requirement has been fully complied with.

At the provided April election which followed adoption of the present charter by electors of the city, defendants were elected city commissioners, superseding the board of aldermen and mayor, who up to that time constituted the governing body of the city

under its old charter. Relator Johnson was then a member of the board of aldermen, and deposed before the term for which he was elected expired by the newly elected city commissioners when they qualified and assumed their duties under the new charter.

While several other more or less technical questions were raised in the pleadings, counsel for appellants state the two questions to be decided are:
First. Is the provision of the new charter, which provides for the election of commissioners by the proportional representation system contained therein, unconstitutional?

***517** Second. If so, does that render the entire charter unconstitutional?

Plaintiff's contention before the circuit court and here is that the system of electing commissioners provided in the charter is unconstitutional because——
'(a) The elector is deprived of the right to vote for every office to be filled.

'(b) The elector is not protected in his right to voting power equal to that of every other elector.'

The provisions of the Constitution which it is claimed this voting system contravenes are section 1 of article 3, which under the heading 'Elective Franchise' provides, so far as applicable here:

> 'In all elections every * * * (defining at length qualified voters) shall be an elector and entitled to vote.'

And the provision in section 25, article 8, under the heading 'Cities and Villages' which provides that——
'No city or village shall have power to abridge the right of elective franchise, to loan its credit,' etc.

The charter adopts the general laws of the state relative to the registration of voters, nominations and elections, 'except as herein otherwise provided.'

Section 35 recognizes as qualified electors all inhabitants of the city 'having the qualifications of electors under the Constitution and general laws of the state,' and section 41, on the 'Conduct of Elections,' introduces the system of voting in controversy as follows:

> '(a) The members of the city commission shall be elected by the proportional representation system. The form of the ballots, the method of conducting elections and the rules for counting the ballots shall be governed by ordinance to be enacted by the city commission, which ordinance shall contain all the provisions relating thereto hereinafter prescribed in the schedule to this charter.'

Whether any ordinance following the 'schedule' was ***518** ever enacted does not appear, but section 181 returns to the subject, and provides that, 'The first election of officers under this schedule shall be held on the first Monday in April, 1918,' specifies officers to be elected, etc., and section 182 prescribes rules for the first and succeeding elections under 'this schedule,' directs how ballots shall be printed with names of candidates 'rotated' and directions to voters at top in part as follows:

> 'Put the figure 1 opposite the name of your first choice, do so by putting the figure 2 opposite the name of your second choice, the figure 3 opposite the name of your third choice, and so on. Express thus as many choices as you please.'

It may perhaps be assumed, in the absence of further mention, that the schedule foreshadowed in previous sections materializes in section 183, which under the heading 'Rules for Counting Ballots,' enlarges upon the subject in a series of directory and explanatory paragraphs from (a) to (t) inclusive, which may be said to furnish the groundwork for this litigation. The commissioners who prepared this charter for submission to the electors state in their explanatory foreword 'to the voters of Kalamazoo' ****337** that it had been the aim and policy of the commission 'to write this charter so that the fundamental laws of the city will be brief, simple and understandable to all. In carrying out this policy all detail and immaterial matter has been excluded.'

Whether that portion of the fundamental law of the city found in section 183 is simple and understandable to all, and whether if applied as it should be understood the result is constitutional, are debated issues of importance, and to approximate an understanding of the controversy it seems advisable, inasmuch as 'all detail and immaterial matter has been excluded,' to quote the section in full, as follows:
***519** 'Sec. 183. Ballots cast for the election of members of the city commission shall be counted and the results determined by the central election board according to the following rules:

'(a) On all ballots a cross shall be considered equivalent to the figure 1. So far as may be consistent with the general election laws, every ballot from which the first choice of the voter can be clearly ascertained shall be considered valid.

'(b) The ballots shall be first sorted and counted at the several voting precincts according to the first choices of the voters. At each voting precinct the ballots cast for each candidate as first choice shall be put up in a separate package which shall be properly marked on the outside to show the number of ballots therein and the name of the candidate for whom they were cast. The ballots declared invalid by the precinct officials shall also be put up in a separate package, properly marked on the outside. All the packages of the precinct, together with a record of the precinct count, shall be forwarded to the central election board as directed by it and the counting of the ballots shall proceed under its direction.

'(c) First choice votes for each candidate shall be added and tabulated. This completes the first count.

'(d) The whole number of valid ballots shall then be divided by a number greater by one than the number of seats to be filled. The next whole number larger than the resulting quotient is the quota of constituency that suffices to elect a member.

'(e) All candidates the number of whose votes on the first count is equal to or greater than the quota shall then be declared elected.

'(f) All votes obtained by any candidate in excess of the quota shall be termed his surplus.

'(g) The surpluses shall be transferred, the largest surplus first, then the next largest, and so on, according to the following rules:

'(h) Ballots capable of transfer up to the number of votes in the surplus shall be successively transferred to the continuing candidates marked on them as next choice. The particular ballots to be taken for transfer as the surplus of a candidate shall be obtained by taking as nearly an equal number of ballots as possible from the ballots capable of transfer that ***520** have been cast for him in each of the different precincts. All such surplus ballots shall be taken as they happen to come without selection.

‘(i) ‘Ballots capable of transfer’ means ballots from which the next choice of the voter for some continuing candidate can be clearly ascertained. A ‘continuing candidate’ is a candidate as yet neither elected nor defeated. ‘Successively’ means one after another separately so far as the work of one electoral official or clerk is concerned; but nothing in this section is meant to prevent the transfer of ballots by two or more officials or clerks simultaneously, provided only that precautions are taken to avoid transferring any ballot to a candidate who has already received the quota.

‘(j) The transfer of each ballot shall be tallied by the tally clerk assigned to the candidate to whom the ballot is being transferred.

‘(k) After the transfer of all surpluses, the votes standing to the credit of each candidate shall be added up and tabulated as the second count.

‘(l) After the tabulation of the second count (or after that of the first count if no candidate received a surplus on the first) every candidate who has no votes to his credit shall be declared defeated. Thereupon the candidate lowest on the poll as it then stands shall be declared defeated, and all of his ballots capable of transfer shall be transferred successively to continuing candidates, each ballot being transferred to the credit of that continuing candidate next preferred by the voter. After the transfer of these ballots a fresh tabulation of results shall be made. In this manner candidates shall be successively declared defeated, and their ballots capable of transfer, transferred to continuing candidates, and fresh tabulations of results made. After any tabulation the candidate next to be declared defeated shall be the one then lowest on the poll.

‘(m) If, after the second or any later count (or after the first count if no candidate receives a surplus on the first) the total of the votes, of two or more candidates lowest on the poll is less than the vote of the next higher candidate, those lowest candidates may be declared defeated simultaneously, and all their ballots capable of transfer, transferred successively to ***521** continuing candidates, each ballot being transferred to the credit of that continuing candidate next preferred by the voter. In this operation the ballots of the lowest candidate shall be transferred first, then those of the candidate next higher, and so on. No fresh tabulation of results shall be made until the ballots of all the candidates thus simultaneously defeated have been transferred.

‘(n) Whenever in the transfer of a surplus or of ballots of a defeated candidate the votes of any candidate become equal to the quota, he shall immediately be declared elected and no further transfer to him shall be made.

‘(o) When candidates to the number of the seats to be filled have received a quota and have therefore been declared elected, all other candidates shall be declared defeated and the election shall be at an end; and when the number of continuing candidates is reduced to the number of seats to be filled, those candidates shall be declared elected whether they have received the full quota or not and the election shall be at end.

‘(p) If at any count two or more candidates ****338** at the bottom of the poll have the same number of votes, that candidate shall be declared defeated first, who was lowest at the next preceding count at which the number of their votes was different. Should it happen that the number is the same on all counts, lots shall be drawn to decide which candidate shall next be declared defeated.

‘(q) In the transfer of the ballots of any candidate who has received ballots by transfer, those ballots shall first be transferred upon which he was first choice, and the remaining ballots shall be transferred in the order of the counts by which they were received by him.

‘(r) On each tabulation a record shall be kept under the designation ‘nontransferable ballots' of those ballots which have not been used in the election of any candidate and which are not capable of transfer.

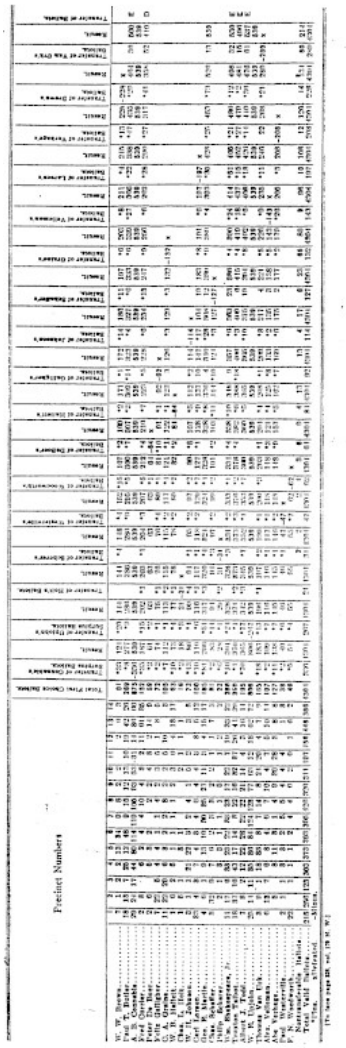
‘(s) Every ballot that is transferred from one candidate to another shall be stamped or marked so that its entire course from candidate to candidate throughout the counting can be conveniently traced. The ballots shall be preserved by the central election ***522** board until the end of the term for which the members of the city commission are being elected. In case a recount of the ballots is made, every ballot shall be made to take in the recount the same course that it took in the original count unless there is

discovered a mistake that requires its taking a different course, in which case the mistake shall be corrected and also any further changes made in the course taken by ballots that may be required as a result of the correction. These principles shall apply to the correction of any error that may be discovered during the original count.

‘(t) The candidates or their duly authorized representatives, and, so far as may be consistent with good order and convenience in the counting and transferring of the ballots, representatives of the press and the public shall be afforded every facility for being present and witnessing these operations.’

It is said, and conceded, that these provisions outline correctly in its ‘essential principles,’ and adopt for the city what is called the ‘Hare System’ of proportional and preferential voting. At the election in question, as we understand the situation, there were 23 candidates nominated for the 7 offices of city commissioner to be filled under the new charter. Of the over 9,000 registered voters within the city only 4,461 took the trouble to visit the polls and vote; 157 ballots were declared invalid, leaving 4,304 to be counted and manipulated as prescribed in the charter. The quota found necessary to elect under that method was determined to be 539. Two of the 23 candidates had more than their full quota on first choice ballots. Then distribution of surpluses and recounts as to the rest began. From that point, for the sake of brevity and accuracy, the narrative of what further was done by the election board in ‘counting ballots' pursuant to the provisions of section 183 will be found continued in Exhibit A, herewith quoted, which is said to delineate plainly and concisely the count, tabulation, and result of the vote at that election. [See accompanying insert.]

Exhibit A



***524** Whether this system proved to be 'simple and understandable to all' the electors who voted in the city of Kalamazoo on that occasion is not disclosed, but over 30 years ago it was named in Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332, as one of four different classes of schemes advocated by those proposing to effect what they claimed would be a reform in existing modes of election to secure for the minority a proportionate representation, as follows:

> '(4) The 'Hare' plan, or 'single vote.' This method is too intricate and tedious ever to be adopted for popular elections by the people. It requires successive counts and redistribution of the votes until an election is reached.'

It does appear, however, that since 1859, when Thomas Hare first published a book in England explaining his system, three cities in the United States have adopted it, as 'Leaflet No. 5' of the 'American P. R. League,' made a part of appellant's brief, informs us. Of the progress made by the Hare system of voting in this republic it advises:

> 'In America it is used for the election of the council or commission in three cities, Ashtabula, Ohio (since 1915), Boulder, Colo. (since 1917), and Kalamazoo, Mich. (since 1918). It is also used for the election

> of the representative bodies of many private organizations including those of several great trade unions in England and Canada and that of the National Women's Trade Union League of America.'

This leaflet illustrates at length, and elaborately explains the system as claimed, states it is a method which results in 'no division of voters,' but instead '*condensation* by voluntary unanimous quotas,' and asserts, partly in italics, that the Hare system 'makes it possible to adopt the 'city manager plan' of government *without sacrificing democracy*.' If in this republic adoption of the city manager plan without resort to the Hare system actually sacrifices democracy, ***525** numerous cities throughout the United States have already made the sacrifice. In that connection it may be noted that the immediate question for determination is limited to the validity of the Hare system of voting, which is but one of numerous proposed methods for practical application of that theory for reform in representative government known as 'proportional representation.' That conception, underlying a variety of proposed systems to materialize it, is based on representation in governmental affairs in proportion to numerical strength of parties or constituencies under some method of grouping the electors according to parties, interests, ideas, or, perhaps, other elements of affiliation, so that such grouped minorities may have representation in legislative and other official deliberative bodies as well as ****339** majorities. Though fundamental to the Hare system of voting, and in that aspect indirectly material here, it does not follow, and is not conceded by many advocates of the principle of proportional representation, that the Hare system solves the problem of its practical application. The theory of proportional representation as an instrumentality for political reforms is not of recent origin. In 1780, almost contemporaneous with the birth of this republic, the Duke of Richmond introduced a bill in the English Parliament, which contained a clause providing for minority representation, and, as noted in the Maynard Case, in 1884, Mr. Gilpin published a pamphlet in Philadelphia, advocating its adoption according to a plan he had originated. Since then the attention of men of inquiring minds in the field of political science has been attracted to the subject from time to time by earnest advocates who have espoused it and devised systems claimed practical for its application, while others of apparently equal sincerity and ability have deprecated the conception as unsound in theory, impractical, and visionary. Certain ***526** of its supporters have been energetic and prolific publicists. A list of books and references to periodicals relating to proportional representation published by the Library of Congress shows abundant reading matter in more than one language for those seeking information upon the subject, which has been much augmented by periodicals, pamphlets, leaflets, and other publications, in a recent renaissance of propaganda according to latest approved methods by its advocates here and abroad. It has apparently been more favorably received, or at least made greater progress, in countries free from constitutional limitations and with a newer or different form of government than that of the United States. Commenting on that fact, The Survey, 'A Journal of Social Exploration,' under the interrogatory heading, 'Are We Really Too Stupid?' says:

> 'Proportional representation may be too difficult to be understood in America, but the newer democracies in Europe 'will use no other.' In Poland, Premier Paderewski and the members of the Constitutional Assembly have just been elected by that method. It was the first election in 140 years without foreign rule, and for the Jews, who constitute an appreciable portion of the urban population, practically the first participation in politics.'

The Proportional Representation Review, a periodical published by the American P. R. League, tells, in the April, 1918, issue of its adoption by Russia, saying in part:

> 'The revolution which brought about the democratization of Russia introduced the principle of proportional representation into all elections in Russia. * * * There were from a dozen to a score of tickets nominated in various districts of the elections to local representative bodies and to the constitutonal convention, and most of the political factions, except those with very small following, received representation.'

***527** Adoption of proportional representation by those and other war-disturbed countries but recently liberated, for self-determination and adoption of a government by and for their people, perhaps throws little light thus far upon the subject, in theory or practice, beyond showing that it does not in practice always operate for the healing of nations as basically and promptly as many of its propagandists have prophesied, and that those countries least experienced in systems of government with the sovereign power vested in the people adopt that political policy with greater avidity than older nations of long experience which have made that form of government fairly successful and stable. In that connection there is ground for saying that the slow progress of this attractive theory for political reform here, and elsewhere in older and more stabilized representative governments, can be attributed in part, at least, to misgivings, even by many recognizing the merits of the theory, as to a feasible method for its practical application which will correctly, and true to the theory, work out the beneficent results indicated.

In an able article advocating proportional representation, contributed to The Nineteenth Century by Earl Grey in 1884, at a time when a proposition to embody it in a reform bill of the English Parliament was agitated, he expressed an 'honest desire to arrive at the nearest possible approach to the realization of the radical formula 'to every vote an equal value,'' and argued that objections to the doctrine 'depended entirely upon the alleged complexity of its methods,' but contended they could be overcome through a system of voting devised by the 'joint labors of Mr. Seebohm and Mr. Parker Smith.' Upon that phase of the inquiry the searcher after truth in the abundance of controversial literature upon the subject will find many advocates of proportional representation confusingly ***528** inharmonious. Many of their books, pamphlets, and magazine articles are largely devoted to some scheme or system, bearing the name of the author or its inventor, at marked variance with and pointing out the inadequacy of other systems by other inventors or authors equally earnest in urging theirs as the only logically correct and true system.

Recognizing this situation, the Proportional Representation Review advises its readers that the American P. R. League, under whose auspices Leaflet No. 5 was issued, 'is not committed exclusively to any system of proportional representation,' though it regards the Hare system best for most purposes, and will be glad to furnish detailed provisions for carrying out any other system which it regards favorably. A bulletin on proportional representation prepared by R. Curtis under auspices of the political science department ****340** of Wisconsin University in classifying the various plans promulgated for voting to materialize that theory groups them into seven general classes under separate headings, instead of four as in the Maynard Case, as follows: 'Limited Vote,' 'Cumulative Vote,' 'Proxy System,' 'Single Untransferable Vote System,' 'The Quota,' 'List System,' and 'Preferential Systems.' Under the last named, with a subheading, 'single transferable vote,' appears, 'Hare System (Andrae, Courtney, Lubbock, Spence, etc.).' The description of that subclass concludes with the information that, 'The d'Hordt quota is not applicable to 'single transferable vote' systems,' and consideration of the 'preferential systems' then passes to that subclass called 'Graduated Systems (preponderance of choice).'

To this but scant suggestion of the field open for study of comparative systems it may be added that the inquirer will often find arguments upon the merits of the various systems of voting devised to effectuate it and arguments upon the merits of proportional representation ***529** itself in the abstract quite confusingly, but perhaps unavoidably, intermingled. Analytic comparison of these various systems is beyond the question, but as one further differentiation we note the caution by a writer in that line not to confuse the 'Hare System' with the 'Ware System.' The latter was devised and promulgated by Prof. Ware of Harvard University, who, from his major premises, reasons forcibly that if proportional representation had then obtained in the United States slavery would have been abolished without a civil war, against the contention of John Bright that had proportional representation been the accepted policy and settled practice in the states it would have been impossible to abolish slavery. Bright also broadly contended apparently even against its adoption in England that it involved 'departure from the old lines of the Constitution,' and was an 'unconstitutional innovation.' The question for determination here is narrowed to whether the Hare system is such in this land of recognized constitutional limitations.

But little relevant authority is to be found on the constitutionality of that system of exercising the franchise in this country. The determination is concededly contingent on the constitutional provisions of the several states where the question arises. The people of Oregon disposed of the constitutional question in 1908 by an amendment to their Constitution authorizing proportional representation in the discretion of the Legislature. In McCrary on Elections (4th Ed.) § 212, the author notes that Illinois has provided in its Constitution for minority representation in its state Legislature to be accomplished by a system of

'cumulative voting,' while in New York and Ohio attempts were made to provide by statute for minority representation, and the constitutionality of the method ***530** provided was seriously questioned in the former, and altogether denied in the latter. Following further discussion of the subject the section ends with the reflection:

> 'It would seem, therefore, that minority representation and cumulative voting can be provided for only by constitutional provision.'

In a general footnote under this section on the subject of minority representation there is enumerated the various schemes for voting to accomplish this purpose, amongst which appears, 'Preferential voting, a plan devised by Mr. Thomas Hare, and advocated by him in a book upon the subject published in 1859,' the theory of which is omitted, as in the Maynard Case, 'because too complicated and intricate to be useful in popular elections.' The author attributes the scant progress made in securing minority representation in state Legislatures 'partly to inherent deficiencies and objections, which are found in every one of the schemes outlined, and partly to the irregularities and impropriety of the proceedings taken to incorporate the systems into the state election laws where their introduction would be repugnant to the existing Constitution.

The provision of section 1, art. 3, of our present Constitution that 'In all elections (a qualified voter) shall be an elector and entitled to vote,' retains the language of section 1, art. 7, of the preceding Constitution of 1850. When under section 21, art. 8, of our present Constitution, authority was conferred upon the electors of cities and villages to frame, adopt and amend their charters 'subject to the Constitution and general laws of this state,' it is significant that precaution was taken in that connection to withhold from them the power 'to abridge the right of elective franchise.'

Our present Constitution of 1908 is for the most ***531** part, as sometimes called, a revision of the former Constitution of 1850, which it follows closely in letter and spirit, the chief alterations relating to the manner of amending the Constitution, adapting it to certain changed conditions general throughout the state, and giving increased power to political subdivisions in matters of strictly local concern. Six of the seven new sections in article 8 relating to cities and villages authorize and direct legislation by a general law conferring upon them autonomy as fully as seemed consistent with the established fundamental principles of state government, the seventh and last briefly stating a few limitations beyond which they could not go; the first named being that they should not have power to abridge the elective franchise, which can fairly be construed to mean in the light of established conditions and laws that the right of each elector to exercise the franchise and the relative value of his vote should be preserved as it existed under the Constitution ****341** and general laws of the state. Subject to this the officers to be elected, subjects to be voted upon, time, place, manner of nominations, conduct of elections, etc., are in the main left open for charter provision.

In State v. Constantine, 42 Ohio St. 437, 51 Am. Rep. 833, under a constitutional provision prescribing the qualifications of an elector, providing elections should be by ballot, and that each elector 'shall be entitled to vote at all elections,' it was said the fair implication of the language, made certain in the light of state policy and existing circumstances when the Constitution was adopted, entitled each elector of a district to vote for a candidate for each office to be filled.

In Maynard v. Board, supra, touching upon the provisions of our first Constitution of 1835, the policy, practice, and legislation as to elections in this state thereafter, it was said of the provision yet retained in our Constitution:

***532** 'These laws were in force at the time of the adoption of the present Constitution, and have been continued in force ever since. They afford a practical construction of the right of every elector to vote for every officer to be elected, and that his vote shall be of equal effect with, and no more than, the vote of every other elector for every officer to be elected. * * *

'Giving to the language of the Constitution its ordinary signification, it declares the principle that each elector is entitled to express his choice for representative, as well as all other officers, which is by his vote, and the manner of expressing such choice is by ballot. When he has expressed his preference in this manner, he has exhausted his privilege; and it is not in the power of

the Legislature to give to his preference or choice, without conflicting with these provisions of the Constitution, more than a single expression of opinion or choice. * * *

'If the people of this state desire to provide for some different means to secure minority representation than that which is in a measure secured by the single district system under the present Constitution, they must do so through an amendment to that instrument, by which a proposition so vitally interesting to them may be passed upon by the popular vote.'

The Constitution of Minnesota provides elections shall be by ballot, and that qualified electors 'shall be entitled to vote at such elections * * * for all officers that now are or hereafter may be elective by the people,' which is in substance the meaning of the language of our Constitution as construed in the Maynard Case. In Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, L. R. A. 1916B, 931, Ann. Cas. 1917C, 474, it was held that a preferential system of voting contained in the city charter of Duluth wherein first, second, and additional choice votes are authorized, to be counted in a provided contingently consecutive manner, was unconstitutional. The court there cites and quotes liberally from the Maynard Case, saying of the quoted constitutional provision:

> ***533** 'It was never meant that the ballot of one elector, cast for one candidate, could be of greater or less effect than the ballot of another elector cast for another candidate. It was to be of the same effect. * * * The preferential system directly diminishes the right of an elector to give an effective vote for the candidate of his choice. If he votes for him once, his power to help him is exhausted. If he votes for other candidates he may harm his choice, but cannot help him. * * * The mathematical possibilities of the application of the system to different situations are infinite.'

Counsel for appellant urge that the objectionable features pointed out by this court in the Maynard Case, found in the 'cumulative' system then under consideration, are eliminated in the Hare system, of which the comments there made were not essential to a determination of the case, and that Brown v. Smallwood, supra, is not in point, since, under the Hare system, it is impossible for a voter's second choice to be used to defeat his first choice, as may occur under 'the so-called 'Preferential System' which has no similarity to the Hare system except so far as the voter expresses his preference.'

It may be conceded that what was directly said of the Hare system in the Maynard Case was in the nature of dictum, and even that those classifying it as a preferential system are technically inaccurate, but a similarity of the Hare system to the preferential system before the Minnesota court seems apparent in the particular that to the finite mind 'the mathematical possibilities of the application of the system to different situations are infinite,' and back of all those contentions over names, systems, and methods is the underlying and directly pertinent question of whether this system as scheduled in the Kalamazoo charter invades the constitutional right of every voter to vote for every officer to be elected and to have his vote so ***534** counted as to have equal value and potentiality with the vote of every other elector who votes. The clearly stated conclusions of this court in the Maynard Case when construing the language of the Constitution upon that proposition were relevant there, and to be recognized as acceptable precedent here. Under the Kalamazoo charter seven commissioners were to be elected at large. Each elector had the right to vote for seven candidates, by a vote not only 'of equal effect with, and no more than, the vote of every other elector for every officer to be elected,' but of equal potential value as to each of the seven candidates he voted for. As construed in the Maynard Case, the Constitution gave him the right to express his choice by a ballot vote for each of the ****342** seven commissioners to be elected; and, having done so, he 'exhausted his privilege.' The Hare system limits his power to express his preference 'in this manner' to but one candidate of the seven, only permitting him to express a second choice for one other, and so on by numerically dwindling and weakening choices until the elector has expressed thus 'as many choices as you (he) please.' As said in the Maynard Case, 'It is not in the power of the Legislature (nor a city adopting a charter under the Home Rule Act) to give his preference or choice, without conflicting with these provisions of the Constitution, more than a single expression of opinion or choice;' and he has the right to express that single choice as to each of the officers to be elected in

his district. While each voter can under the Hare system vote for all candidates to express sequential choices as provided, it is evident that his vote is primarily and positively effective for only one candidate.

It is true that the right of an elector to vote for all officers to be elected is limited to all officers to be voted for in or elected from his own political district, constituency or territory geographically defined by law ***535** for choosing or electing officers who serve and represent it. Under its present charter Kalamazoo city constitutes a single district or constituency, with seven commissioners elected from the city at large, for all of whom under the rule stated each elector of the city is entitled to vote; but appellants, in avoidance of that apparent infirmity in the Hare system, urge that the charter, of which the Hare system is a part, does in legal effect divide the electorate into seven districts or constituencies, 'based on common opinion instead of arbitrary geographical lines,' with a system of voting and counting by which 'every man's ballot is counted for one man who is his representative among the candidates on the legislative body,' which would be all he could do were the city divided into seven wards, and therefore it cannot be said his right of elective franchise has been abridged. Counsel very interestingly discuss the advantages of that theoretical method of districting constituencies by boundary lines of opinion, belief or policy, but, however alluring in theory, such intangible, undefined theoretical demarcation by similar thought or views is not a legal substitute for what is in law recognized to be a voting constituency or geographically defined representative district, as the right of franchise has become established under our Constitution.

While we cannot accept to the full extent urged appellee's contention that under the Hare System one elector's vote is necessarily of greater weight or counts for more candidates than that of another, the system does contain an element of the chance that it may so result. The framers of the Kalamazoo charter appear to have copied its rules for counting ballots as scheduled in section 183 practically verbatim from those set out in the January, 1917 (Third Series), number of the Proportional Representation Review. An examination of rule (h) discloses a method of transfer ***536** of surplus votes involving an element of chance by which the result can readily vary according to the shuffle, or chance position of ballots. This is recognized by the advocates of the Hare System, who call it the 'Chance Method' as distinguished from another proposed form for rule (h), called the 'Exact Method.' This subject is discussed in a July, 1917, supplement sheet of the Review, stated as 'not intended for the general reader.' The leaflet contains illustrative or hypothetical elections and developed mathematical problems by which it is claimed to be demonstrated that the element of chance is comparatively slight. An actuary, mathematically skilled in the application of the doctrine of chances to financial and other affairs, might work with confidence upon the possibilities of this system, but to the nonexpert there is force in the dictum of the Maynard Case that it appears 'too intricate and tedious to be adopted for popular elections by the people.' To the average elector the destiny of his vote is a mystery, however easy it may be for him to follow instructions in marking his ballot. In abridging the right of elective franchise as pointed out, we conclude the election method prescribed in section 183 of the charter is in contravention of our state Constitution and invalid.

In support of the claim that invalidity of the voting system appearing in the charter renders the entire charter void, the following reasons are urged:
'(a) The new charter was adopted as a whole and the provisions for a commission and the method of election of same must be construed as inseparable and mutually dependent upon each other, and as so intended by the people who adopted the charter.

'(b) The elimination of the objectionable features providing for elections does not leave a workable instrument.'

We find nothing in the charter impelling a construction that the prescribed method of election found invalid ***537** and other parts of the charter are so inseparable and interdependent as to vitiate the whole, or that the charter would have been rejected by the electorate had the rejected provisions not been included. In the main this charter is an exceedingly well worked out and carefully prepared commission form of city government charter, evidently the result of much labor and study of the authorities upon the subject and of the charters of other cities where that form of government had been adopted. For the most part it travels within beaten lines, many of which have stoodthe ****343** test of the courts. As to any experimental features the commissioners took the precaution to put an anchor to the windward by a section providing that if any section or part section of the charter proved invalid or unconstitutional it should not invalidate or impair the force and effect of any other unless it plainly appeared such other section or part was necessarily dependent upon the section or part found invalid. It would seem that the election provisions

of the charter were carefully formulated to meet such a contingency; for, entirely eliminating subdivision (a) of section 41, and sections 182 and 183, which contain all the election features questioned, a complete, practical charter, including independent, workable election provisions, yet remains. Section 5 of the charter provides for a city commission of seven members, elected for a term of two years from the city at large on a general ticket; section 31, as before noted, provides for registration of voters, nominations and elections to be held according to the general laws of the state, except as otherwise provided; section 33, a plan for nomination of candidates; section 34, the date of elections; and sections from 35 to 40, inclusive, contain appropriate provisions for a city election supplemental to the state election laws.

With the invalid election features stricken out the ***538** charter yet contains ample machinery for nomination and election of all elective city officers. As applied to the situation presented here, we think the law well settled that rejection of those provisions held invalid does not affect the rest of the charter. Attorney General v. Loomis, 141 Mich. 547, 105 N. W. 4; Battle Creek v. Barnes, 143 Mich. 400, 106 N. W. 1119; 36 Cyc. 976.

The trial court held the charter provisions relating to the Hare System of election unconstitutional, rendering the election of defendants invalid, and in a supplemental opinion concluded:

> 'The court does not hold by reason of such unconstitutional provisions that the whole charter is invalid.'

This information was filed, and summons issued on September 13, 1919. Johnson's term of office as alderman, to which he was elected under the old charter, commenced April 10, 1916, and was for two years. The new charter abolishing said office was adopted February 4, 1918. He was a candidate for the office of city commissioner under the new charter at the first election, held on the first Monday of April, 1918, under the Hare system, and declared defeated by the election board. He did not then or before interpose any objection in legal form, or otherwise so far as shown, to the new charter under which he ran, nor to the method of election, nor did he take any steps to do so thereafter until September 12, 1919, when he made application as a relator, supported by his affidavit, to the prosecuting attorney for the information filed herein. Defendants' then terms as commissioners under the new charter expired on the second Monday of November, 1919. This case was heard in the circuit court of Kalamazoo county October 29, 1919. An opinion was filed in that court January 7, 1920, and judgment of ouster entered January 17, 1920. So far as Johnson's right to the office he claims under such a state of affairs is concerned, the court might well refuse to entertain ***539** the proceeding under its discretionary power. Osterhous v. Van Duren, 168 Mich. 464, 134 N. W. 456, Ann. Cas. 1913C, 1302.

But the prosecuting attorney states in the information he filed that his action is not alone founded upon relator's right to office, but 'also as such citizen and taxpayer, and upon the right of the people of the state of Michigan to test the rights of respondents,' etc., and defendants urge with reason that an authoritative determination of the issues involving the validity of its charter is 'of the utmost public interest to the city of Kalamazoo.' Therefore, because public interest seems to require such course, the case is entertained only to pass upon those constitutional questions of public interest involved. Neither public interest, nor rules of practice, require us to pass upon the now in effect moot question of Johnson's right to the expired term of an abolished office (Stevens Practice, vol. 2, § 498; People v. Miles, 2 Mich. 349; People v. Mayworm, 5 Mich. 148), and it may he added as a matter of public interest that upon the facts disclosed in this record it is fairly evident defendants, and all city officers legally nominated and formally found elected under color of the voting system provided in the charter, who qualified and acted as such, were and are defacto officers whose official actions within the scope of the charter are valid until they are legally deposed from such positions.

As only questions of public interest are entertained and passed upon in this opinion, the conclusions of the trial court as to them are affirmed, without costs to either party.

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