

ERNESTO GARDINER, PROTESTANT AND APPELLANT, VS. GREGORIO ROMULO, PROTESTEE AND APPELLEE.*G.R. No. 8921. January 09, 1914*

Ponente: TRENT, J.

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An appeal from a judgment of the Court of First Instance in an election protest for the office of provincial governor of the Province of Tarlac. In the short opinion heretofore rendered by this court[1] the entire election held in the municipality of Camiling was annulled. It is our purpose, in this opinion to set out our reason for taking such action.

An examination of the record convinced us that the frauds and irregularities occurring in the conduct of the election in this municipality were very numerous. They may be grouped under the following general headings: (1) Irregularities in the selection of polling stations and the construction of the voting booths; (2) the disappearance of blank ballots after delivery thereof to the municipal treasurer, and the subsequent markings of the remainder by the various election boards; (3) frauds practiced by the inspectors in the preparation of the ballots of illiterate voters; (4) other irregularities and frauds in connection with the preparation and counting of the ballots; (5) intimidation and threats employed by Romulo and his partisans on the day of the election.

1. A preliminary question is raised by the appellee as to whether evidence as to the disregard of the Election Law in the selection of polling stations and the construction of the voting booths was admissible under the allegations of the motion or petition by which the protestant instituted his contest. An election contest under section 27 of the Election Law is a special summary proceeding, the object of which is to expedite the settlement of the controversy between candidates as to who received the majority of the legal ballots in an election for a specified office. In *Arnedo vs. Llorente* (18 Phil. Rep., 257) it was held that rules of procedure applicable to ordinary civil actions can only apply to election contests instituted under section 27 of the Election Law where they are not inconsistent with the provisions of that section, or to meet an exigency not provided for in the skeleton procedure there outlined. While we are of the opinion that the motion by which the contestant introduces the proceedings should be sufficiently comprehensive to apprise his adversary of the frauds or irregularities upon which he relies to obtain a revision of the official results, in order that the contestee may intelligently prepare his defense, there appears to be no good reason for insisting upon a more stringent application of the rule of *allegata et probata* in an election contest than in an ordinary civil action. Under the liberal provisions of the reformed procedure, this rule of evidence, which, under the common law, was most rigid, has been greatly relaxed, and it is now well settled that a variance between the allegations and the proof is immaterial unless the opposite party has actually been misled or surprised thereby to his prejudice. The truth of the evidence objected to is expressly admitted in various stipulations of counsel for the opposing parties during the progress of the trial. The protestee does not object to the admission of this evidence upon the ground that he was misled by it or that it surprised him. His objection is the purely technical one that the motion which instituted the proceedings did not refer to it. Under such circumstances, and without considering whether his objection would have been sufficient had the proceedings

been an ordinary civil action, we do not hesitate to say that the evidence was properly admitted. Technicalities are regarded with disfavor, even in ordinary civil actions. They should receive still less attention in such a summary proceeding as an election contest.

The evidence objected to is thus summarized in the opinion of the lower court: "The condition of the polling places in the municipality of Camiling were as follows: The rooms intended for polling places in each of the five precincts of Camiling were located in the upper stories of the respective buildings, and it was necessary to climb a stair in order to enter the said booths. Inocencio Guinto describes how the voting booths were constructed, 'There was,' he says, 'a wire which ran from one side of the room to the other and the rods were fastened at one end of a wire the other end of which was attached to the wall. The curtains or cloth partitions were hung on the rod there was between the wire and the wall. The piece of cloth used as a division of the booths was 1 yard wide and was hung in such a manner that its lower border was about a foot from the floor. There was nothing at the entrance of the booths and in front of the entrances there was no guard rail. The only guard rail in each of the polling places was that intended for the election inspectors, and was in another separate room. In each and all of the five precincts of this municipality the voting booths were arranged in that same manner. In each booth there was a school bench used as a writing table by the voters.'"

In addition to this it may be said that from the testimony of the various witnesses it was proved that the school desks placed in each booth were so arranged that the voter sat facing the side of the booth, so that anyone passing along the row of booths could easily see what was being written by the voter if he took the trouble to look.

Section 9 of Act No. 1582 provides: "* * * Each such [polling] place so designated shall, if practicable, be a room upon the lower floor, of reasonable size, sufficient to admit and comfortably accommodate twenty electors at one time outside the guard rails * * *.

"There shall be in each polling place during each election a sufficient number of voting booths, not less than one for every fifty voters in the election precinct. Each such booth shall be at least one meter square, shall have four sides inclosed, each at least two meters high, and the one in front shall open and shut as a door swinging outward and shall extend to within fifty centimeters of the floor. Each such booth shall contain a shelf which shall be thirty centimeters wide extending across one side of the booth at a convenient height for writing, * * *. A guard rail shall be placed at each polling place at least two meters from the ballot boxes and from the booths, and no ballot box or booth shall be placed within two meters of such rail, and each guard rail shall be provided with an entrance and an exit, the one separate from the other. The arrangement of the polling place shall be such that the booths can only be reached by passing within the guard rail, * * *. Such booths shall be so arranged that there shall be no access thereto except by the door in the front of said booth.

"A printed copy of this Act, in English and Spanish, shall be hung and kept in a conspicuous available position in every polling place on all registration days and on election day and may be consulted by any voter or person offering to register."

2. The provincial treasurer of Tarlac Province testified that he received from Manila and delivered to the municipal treasurer of Camiling 3,300 blank ballots. A receipt executed by the municipal treasurer on May 11, 1913, acknowledges receipt of this number. The municipal treasurer testified that he did not receive this number. Also, that he did not deliver all that he did receive to the election inspectors of the respective precincts. The following tabulated statement illustrates the above conditions:

Precinct.

Delivered to municipal treasurer of Camiling Number received according to testimony of municipal treasurer. Number delivered by municipal treasurer to election boards. Number retained by municipal treasurer.

700 698 (2) 584 114

650 629 (21) 420 209

650 646 (4) 350 296

650 646 (4) 330 316

650 647 (3) 470 177

Total 3,300 3,266 (34) 2,154 1,112

In explanation of this shortage of 34 blank ballots, the municipal treasurer testified that he did not actually count the ballots received until June 3, the day preceding the election, when he found 34 ballots missing; that the ballots were in five packages, corresponding to the five precincts of Camiling; and that from the appearance of the wrappers, there was no indication that any of the ballots had been taken from any of the packages. As opposed to this testimony, we have the admission of counsel for the contestee that the provincial treasurer actually sent 3,300 ballots to Camiling. There was no shortage reported from any other municipality in the province. The municipal treasurer testified that he kept these ballots in an aparador from the date he received them until election day. On the morning of the election, June 4, he called a meeting of the inspectors of the various precincts to advise them of the shortages. The majority of the inspectors were present, but he could not say if all were there. He did not deliver all the ballots he had received to the various election boards because, as he stated, the municipal president had advised the provincial treasurer that there were 2,000 voters in Camiling, whereas there were only 1,300. So witness decided to deliver only enough ballots to allow one and one-half ballots to each voter. He still had in his possession at the time of the trial the remainder of the ballots. Upon being informed by the municipal treasurer of this shortage, the inspectors of the various precincts held a meeting, at which it was decided to mark all the ballots before they were given to the voters, so that if the missing ballots were used by anyone, they could be detected. The mark decided on was an accent mark over the letter "O" of "Official Ballot," printed on the reverse side of each ballot. We do not hesitate to say that the testimony of the municipal treasurer that there was a shortage in each of the packages of ballots he received is, in our opinion, false. The ballots were extracted from the packages while in his custody. And in view of his false testimony in this respect, there is a strong presumption that they were taken with his knowledge and connivance. An inspection of the ballots after the election showed the following results:

Of the ballots found in the two ballot boxes of the first precinct, all but five bore the accent. Four of these were presented as exhibits for the contestant, and of them the lower court said: "All of these ballots are found to be marked, on their reverse side, with an accent over the 'O' of 'Official Ballot,' with the exception of four, Exhibits E-1, E-2, E-3, and E-4, which bear no mark whatever. Three of these ballots are for Gregorio Romulo. These ballots should be rejected. As all the ballots of this precinct were marked, those lost while under the control of the municipal treasurer were utilized here."

The municipal, treasurer delivered to this precinct 584 ballots. Five hundred and eighty-three were found in the two ballot boxes, leaving an unexplained shortage of one ballot.

All the ballots used in the second precinct bore the accent mark. Of the 133 blank ballots delivered to the municipal secretary after the election from this precinct, only 13 bore the distinguishing mark.

None of the ballots used in the third precinct bore the distinguishing mark. No explanation is given of this.

Whether the inspectors of this precinct were not present when the municipal treasurer advised the inspectors that ballots were missing, or whether they were so advised and declined to agree with the other inspectors to mark the ballots with the accent mark agreed upon, is not clear.

All of the ballots used in the fourth precinct bore the accent mark. Of the 123 blank ballots delivered to the municipal secretary after the election from this precinct, eight had the distinguishing mark. Five of these eight ballots showed that they had been doubled in the form in which good ballots are doubled, and then straightened out in order that they might be placed flat in the envelope.

Of the ballots delivered to the fifth precinct, the lower court found in this connection as follows: "All the ballots found in the boxes, except 19, bear on their reverse side the marks made by the election inspectors; but among the blank ballots returned to the municipal secretary, there are some which are marked the same as those that were used and 87 of them bear a stroke across the letter 'O' of the word 'Official' on the inside, and not on the outside, of the said ballots."

3. According to section 22 of the Election Law, as amended by section 12 of Act No. 2045, the following procedure must be observed in the case of voters incapable of preparing their own ballots: A voter, otherwise qualified who declares that he cannot write, or that from blindness, or other physical disability he is unable to prepare his ballot, may make oath to the effect that he is so disabled, and the nature of his disability and that he desires the inspectors to assist him in the preparation of such ballot. The board shall keep a record of all such oaths taken and file the same with the municipal secretary with all the other records of the board after the election. Two of the inspectors, each of whom shall belong to a different political party, shall ascertain the wishes of the voter, and one of them shall prepare the ballot of the voter according to his wishes, in the presence of the other inspector, and out of view of any other person."

The judgment of the lower court contains the following comment as to the discrepancies in the reports rendered by the inspectors of the five precincts of Camiling, in compliance with the above provisions of law.

"First precinct: According to the record of the illiterate voters of this precinct, the inspector Marcelino Fabros assisted only three such persons in the preparation of their ballots, and Eudoxio Masilongan, twelve. The first named, nevertheless, identified 13 ballots as his, written in his own handwriting; and the last named, 32. There is an excess of 30 ballots. It is understood how, for various reasons, a few names might have been omitted from the list of illiterates, but not those of thirty voters. Undoubtedly, these inspectors betrayed the confidence reposed in them, and the ballots written by them merit no consideration whatever.

"Second precinct: According to the record of illiterate voters, 59 of these were assisted by the inspectors; but the latter identified 77 ballots. There is, therefore, an excess of 18 ballots. Were it a question of only three or four names, we might say that the election inspectors forgot to record these three or four names in the list of illiterates, owing to the haste with which they proceeded in all their acts and to the large number of voters who requested their assistance; but we do not believe that those inspectors forgot to enter 18 names. If these men had actually voted, we believe that their names would have appeared in the list or record of illiterates. We are of opinion that all these ballots should be rejected; and as 42 of them were cast for Romulo and 35 for Gardiner, 42 votes should be deducted from those obtained by Gregorio Romulo and 35 from those obtained by Ernesto Gardiner.

"Third precinct: With respect to illiterate voters, Inspector Juan Guillermo assisted 80 of them. One hundred and nineteen ballots were identified as having been written by this inspector. Of these 119 ballots, 16 are for Ernesto Gardiner and the rest for Gregorio Romulo. There is proof that 136 illiterate voters voted in this precinct, all of them assisted by Juan Guillermo. It is to be presumed that in the ballot boxes there were 17 more ballots written by this inspector. It must be taken into account that Juan Guillermo did not identify the ballots written by himself, but these were identified by his two companions, Inspectors Zacarias Reyes and Pio

Salamanca. Of the 136 illiterates, 54 of them testified that they indicated to Juan Guillermo that they wished to vote for Gardiner for governor. Of the 119 ballots identified as written by Juan Guillermo, only 16 of them were cast for Gardiner. Juan Guillermo defrauded the will of 38 voters for Gardiner, and these votes should be awarded to this candidate and deducted from those obtained by Gregorio Romulo. The other 82 illiterates who testified all voted for Gregorio Romulo, which is proved by their own testimony.

"Fourth precinct: With regard to the illiterate voters, 49 of them were assisted by the election inspectors, but the latter identified only 41 ballots. There must be a few more ballots that were written by these inspectors and which could not be identified by them for some reason or other.

"Fifth precinct; With respect to the illiterates, it is sufficient to say that, according to the certificate of election, only 73 of them were assisted by the inspectors, while the chairman of the board identified 98 ballots as having been written by the inspectors."

We do not understand why the court failed to find the inspectors of the second, third, fourth, and fifth precincts guilty of fraud by the same line of reasoning which was applied to the inspectors of the first precinct. In the second precinct the court finds that the discrepancy between the records of the inspectors and their testimony could not be explained as an oversight in the keeping of records. As the discrepancy is only attributable to a willful disregard of the above quoted provisions of section 22, for no good purpose, their conduct is on a par with that of the inspectors of the first precinct. The court does find, in effect, that the inspectors of the third precinct grossly defrauded the illiterate voters. That, perhaps, is sufficient, without expressly stating that they were guilty of fraudulent acts. In the fourth precinct, however, the inspectors' records show that 49 illiterates voted, while they could identify but 41 ballots, a discrepancy of 8. The explanation is that the inspectors were unable, in eight instances, to recognize their own handwriting. This explanation is not consistent with the well known accuracy with which a person can identify his own handwriting on a document containing as much of it as a ballot at a general election. The better explanation seems to be that the inspectors deliberately padded the list of illiterates. In the fifth precinct, where the court found the inspectors guilty of fraud in other particulars to such an extent that it was found necessary to annul the returns from that precinct, there can be no question that the shortage of 25 illiterates on the records of the inspectors was due to fraudulent practices.

In this connection it seems advisable to discuss facts proved at the trial with reference to the manner in which illiterates were assisted by Inspector Guillermo of the third precinct. Guillermo testified that he was asked to write some of the ballots by the voters themselves; that as to others, he noticed they were in the booths doing nothing with their ballots (he could do this as there were no doors to the booths), and presented himself with the offer to write their ballots for them in order to expedite the voting, but that he was always accompanied by another inspector. Both the other inspectors, Reyes and Salamanca, testified that Guillermo attended to the writing of these ballots himself, and that he instructed them to stay behind the guard rail around the inspectors' desk. As will be noted in the above quotation, a considerable number of illiterate voters from the third precinct were called as witnesses. From the testimony of those who declared that they voted for Gardiner, the following tactics of Guillermo were exposed: In practically every one of these cases, the voter stated that no other inspector was present when Guillermo wrote his ballot for him. In some cases, when the voter asked for the assistance of two inspectors, Guillermo advised him that he was enough; and in most cases Guillermo returned the ballot to the voter folded, with instructions not to open it or he would lose his vote. These tactics were varied at times. Eutiquio Bunao testified that he gave Guillermo a provisional ballot bearing the name of Gardiner, for the purpose of writing his official ballot accordingly, but that Guillermo thrust it in his pocket and wrote his ballot without reference to it, at the same time hiding what he was writing from the witness. Bailon testified that he requested Gardiner to call another inspector to which Guillermo replied by asking why it was necessary to call another inspector when he was there. Guillermo put the provisional ballot which witness handed to him, bearing the name

of Gardiner, in his pocket, and concealed what he was writing on the ballot. Fernando testified that he handed Guillermo his provisional ballot, which bore Gardiner's name. Guillermo would not accept it and handed it back to him without reading it, saying it was no good. Guillermo told the witness that what he had written was all right. Pascual testified that he told Guillermo whom he wished to vote for, but Guillermo replied that he already knew. Cebredo testified that when he had told Guillermo his candidates for assemblyman, third member, vice-president, and two councilmen, Guillermo told him that was sufficient and refused to write any more names.

The greater number of these witnesses were thoroughly cross-examined, but their testimony was not shaken in the least. Their statements as to whom they voted for appear to have been accepted by the lower court as true, inasmuch as the returns from this precinct were revised in accordance with their statements. We see no reason for not also accepting their statements as to the conduct of Guillermo.

In this connection it may be well to notice the fact that the protestee presented some sixty illiterates from this precinct who testified that they voted for Romulo and that they were assisted by two inspectors. This testimony was intended to rebut that offered by the witnesses for the protestant to the effect that the latter were assisted by only one inspector. The admission of this evidence was objected to by the protestant and is raised by him on this appeal, but owing to the length of this opinion and the minor importance of the question in this case, we shall not attempt to determine it at this time. A comparison of the testimony of a considerable number of these witnesses with the record of illiterates, however, develops at least three discrepancies. Simon Ramon, Domiciano Paz, and Victor Ventura testified that they were assisted by inspectors Guillermo and Salamanca while the record of illiterates shows that they were assisted by inspectors Guillermo and Reyes.

It seems from the testimony of Vicente, Basilio, Berzosa, and Vicente, four illiterate voters of the second precinct, that they were also assisted by only one inspector in making out their ballots.

It is thus seen that frauds were perpetrated on the illiterate voters of each of the five precincts of Oamiling by the inspectors themselves.

4. The testimony of Mariano Morales, a voter of the first precinct, stands out prominently as a most glaring abuse of authority on the part of an election inspector. This man spoiled his first ballot, and asked for and received another. He had just written the name of his candidate for the Assembly when inspectors Masilongan and Castro approached. Masilongan entered the booth and finished writing the ballot for him. In reply to the inspector's question as to who his candidate for governor was, Morales replied, "Ernesto Gardiner;" whereupon the inspector called to a police officer standing in the room, "Officer, take this man out;" and when the ballot had been completed, the inspector Castro, who was looking on, said, "Now fold your ballot," and through fear witness folded his ballot and deposited it. The ballot in question was properly identified. The name of witness' candidate for the Assembly was written in his own labored handwriting. The rest of the ballot was filled out in the handwriting of the Inspector Masilongan, and Romulo's name appeared as the voter's candidate for provincial governor. Trinidad, one of Gardiner's watchers, testified that Gardiner's watchers were not allowed within the polling station during the time the voting was taking place. They were allowed to witness the count of the ballots, but as there was only one light, they could not see the writing on the ballots. Garcia testified that while he was making out his ballot, the chairman Castro stood beside him, watching what he was writing; and that through fear he voted for Romulo, although he wanted to vote for Gardiner. The ballot boxes of this precinct were not delivered to the municipal secretary until the afternoon of the 6th. Although the ballot boxes were sealed with wax, it bore no signet. According to the inspection of the court, however, the boxes did not appear to have been opened after they were sealed.

An inspection of the ballot boxes- of this precinct also showed 19 ballots in the same handwriting. Of these ballots

the lower court said: "Objection was made by the plaintiff to the ballots Exhibits Z-1 to Z-19, as being in the same handwriting. All of them were cast for Gregorio Romulo for the office of governor, and a simple inspection is all that is required to disclose that they were written by one or two persons. These ballots were not written by any inspector, and inasmuch as, according to the law, no voter may write more than one ballot, they should be rejected."

These ballots were not written by any inspector. The municipal treasurer found only two ballots missing from those destined to this precinct. The inspectors accounted for all the ballots delivered to them by the municipal treasurer. How some one other than the inspectors got possession of these nineteen ballots and voted them is not explained.

In the third precinct, as stated above, none of the ballots were marked by the inspectors. According to Guillermo, the inspectors finished their labors at about 7 o'clock on the night of the 6th, but could not immediately deliver the ballot boxes to the municipal secretary as it was raining. It was past 11 o'clock when it stopped raining and they were able to proceed to the secretary's house. They reached the latter's house after 12 o'clock. He was enabled to fix the time of their departure for and arrival at the secretary's house because he looked at his watch both times. The secretary refused to receive the boxes as it was after midnight. He and the secretary of the board, one Santos, thereupon went to the house of one Gil Clemente and spent the night there, taking the boxes with them. The next morning they went to the municipal building, and at 7 o'clock met the other members of the board there. While awaiting the arrival of the municipal secretary, they noticed that the registry numbers of the illiterate voters had not been placed on the list of illiterates who had voted. They also noted that in some cases the votes for some of the candidates for the municipal council had not been segregated. Also, the cousin of one Cansino asked witness how many votes the latter had received, and on looking at the election return he did not find this name. On referring to the tally sheets, he saw that this name appeared. According to the election return as finally incorporated in the record, this man received 22 votes. On discovering these imperfections in their reports, they asked the municipal president for desk room in the municipal building to make their corrections, which was refused them, with- the information that they could return to the polling station to complete their labors. This they did, and at 5 o'clock that evening they had finished this work and were ready to make another effort to deliver the boxes to the secretary; but it was raining again. At 8 o'clock it stopped raining and they then delivered the boxes to the secretary. Clemente's house, where witness and the secretary spent the night of the 6th, was very close to the municipal secretary's house. Yet, it only took 25 minutes to make the trip from Clemente's house to the polling station the morning of the 7th, while the night before it took an hour to make the trip from the polling station to the secretary's house. The direct examination of this witness, if it could be believed, was a clear, concise, and logical exposition of the facts relating to the election, the method of conducting the same, all the details as to what took place. Most of his testimony is included in the answer to one question and covers some seven typewritten pages of the record. His cross-examination, however, presents a series of evasions and insincerities, and shows such an inaptitude and hesitancy in answering the questions propounded to him that credence could hardly be given to his testimony if it stood alone. Salamanca testified that he did not see the boxes after the night the secretary refused to take them. Reyes says nothing about spending the 7th in the polling station correcting the records of the board. The municipal secretary testified that he saw all the inspectors at the municipal building on the morning of the 7th and that they did not deliver the boxes to him as they had some corrections to make. The boxes were delivered to him that night between 9 and 10 o'clock. According to Reyes, who also referred to his watch, it was 12 o'clock when they finished with the returns and started for the secretary's house on the night of the 6th, and 12.30 when the secretary refused to receive them. According to the secretary, it was 12.20 when the inspectors appeared at his house with the boxes. Reyes repeatedly stated that Guillermo told him and Salamanca to leave the conduct of the election to him and he would look out for things. From the testimony of this witness

and a letter written by him at the request of counsel for the appellee, it is quite evident that this witness was hardly competent to be an inspector at an election, as he wrote with difficulty, and did not understand Spanish at all well. Gil Clemente, at whose house Guillermo and the board's secretary spent the night of the 6th with the ballot boxes, testified that on the morning of the 7th, just as he got up, these two persons were sealing the boxes with wax. Later on in the day he found two pieces of wax underneath his house. Of this matter the lower court says:

"The ballot boxes of this precinct were carried to a private house, that of one Gil Clemente, at about 12.30 at night on June 6, 1913. The reason why that was done, was because the municipal secretary refused to receive the said ballot boxes when they were delivered to him, on the ground that the hour for effecting such delivery had already passed. Gil Clemente testified that on the following- day he had seen Juan Guillermo seal the ballot boxes with wax. Juan Guillermo denied this, and the poll clerk, Victor de los Santos, who accompanied Juan Guillermo while he had the custody of the ballot boxes, was not called upon to testify. On the other hand, there is no proof that the contents of the said boxes were touched. These boxes were properly sealed and the other inspectors of election have not ventured to testify that the seals were broken. The result of the recount made by the commissioners is in entire agreement with that found in the statement of the inspectors."

Nevertheless, the pro forma denial of Juan Guillermo does not merit much weight when we consider the frauds practiced by him on the illiterate voters, his unsatisfactory testimony, and the contradictory evidence contained in the declarations of Inspectors Reyes and Salamanca and of Clemente. Guillermo was practically the whole election board and the other two inspectors did not interfere with his acts. Having perpetrated frauds on illiterate voters, he would certainly not have hesitated to commit other fraudulent acts if he had the opportunity; and since the returns were practically prepared by him, the mere fact that they agree with the recount made by the commissioners is not a convincing argument that he did not tamper with the ballots and falsify the returns in other ways. Opportunities to do so were not lacking, and the time at his disposal, some seventy-two hours, was sufficient for the purpose.

In the fourth precinct, the ballot boxes were opened twice between the time of their delivery to the municipal secretary by the inspectors and their delivery to the clerk of the trial court. Asuncion, one of the inspectors in this precinct, testified that this was done in the municipal building the first time in the presence of all the inspectors, and the second time in the absence of Inspector Espiritu. Nevertheless, this inspector's name appears on the paper with which the box was sealed. Primero, the remaining inspector, testified the second day of the trial that his signatures appearing on the paper with which the box of good ballots was sealed, were not his; but a week later, when the ballot box was not before him, he testified that those signatures were his. He further testified on this occasion that the ballot boxes were opened only once.

As to the fifth precinct, it is sufficient to quote from the opinion of the lower court: "Three ballots, therefore, have disappeared, for the commissioners found only 271 good ballots in the ballot box. We are of the opinion that the ballot boxes of this precinct were tampered with. This opinion is strengthened by the document (p. 62 of the record) which reads: 'The board of election inspectors of the fifth electoral district decided to make a second canvass of the ballots previously counted on June 4, 1912, in view of an irregularity committed by its chairman, Ramon Barvo, in reading the ballots not in conformity with the names that appear thereon. And, for such purposes as may be proper, we hereunto affix our signatures, in Camiling, this 6th day of June, 1912. (Sgd.) Simon Hilario, Inspector. (Sgd.) Nicasio Agliam, Inspector.' Further support of this opinion lies in the fact that the ballot boxes of this precinct were not sealed."

5. It seems that on the eve and day of the election most of the candidates for governor and municipal president were distributing provisional ballots with their names written thereon. The plan was for their constituents to take these ballots into the booths and copy therefrom to the official ballots in order that no mistake might be made. Romulo's provisional ballots bore his photograph on the reverse side, while Gardiner's ballots were devoid of any

such embellishment; so the provisional ballots of the two rival candidates were easily distinguishable.

In the first precinct, the witness Morales testified that he met Governor Romulo on the stairway leading up to the polling station as he went in to vote and as he came out. Estrade testified that he voted about 8 o'clock in the morning. At this time, the governor was on the stairway exchanging his sample ballots for those carried by Gardiner's constituents, and telling them to vote for him and that if they did not look out, as he would be governor until October. The governor talked to each one individually and spoke in a low voice so that he could not be heard unless one was near him. He saw the governor exchange about twenty ballots in this manner, and then went to inform Gardiner. The latter complained to Captain Reyes of the Constabulary, who was in the municipality that morning, and Captain Reyes thereupon came to the polling station of the first precinct, and made the people about the polling station clear the 30-meter space around the station. The voters did not accept the ballots handed to them by Romulo willingly but through fear of him. Salvador, who voted about 7 o'clock in the morning, testified that he saw Governor Romulo on the stairway; that he was depriving Gardiner's adherents of his provisional ballots and substituting his (Romulo's) own. He took some of these Gardiner ballots from the pockets of the voters and thrust his own in place of them. He saw the governor exchange about 40 ballots in this manner. He watched this proceeding about twenty minutes, until one Cabrera informed the people that they were violating the law by remaining there. On hearing this, witness left, but the governor went on up the stairway where there were more voters. Some of the voters appeared willing to accept Romulo's ballots, while others accepted them only because they were afraid of the governor. Juan Garcia voted in the first precinct at a little after 8 o'clock. He testified that the governor was on the stairway of the building exchanging his own ballots for Gardiner's. He (witness) had one of Gardiner's ballots and intended to vote for him when the governor made him exchange it for one of his own, saying that if he did not vote for him he had better look out, as he would be governor until October. Through fear of this threat he voted for Romulo. Chairman Castro of the election board was watching him while he wrote out his ballot. Pedro Gampon, an illiterate, testified that Governor Romulo exchanged a Gardiner ballot which he had intended to use when he voted, for one of his own, saying that he had better look out if he did not vote for him. The governor was on the stairway at this time, which was about 7 o'clock. The cross-examination of these witnesses, although thorough, did not develop any material discrepancies or inconsistencies in their testimony. Their declarations are confirmed to a certain extent by the testimony of Captain Reyes, who testified that Gardiner informed him that Romulo was electioneering within the thirty-meter limit in the first precinct, and that on going to the polling station he found the crowd gathered around the stairway, among whom was the governor, who was talking to the people.

Of the charges of threats in this precinct the lower court said: "The most important point in this matter, in connection with this precinct, is the allegation that the governor, Gregorio Romulo, was changing ballots, threatening with imprisonment such voters as would not change their ballots, and saying to them besides that he would be governor until October. Apparently all this was nothing else than electioneering within the 30-meter limit. It is most likely that Ernesto Gardiner was told of these things and complained of such threats to Captain Reyes of the Constabulary. Now then, Captain Reyes testified that only Gardiner told him that Romulo was electioneering within the 30-meter limit, and that in view of this complaint by Mr. Gardiner, he, the witness, cleared the voters out of the space comprised within the 30 meters. Moreover, the ballots concerned were provisional ones, not official ballots, and there is no evidence whatever that those electors in voting did not do so freely in favor of the candidates they desired to see elected."

We are at a loss to understand this appreciation of the above testimony. Either it is true or it is not true. If it is true, Governor Romulo was certainly guilty of something more serious than a mere nonobservance of the 30-meter space around the polling station. Depriving an elector of a provisional ballot given to him by another candidate and forcing upon him one of his own, accompanied by veiled threats of the consequences of not voting

for him, certainly exceeds the limits of legitimate campaigning which Governor Romulo was entitled to carry on. The testimony of the above witnesses is not rebutted by any satisfactory evidence in the record. No valid reason has been suggested nor can we conceive of any for rejecting this testimony. Our conclusion is that the lower court failed to give it its proper weight, and that the charges of threats and intimidation in this precinct are established by the great preponderance of the evidence.

The polling station in the second precinct was in the house of Juan Vigilia, a sergeant of the municipal police who was apparently charged with inspecting the various polling precincts of the municipality. He was a Romulo adherent. Captain Reyes found him near the entrance to the stairway of the polling station in the second precinct, talking to the voters, and admonished him that even though the house belonged to him it did not look well for a police officer to be violating the Election Law in that manner. Witness Del Rosario testified that he was around the polling station all day. He did not vote until about 4 or 5 o'clock in the afternoon. At between 8 and 9 o'clock in the morning he saw the president of the municipal board of health, Juan Bauson, within the 30-meter limit around the polling station. From his testimony it appears Bauson was following the same tactics as were attributed to the governor himself in the first precinct. At between 9 and 11 o'clock witness saw the governor there and he also was exchanging ballots and using threats. The governor remained about half an hour. He saw Captain Reyes reprimand Vigilia for violating the 30 meter space around the polling station. In the afternoon he could see Vigilia in the room where the booths were located, walking up and down the room, but did not see him talking to anyone. In the morning Vigilia was using threatening language at the foot of the stairway. Domingo Acosta corroborates Del Rosario in all important particulars, and one Clemente, a partisan and nephew of the candidate for municipal president of the same name, testified that he saw Vigilia in the polling station on at least two occasions talking to the inspectors and electors. The appellant in this case, Ernesto Gardiner, testified that as he and Papa were passing the polling station of the second precinct in a calesa on their way to the third precinct at about 4 o'clock in the afternoon, he saw Vigilia standing near the window of the polling station, talking to an elector. They stopped the calesa and Papa called out to Vigilia asking why he was electioneering in the polling station, to which Vigilia replied that they (Papa and Gardiner) had already lost. Vigilia denied this, saying that the only time he was in the polling station was when he voted, sometime in the afternoon. He spent the entire day inspecting the different precincts, visiting each one three times. He resigned from the police force on June 10. Juan Bauson, the president of the municipal board of health, testified that he was not in the second precinct on election day at all. Captain Reyes testified that he saw Bauson in the morning, whether in the first or second precinct he could not remember. Bauson testified that he saw Captain Reyes in the first precinct at noon, when he voted there. But Captain Reyes left the municipality at 10.30 in the morning. Bauson denied making any threats whatever. He first testified that he was only in the third and fourth precincts, but later on in his testimony said he was also in the first precinct when he voted there. He was in the fourth precinct about two hours in the afternoon, in the third precinct between 4 and 5 o'clock, and in the first precinct at 12 o'clock. The court summed up all this testimony as follows:

"It is also alleged that one Bauson, the president of the board of health of Camiling, changed in this precinct the provisional ballots the voters had for other ballots in favor of Mr. Romulo, and that he said, besides, that they'd better look out, for however it turned out, Mr. Romulo would be governor until October. It is also alleged that Romulo threatened the voters by saying to them that if they did not vote for him they'd better look out, and that he afterwards treated them to gin in a bar. Threats must be serious and formal and infuse in the mind sufficient fear to restrain personal liberty of action. The acts performed by Bauson and Governor Romulo, as well as those of Sergeant Vigilia of the municipal police, do not constitute threats; they are simply electioneering acts."

The evidence of misconduct in this precinct on the part of Romulo and his partisans is stronger, if anything, than the evidence relating to their actions in the first precinct. The polling station was even placed in the dwelling house of one of his supporters. It will be noted that the lower court was of the opinion that the statements of

Romulo and Bauson that the voters had better look out as Romulo would be governor until October did not constitute a threat. If we correctly interpret this expression, it was in the way of a warning of impending evil in case the persons to whom it was addressed did not do a specified thing. We agree with the court that a threat must be serious. At the same time we cannot believe that the threats were intended as mere pleasantry. Whether they were spoken merely with the intention of intimidating the voters and were mere bluster, or whether Romulo and his friends believed themselves to be in a position and intended to punish the voters in case these instructions were disregarded, is immaterial. If they were sufficient to inspire fear, which it appears they did, they were threats. It must also be remembered that these threats emanating, as they did, from officers who were then in power, must have carried more weight than had they been uttered by a faction not yet in power.

Pio Salamanca, an inspector of the third precinct, testified that one Ricardo Reyes, a stepson of Diego Reyes (the latter a candidate for municipal president), armed with a bolo, was in the polling station about one hour in the afternoon, threatening Gardiner's adherents and exchanging the provisional ballots which they carried for Romulo's. Jose Andres testified that while he was in a booth writing his ballot, Reyes approached him and told him he had better call an inspector to write his ballot for him and told him to vote for Romulo or something would happen to him. Candido Calimlim and Anastasio Santos were called as witnesses, and it was stipulated that they would testify as had Jose Andres. Zubiate and Bravo, two municipal policemen on guard in the third precinct, testified that the only time Reyes entered the polling station was when he voted, at about 12 o'clock.

Of this testimony, the court said :

"Intimidation is also charged here. It is alleged that one Ricardo Reyes, carrying a bolo at his waist, threatened the voters in the polling place to make them vote for Gregorio Romulo. It is impossible to conceive the performance of such an act. All the election officers were at the time within the polling place and batches of 24 voters were continually and alternately entering and leaving, for the purpose of voting. Besides, there were in the immediate vicinity of the polling place municipal policemen, Constabulary officers, and some 90 voters who were awaiting their turn. Under these circumstances, such acts could not be attempted without being immediately repressed."

In the fourth precinct Vicente Ines testified that he had one of Gardiner's ballots and that when he came within 20 meters of the polling station, Juan Bauson (reference to whom has already been made while discussing the second precinct) saw the ballot and told him that that ballot was bad, and gave him another ballot, saying that that was his and that if he did not vote that way he would be sent to the provincial jail at Tarlac. Inspector Primero wrote his ballot for him, and witness told him he wanted to vote for Gardiner, but Primero said, "Leave that to me. I will take care." Bauson testified that he was in the fourth precinct but that he did not make any threats there. He said that he talked with one of Gardiner's partisans trying to convince him that he ought to vote for Romulo, but as this man stated that his candidate had given him a ballot to vote he left him. He talked to another Gardiner man, but as he saw he was a bitter partisan of Gardiner, he did not care to exchange ballots and left him. He was within the 30-meter limit at this time because the crowd was there. He carried about twenty of Romulo's provisional ballots that day. Captain Reyes testified that he found the people disregarding the 30-meter limit around this precinct also. This was about 9 o'clock in the morning. Of this precinct the court said: "There is no proof that the elections in this precinct were not held in a perfectly regular manner."

Andres Andres, of the fifth precinct, testified that he saw the governor within the 30-meter limit, as well as one Francisco Reyes, an adopted son of Romulo. Reyes was there from the opening of the polls until after 9 o'clock, exchanging ballots and threatening those who seemed unwilling to take the ballots he offered them. Eulogio Madriaga arrived at the polling station about 9 o'clock and saw Reyes erase Gardiner's name from one of his provisional ballots carried by an elector whom witness knew. Pablo Agustin testified that Reyes exchanged some

forty ballots, telling the voters that Gardiner was a Spaniard and that if they voted for him the friars would get back into power. Reyes admitted that he had changed the name on the ballot referred to by Madriaga but said that he first secured the permission of the voter. He testified that he changed the names on several other ballots with the permission of the voters. He saw Gardiner's adherents distributing provisional ballots and this caused him to become enthusiastic in espousing Romulo's cause, and after they had left, he approached several of these voters and found they were really Romulo's men. The court says nothing about this testimony, probably because the entire returns from this precinct were thrown out for the reasons stated in the quotation from its opinion appearing above.

Such is the resume of the more important evidence from the record before us. Our conclusions from a review of this evidence are as follows:

1. That in all of the precincts of Camiling the booths were on the second floor instead of on the lower floor as required by law.
2. That in all these five precincts, due to the absence of doors to the booths, the fact that the desks on which the ballots were marked faced the sides of the booths, and the fact that there were no guard rails in front of the booths, the ballots were exposed to the view of persons passing in front of the booths in the very act of being marked by the voter, thus practically destroying the secrecy with which the law requires that the elector shall be protected while marking his ballot.
3. That ballots were surreptitiously abstracted from the packages of printed blanks while in the custody of the municipal treasurer and never recovered; that the accent mark placed over the letter "O" in the phrase "Official Ballot" on the reverse side of the ballots was not an adequate mark whereby to distinguish the remaining blank forms from those illegally taken from the supply; that this official mark was not observed at all in the third precinct and that in none of the precincts were all the blank forms received by the respective election boards thus marked; that not even ordinary precautions were taken by the various election boards to prevent the stolen ballots from being voted.
4. That the election board in each of the five precincts (except the fourth) perpetrated unconscionable frauds in marking the ballots of the illiterate voters; and that in the fourth precinct there was a discrepancy between the list of illiterates as shown by the election records and the number of such ballots identified as having been written by the members of the board, for which they failed to render any satisfactory explanation. Of the truth of these findings there can be no serious question.
5. The most difficult point to determine is whether Romulo and his adherents were guilty of a species of electioneering on election day amounting to intimidation of the voters. A consideration of the evidence bearing on this phase of the case and the judge's findings relative thereto, convince us that the lower court failed to give it due consideration. The evidence as to the forcible exchange of provisional ballots, threats, and intimidation in the first and second precincts is particularly strong. A considerable number of witnesses testified as to the intimidation of voters in these precincts. As we read this testimony it is convincing and devoid of serious discrepancies or inconsistencies. Nothing contained therein taxes the credibility unless it be that so prominent an official as the governor of the province should resort to or countenance such unworthy and reprehensible practices in order to succeed himself in office. Governor Romulo did not testify. All of the others who were accused of resorting to these tactics in his behalf, however, did so testify. From the testimony of the latter we find them all self-acknowledged adherents of Romulo and in some instances his relatives. We find Juan Vigilia, the local police officer charged with the maintenance of order around the polling stations, himself disregarding the law in this respect, and talking to voters whom he also allowed to crowd around the entrance to the polling station, which,

incidentally, was his own private residence. We find Bauson testifying that he saw Captain Reyes in the first precinct at 12 o'clock while Captain Reyes had left the municipality at half past ten o'clock; and by the testimony of Captain Reyes it is established that Bauson was seen by him in the first or second precinct on the morning of the election. The evidence as to intimidation and threats in the other precincts is not so strong. In the third precinct particularly we are inclined to agree with the lower court that such evidence is far fetched and unreliable. In the fourth precinct the evidence of intimidation is limited to the testimony of one witness. Bauson, however, admits that he talked to two voters in this precinct and if the evidence of his conduct in the first precinct is to be believed, there is good reason for presuming that he assumed the same arrogant bearing in the fourth precinct, as testified by the witness Ines. In the fifth precinct Francisco Reyes, a relative of Romulo, appears from the testimony of several witnesses to have threatened and intimidated voters.

After a careful consideration of the evidence before us, we have come to the conclusion that Romulo, Bauson, Vigilia, and Reyes were guilty of forcing Romulo's provisional ballots upon unwilling constituents of Gardiner, by threatening and intimidating them in a manner calculated to make them believe that, on the principle of the maxim "Of two evils choose the lesser," it would be advisable to vote for Romulo. The first three named spent the greater part of the day visiting the various precincts. Two of them were prominent municipal officers, and the other occupied the highest office in the province. There can be no doubt that such a combination was capable of intimidating the more ignorant and poorer class of electors by threatening reprisals if they did not vote for Romulo. We are led irresistibly to the conclusion that Romulo's handsome plurality, or better said, majority, in each of the five precincts was due to a great extent to the intolerant and high-handed methods above set forth, in the execution of which it appears he actively participated.

But withal, we would not be heard to say that there were not honest votes cast for Romulo in Camiling. There were undoubtedly many voters who honestly believed that Romulo was the candidate most worthy of the office of provincial governor, who cast their votes for him from no other reason than that he was their choice for the office, nor that there were no electors superior to the threats of the Romulo faction and who marked their ballots for Gardiner, despite the fact that they were compelled to mark them exposed to the view of persons passing by the booths, and whose ballots were correctly counted by the election inspectors despite their illegal favoritism for Romulo. This leads us to a consideration of the principles upon which we have determined to avoid the returns from Camiling, notwithstanding the ballots of such voters.

The purity of elections is one of the most important and fundamental requisites of popular government. To banish the spectre of revenge from the minds of the timid or defenseless, to render precarious and uncertain the bartering of votes, and lastly, to secure a fair and honest count of the ballots cast, is the aim of the law. To accomplish these ends, Act No. 1582 was enacted. This law requires that only qualified electors shall be admitted to the polls; that they shall vote in absolute secrecy, and that the returns shall be justly compiled and announced. In its essential details, this law is a counterpart of the ballot laws almost universally adopted within comparatively recent times in the United States, and is generically called by textwriters the Australian ballot law. The interpretation and application of the essential features of this law have received the attention of the high courts of every jurisdiction where it has been enacted, and a noticeable effort has been made to divide its provisions into those mandatory and those directory, the former being supposed to have the effect of vitiating the returns when not complied with, while the effects of a disregard of the latter are held to be contingent upon whether they affect the merits of the proceeding. The provisions of the law as to the conduct of the elections which were disregarded in the five precincts of Camiling which first attract attention are that the polling station shall be upon the ground floor, that the booths shall have four sides enclosed, the one in front to open and shut as a door, and that they shall be provided with a guard rail. (Sec. 9, quoted *supra*.) The law does not specify the consequences of a nonobservance of any one of these requirements, and it is therefore our duty, upon well established rules of interpretation and

construction of statutes, to consider whether a failure to observe them violates the spirit and intent of the law.

In *Bowers vs. Smith* (111 Mo., 45; 16 L. R. A., 754), the court said: "If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (*Led-better vs. Hall*, 62 Mo., 422.) In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had, or had not, so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial." In *Kenworthy vs. Mast* (141 Cal., 268), it was said: "It is practically impossible to lay down any general rule covering all cases, but we think the true test to be applied to departures from the requirements of the laws relating to the conducting of elections on the proper day and at the proper place, be those requirements called mandatory or directory, is as to whether or not the particular departure is of such a nature as to make it impossible or extremely difficult to determine, under the circumstances of the case, whether fraud has been committed or anything done which would affect the result."

In *Atkinson vs. Lorbeer* (111 Cal., 419), it was said: "Election contests arising out of irregularities of election officers frequently present to courts the alternative of either setting aside in the case in hand the honest and clear expression of the will of the majority of the voters, or of so construing the election laws as to open the door to future frauds which it is the purpose of those laws to prevent. Of course, neither the voters nor those voted for have any control over election officers; and to set aside the vote of a precinct, when there was clearly no fraud or any mistake affecting the result, for mere irregularities occasioned by the ignorance or carelessness of election boards would in many cases be a patent injustice. Moreover, a construction requiring an exceedingly strict compliance with all statutory provisions might tempt to irregularities contrived for the very purpose of vitiating the vote at a certain polling place, and, as was said in *Whipley vs. McKune* (12 Cal., 361), 'might lead to more fraud than it would prevent. On the other hand, statutory provisions which are clearly mandatory must be substantially complied with; and even directory provisions cannot be so grossly departed from as to make it impossible or extremely difficult to determine whether fraud had been committed or anything done which would affect the result.'"

A statement of the rule in *Jones vs. State* (153 Ind., 440), by the supreme court of Indiana has often been quoted with approval: "All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."

These general rules have been frequently applied. In *Choisser vs. York* (211 111., 56), the returns from one precinct were not signed by the judges and clerks of election, as required by law. Proclamation of the results was made in only two out of fifteen precincts. In another precinct the judges of election did not appear, and three persons constituted themselves judges and proceeded to hold the election. There was an entire absence of fraud or intimidation in the conduct of the election, and it was held that these being mere irregularities which did not prevent or subvert a free and honest expression of the popular will, should not be allowed to vitiate the returns.

Initials of poll clerks indorsed upon the lower right hand corner on the back of the ballots instead of on the lower left hand corner as prescribed by law were held not to render the ballots invalid, the court saying that the error was an innocent and honest mistake of the officers. (*Parvin vs. Wimberg*, 130 Ind., 561; 15 L. R. A., 775; 30 Am. St. Rep., 254.)

In *Montgomery vs. Henry* (144 Ala., 629; 1 L. R. A., N.S., 656), the ballots were not numbered to correspond with the name of the person voting the same on the poll list, as required by law, but it was held to be a mere irregularity not sufficient to invalidate the election, as there was no suspicion of fraud on the part of the inspectors in failing to do so.

Failure of the election judges to take oath when there was a fair vote and an honest count was held, in *Heyfron vs. Mahony* (9 Mont, 497; 18 Am. St. Rep., 757), not to invalidate the returns.

Minor irregularities of an election board, voters, and by-standers in a polling station, unaccompanied by fraud or conduct affecting the integrity of the ballot were held not to operate to quash the election in *Bingham vs. Broadwell* (73 Neb., 605).

"The general rule is that a failure on the part of the election officers to perform their duties according to the statute, will not be allowed to disfranchise the voters, unless such failure has prevented a fair election or in some way affected the result. *McCrary on Elections*, section 724." (*Craig vs. Spitzer*, 140 Ky., 465.)

Other cases may be found of irregularities waived, always in the absence of fraud, in *Lindstrom vs. Board of Canvassers* (94 Mich., 467; 19 L. R. A., 171) ; *Skelton vs. Ulen* (217 Mo., 383); *Gass vs. State* (34 Ind., 425); *Hayes vs. Kirk wood* (136 Cal., 396); *Bailey vs. Hurst* (113 KyM 699); *Carwile vs. Jones* (38 Mont., 590); *Hankey vs. Bowman* (82 Minn., 328); *Coleman vs. Board of Education* (131 Ga., 643); *Clark vs. Hardison* (90 S. W., Tex. Civ. App., 342); *Norman vs. State* (99 N. E., 812).

In *State vs. Shanks* ([N. D.], 125 N. W., 122), it was held that an election in a different place from that designated in the election notice was not sufficient to avoid the election when it was not shown that any elector was deprived of his vote.

But that irregularities, even when not accompanied by fraud or intentional wrong, may be so serious as to invalidate the returns, is also well established.

In *State vs. Ely* ([N. D.], 137 N. W., 834), a polling station had been duly established by the county commissioners, but the election was held at another place a considerable distance therefrom, without special reasons. The court ordered that the returns should not be canvassed for the reason that the change was unauthorized and that it was therefore the duty of the election inspectors to show that the change was made in good faith, without fraud, and with no intent to injure the cause of respondents, and that in fact no one was thereby deprived of his vote. (Citing *Whitcomb vs. Chase*, 83 Neb., 360; 17 Ann. Cases, 1088.)

The omission of registration has been held to be so grave an irregularity as to vitiate the returns, even in the absence of fraud. (*Ledbetter vs. Hall*, 62 Mo., 422.)

In *Melvin's Case* (68 Pa., 333), it was said to be settled law that a whole election district may be stricken out on showing an entire disregard of conformity to law in holding it, either by design or accident.

In the Michigan case of *Wheeler vs. Coleman* (decided July 9, 1913; 142 N. W., 570), the returns were announced and the box then locked and, in a manner, sealed, though not in accordance with law. During the canvass the unused ballots were passed around to keep tally on and not returned to the township clerk. No certified statement of the result was prepared the night the canvass was made, and the ballot box was left unguarded in the town hall during the night. The next morning the defeated candidate appeared and orally asked for a recount, although by law such a request was required to be in writing, accompanied by a deposit. The inspectors acceded to the request, and proceeded to recount the ballots, the candidate in question and his brother assisting and advising. Their count gave this candidate a small plurality. Although there was no showing of fraud, it was held that these irregularities were so prominent as to necessitate a return to the figures originally given out by the board.

In *Perry vs. Hackney* (11 N. D., 148), through a misinterpretation of the law relating to the construction of the booths, they were built in exactly the same manner as were the booths in the municipality of Camiling, except that the writing shelf was placed against the back of the booth, so that the voter's body and the sides of the booth prevented anyone passing along the line of booths from seeing the ballot while it was being marked. There was also a row of school desks used as a guard rail in front of the booths, although they were not 10 feet from the booths as required by law. There was not even an allegation of any fraud or intimidation in the conduct of the election. The court said:

"Not only do the findings show that the omissions had no effect upon the state of the vote, but they also show that the electors in Cheyenne precinct had a secret ballot within the meaning and spirit of the law. It is true, the statutory mode of guarding its secrecy was not strictly obeyed; that is, the voter was not screened from observation when marking his ballot in the manner contemplated by the statute, and the guard rails were not 10 feet from the ballot boxes and booths. But these are mere means of securing a secret ballot, which is the end aimed at, and when that is accomplished the spirit and purpose of the law has been accomplished. By reference to the findings before set out, it will be seen that, while the body of the voter was in full view when in the booth, his ballot, when laid across the shelf in the booth for marking, was concealed by his body and the sides of the booth. He was able to mark his ballot screened from observation, and it does not appear that any ballots were marked otherwise than in secret. To hold that this election was not by secret ballot would be, in our opinion, to subordinate substance to form, and to hold that the means, and not the end, is of permanent importance."

It will be noted that the court emphasized the fact that the booths so far complied with the law that the voter was not prevented from marking his ballot in secret. It can well be doubted if the returns would have been upheld, even though it appeared that the election was conducted without fraud, had the inspectors provided no guard rail and had placed the writing shelf facing the side of the booth instead of the rear, so that a person passing along the row of booths could easily see how the ballot was being marked.

In *Choisser vs. York* (211 111., 56; cited supra), the judges of election in one precinct did not appear and three persons constituted themselves judges and proceeded to hold the election. There were only three booths, an insufficient number, and for that reason some of the ballots were marked in a small adjoining room. The authorized register of voters was not used but it was not shown that any illegal votes were cast in consequence of the absence of the register. The court upheld the results with the exception of the votes which were marked in the small adjoining room on the ground that there had been no fraud in the conduct of the election.

As to these votes, however, the court said: "This provision of the statute (relating to the construction of booths) is an important one, and should not be disregarded. It has been held that a failure of election officers to erect booths in compliance with law was an irregularity which would not vitiate the election. (*Moyer vs. Van de Vanter*, 12 Wash., 377; 50 Am. St. Reps., 900.) We are of the opinion, however, that this statute is so far mandatory that it must be substantially complied with. To permit a room adjoining the room in which the election is held to be used as a booth, would open wide the door for fraud by permitting unauthorized persons to have access to the voter and it would substantially destroy the seclusion of a citizen while preparing his ballot—at least such might be the result."

In *Banks vs. Sergeant* (104 Ky., 843), about 75 voters in one precinct had their ballots marked on the table by some officers of election without any disability being shown and without swearing the voter. The proof showed that the voter would be furnished with a card or slip of paper, when he entered the polling station, containing the names of the parties he desired to vote for, and that on presenting this card one of the election officers would read it aloud while another would mark the ballot. Booths were placed near a window with the window lights out and near large cracks in the house, it being a log house. When a voter went into a booth persons outside could see how he

was marking the ballot. Of this precinct the court said:

"It was in no sense a secret ballot. The secrecy of the ballot is a fundamental idea of all elections, and this is required by the constitution as well as by statute. This central idea being disregarded in this precinct, and a practical viva voce election held, as the proof shows, we are of opinion that the returns therefrom should be disregarded."

Contrast the above cases, in which there was no charge of fraud or intimidation on the part of anyone, with the following cases, where the inspectors of election were guilty of fraudulent practices.

In *State vs. Malo* (42 Kan., 54), the election board willfully refused to issue a statement, immediately after the polls closed of the number of votes polled, as required by law; they refused to permit any of the opposing party to be present in the polling station during the reception of the votes, as required by law; and indulged in many other fraudulent practices. The court said: "In a word, every provision of the statutes of this State made for the purpose of preventing fraudulent and corrupt practices in the conduct and result of elections was wantonly disregarded by the election boards in Cimarron and Foote townships, and by the clerk of the county, and by all the officers whose duty it was to see that a free and fair election was held and an honest count had. These repeated omissions of duty and willful violations of positive requirements were not the result of ignorance or carelessness, but were produced by a settled determination to carry the election in favor of Cimarron by any means and at all hazards."

In *Rhodes vs. Driver* (69 Ark., 501), persons were permitted to vote who had not paid their poll taxes; votes of two persons known to one of the judges to be dead were received; twelve were recorded as voting who swore they did not vote; four were recorded as voting who were not in the township; sixteen recorded as voting could not be found in the township; and all of the above votes were for the contestees. The officers of election were strong partisans of the contestees. There was evidence that the original poll lists were destroyed and others substituted. These frauds on the part of the election board were held to vitiate the election.

In *Attorney-General vs. McQuade* (94 Mich., 439), which was before the court on a demurrer to the complaint, it was alleged that the chairman of the election board deposited 13 ballots of unregistered persons in the ballot box; about seventy-five exposed their ballots after being marked; and the chairman refused to swear an inspector for the purpose of marking ballots of illiterate voters as required by law. The court said: "If an inspector or other person be permitted to enter the booths with the voters, the danger is far greater than under the old system, where there was some opportunity to see and detect fraud. Under this practice, venal voting could readily be accomplished. The law is designed to secure absolute secrecy to the elector, and thus prevent all opportunity for corrupt practices. The law does not permit parties to profit by such frauds, though they may not have participated in the fraud."

In *Vigil vs. Garcia* (36 Colo., 430), one of the judges frequently left the polling place, and an unsworn substitute took his place, the judge in question becoming so intoxicated that he was incapacitated and was compelled to sleep during a considerable portion of the time the votes were being counted; he refused to assist an illiterate and told the other judges to assist him and be sure and vote him against two prominent candidates; alleged illiterates were assisted without affidavits of their illiteracy; the ballots were counted in a large part by unauthorized persons; and many people voting were seen in the precinct only a few days before and not after the election. These incidents caused the court to void the returns.

In *Freeman vs. Lazarus* (61 Ark., 247), where the returns were thrown out, it was established that the judges of election electioneered with voters in the booths, and urged them to allow such judges to prepare their ballots; that a large number of ballots were prepared by one judge instead of two as required by the statute; that they were prepared directly contrary to the express wish of the voters and were returned to them folded. The court reviewed

the law as to the construction of the booths and non-interference with the elector while he was prepaying his ballot, saying that all these were stringent provisions intended to guard the voter against interference or influence while preparing his ballot and that it was the intention of the Legislature by these means to free the voter from all extraneous influence, and to make his ballot an expression of his own will.

In *Orr vs. Kevil* (100 S. W., 314, Ky. Ct. App.) 18 ballots were marked by voters who had been bribed, a fact of which the election inspectors were cognizant; 26 ballots were found in the box which did not bear the clerk's name upon their backs, and upon three of these being unfolded and found to be Republican votes, objection was made to opening any more. Upon trial these 26 ballots could not be found. The law provided that where it appeared from an inspection of the whole record there was such fraud and bribery in the conduct of the election that no one could be said to have been fairly elected, the returns should be thrown out. This provision of law was held applicable and the returns from that precinct ordered thrown out, the court saying: "An election officer who so far forgets the sanctity of his oath as to participate in one kind of fraud at an election, can readily be believed to be willing to commit any other which the necessity of his party requires, and the opportunity of his position permits. It requires little knowledge of the methods of election frauds in modern times to appreciate how easily a close election could be turned by a shifty and resourceful clerk omitting his name from the backs of the ballots of ignorant and unwary voters, if this would suffice for the accomplishment of the evil design."

In *Russell vs. State* (11 Kan., 236), the court said in part: "Now comes the contestant and says that the record (of the election board) is a lie, and proves that 127 of the names so recorded as the names of legal voters are fictitious, and that 127 spurious ballots were cast into the ballot box. In other words, he proves absolutely that nearly one-fourth of this record is false. And this falsehood cannot have been the result of ignorance or mistake. It is not possible that this could have happened without the knowledge, consent, and connivance of both the clerks, and some, at least, if not all, of the judges. Surely, there was criminal culpability if not actual, intentional wrong-doing on the part of all the officers of that election board. But, says the contestee, the whole record is not shown to be false. Reject the 127 votes proved to have been spurious, and accept the balance not thus proven. In other words, accept all of the record not proved untrue. If the falsehood resulted from mere mistake, there would be great force in this demand. So also, if the falsehood resulted from the fraud or wrong-doing of others than the board. But where» the recording officers are proved to have knowingly made a largely false and fraudulent record, how can we place reliance on any of the record? *Falsus in uno, falsus in omnibus.* * * *

"It doubtless happens that some legal voters are by this decision deprived of the benefit of their votes. Perhaps there were honest votes cast, enough to have given the majority to Fredonia. A large majority of the citizens of Fredonia are honest men, were ignorant of the fraud which was being perpetrated, and are doubtless as much grieved as we at this terrible trespass on the purity of the ballot box. May this example preach its lesson, not alone to them, but equally to every citizen of the State. They who in Rome watched and kept the sacred fire were vestal virgins. Equally pure should they be who watch and guard that which is far more to us than mystic altar fires."

The contrast between the two lines of cases is most marked. Where it has been established that a fair and honest election was held, none but the gravest irregularities will avoid the election: such as might be said to raise a presumption of fraud. But where the election board has committed irregularities fraudulently, they need not be serious or numerous. The position and duties of an election board is one where much must be left to the honesty and integrity of its members. Many of its acts must be accepted as true even though false, for the reason that no adequate proof can be secured of their falsity. The law has, however, outlined its duties with some care; and fraudulent practices kept within bounds can not, as a rule, assume large proportions. Nor can fraud be practiced in many directions without asserting itself at some point or other. So that from the very difficulty of following all the movements of the board, a grave suspicion immediately arises as to its honesty of purpose when once a fraud

chargeable to it has been discovered. The thought immediately suggests itself, if fraud was committed here, it is probable that it was also committed there, where it can not be proved except by the confession of the inspectors themselves. The general rule is that a witness proved a willful falsifier on a material point is thoroughly discredited. The same rule should apply to the record made by an election board. It is prima facie evidence of the results of the election, backed by the familiar presumption that public officials have done their duty. But once it is proved fraudulent in an important particular, the party claiming under it should be put to his proofs. Such is the rule, more strongly stated, however, by McCrary on Elections, sec. 541 et seq:

"The safe rule, probably, is that where an election board are found to have willfully and deliberately committed a fraud, even though it affect a number of votes too small to change the result, it is sufficient to destroy all confidence in their official acts, and to put the party claiming anything under the election conducted by them to the proof of his votes by evidence other than the return."

And he declares the same rule applicable when the integrity of the returns is destroyed by misconduct of the officials, consisting in "a reckless disregard of the law, or in ignorance of its requirements" though no corrupt purpose be affirmatively shown. (Id., sec. 540.) (And see *Londoner vs. People*, 15 Colo., 557.)

Such are, we believe, the principles which govern the case at bar. The questions we are called upon to decide are: Were there mere irregularities in the conduct of the election in the five several precincts of Camiling? If so, were these irregularities of so serious a character as to be ascribed to inexcusable ignorance or a reckless disregard of the law? Were there fraudulent practices in the conduct of the election? Were threats and intimidation employed of a character serious enough to intimidate and coerce the electors?

Were we confronted with the bare proposition that the polling stations were located on the second floor and that the 30-meter space around them was not kept clear, it might be that we should not have taken the drastic step of avoiding the returns from this municipality. The law directs that these things be done, but it does not say that the fact that they were not done shall have the effect of vitiating the returns, and unless the nonobservance of the law in this respect was made a means of fraud or coercion they should be considered as harmless irregularities.

But the failure to provide booths according to law is of a more serious character. The central idea of the Australian ballot law, as so often expressed in the cases, is to shroud the marking of the ballots in absolute secrecy. All the efforts to secure a free and untrammelled expression of the elector's will lead up to and depart from that point. If the plan fails in this particular, it is worse than useless to have him register his vote on a slip of paper and require the election board to go through the arduous task of compiling and ascertaining the result from numbers of such slips. The voting booths in the five precincts of Camiling in nosense of the word insured a secret ballot. The most superficial study of the Election Law should demonstrate that the central idea is to prevent any other person than the voter from knowing how he marks his ballot And the most ordinary intellect could not fail to observe that open booths, unprovided with a guard rail, and with the writing shelves facing the sides of the booths would leave but a mere shadow of the absolute and impenetrable secrecy which a strict compliance with the law affords the voter. No explanation of this gross disregard of the law has been made. It has not even been alleged that it was due to ignorance or a misunderstanding of the law. Indeed, it would be difficult to believe that the importance of affording the elector a secret ballot should be so far misunderstood as not only to fail to provide booths with doors and guard rails, but also to place the writing desks so that they faced the sides of the booths. The combination of the three circumstances suggests strongly that it was due to design rather than to mistake or ignorance.

But it is unnecessary to base our decision in this case on the faulty conditions obtaining in the polling stations. The inspectors of the first, second, third, and fifth precincts have been conclusively shown to have returned a fraudulent list of illiterates. The same list prepared by the inspectors of the fourth precinct is also inaccurate, and

the certainty of their dishonesty is only lessened by the reduction of the discrepancy. For this discrepancy the election inspectors of this precinct offer no explanation, and none has been suggested which, to our view, is reasonable. Ballots unaccountably disappeared after the blanks had arrived at the municipality of Camiling, and no adequate system of marking the remaining supply was adopted, and even this was not uniformly adopted. Charges of threats made within the 30-meter limit, and in some instances, within the very building where the polling station was located, appear to be well founded. Besides these matters, applicable to all the precincts, various incidents—straws, as it were, indicating the direction of the current—have been proved to have occurred in particular precincts, which it is not necessary again to recall. A threat as the voter entered the polling station, and the espionage of a zealous partisan while the ballot was being marked doubtless caused many a voter of peaceful tendencies to succumb to such strong-arm methods, and to finish the disagreeable business as soon as possible. How many such votes were thus obtained it is, of course, impossible to tell. Such methods are not confined to particular ballots, easily distinguishable during the canvass of the votes. They are diffusive: to locate their triumphs is impossible. Nevertheless, votes so obtained are as fraudulent as particular ballots containing identification marks, which are conclusively presumed to be fraudulent. The latter, when discovered, are simply not counted. They have no other effect on the results. It is just as desirable that votes obtained through coercive methods should not be counted, but being incapable of detection it has been necessary to adopt a more heroic treatment. The courts have therefore laid down the rule that when fraudulent votes are so mixed up with honest votes that it cannot be determined how many are honest and how many are fraudulent, the returns shall be destroyed. (*State vs. Fulton*, 42 Kan., 164.)

"It is not necessary to show that a majority were actually prevented from voting, or voted against their wishes by reason of the practice (intimidation). When the wrong is flagrant and its influence diffusive, it is sufficient that it renders the result doubtful." (*Jones vs. Glidewell*, 53 Ark., 161; 7 L. R. A., 831.)

In *Martin vs. McGarr* (27 Okla., 653), it was said: "While a contestant in an election may always object to the counting and consideration of fraudulent or illegal votes, yet the reception of the same will in no instance result in the avoidance of the election except where the entire poll is so tainted that the good votes cannot be separated from the bad, and it is impossible to ascertain for whom the majority of the valid ballots were cast. The general rule obtaining throughout all the States of the Union is that an election is not to be held invalid except as a last resort, the correct doctrine being announced by Judge Brewster, in the case of *Batturs vs. McGary* (1 Brewster, 162), as follows: The courts have the power to reject the entire poll, but only in the extremest case—as where it is impossible to ascertain the true vote. Impossibility is the test."

In *Hardy vs. Beaver City* (125 Pac, 679), it was said:

"Where an election takes place which is held or conducted in violation of some express constitutional or statutory provision, or where through some act of commission or omission prohibited by law on the part of the voters or some of them, the result of an election is affected, or if it be shown that fraud, intimidation or other illegal methods were practiced, then an election cannot stand."

These are the grounds upon which we rejected the returns from the five precincts of the municipality of Camiling: a fatal flaw in the conduct of the election, accompanied by frauds on the part of the election officials, and intimidation of voters.

In concluding this extremely disagreeable task, we desire to state that we are aware of the seriousness of disfranchising the innocent electors of a whole precinct for acts done by others. We are not unmindful of the force of the argument that if courts set aside the returns from a precinct for light and trifling causes, it will encourage the unscrupulous to seek profit by the honest mistakes of election officers committed in the conscientious performance of their duties. On the other hand we appreciate the importance to the people of enforcing those

statutory provisions which the legislature have provided to insure a free and undefiled expression of the popular will at the polls, to the extent that fraud may not flourish under the guise of honesty. The right of suffrage is of comparatively recent origin in this country. If at this early stage of its existence, the courts are to countenance such bold disregard of the law as was exhibited in the municipality of Camiling at the last general election, representative government will soon become a farce; a mere catchword or an empty illusion. Regardless of the political unrest engendered by such deplorable litigation as the present and its enormous expense to the contestants, we are of the opinion that a firm stand against fraudulent elections must now be taken, once for all. If no encouragement is offered to vicious practices, they will, at least, never grow larger.

Torres, Johnson, and Moreland, JJ., concur.

[1]OCTOBER 31, 1913.

The trial court found that the protestee, Romulo, received a plurality of 138 votes. We have reached the conclusion that the entire election held in the municipality of Camiling must be annulled on account of frauds and gross irregularities. This gives the protestant a plurality of 143 votes. Whatever might be our rulings on the validity of the other questioned votes, the result would not be changed. We therefore accept the decision of the trial court upon these points without announcing any doctrine in reference thereto. The result is that an order must be issued directing the provincial board of canvassers to correct their returns by giving the protestant a plurality of 143 votes.

In view of the importance of the questions presented and argued, this court will, at the earliest practicable date, set forth in full its reasons for annulling the election in Camiling.

No costs will be allowed in either instance.

Torres, Johnson, Moreland, and Trent, JJ., concur.

Arellano, C. J., Mapa and Carson, JJ., dissent.

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