STATE OF WISCONSIN.

IN SUPREME COURT

H. W. GILKEY,
Contestant and Appellant,
vs.
W. A. McKINLEY,
Claimant and Respondent.

CASE.

This was a proceeding taken under and in pursuance of Chapter 464, Laws of 1885, Sec. 8, and was commenced by petition as follows:

CIRCUIT COURT--OCONTO COUNTY.

H. W. GILKEY, *Contestant.*
vs.
W. A. McKINLEY, *Claimant.*

The petition of H. W. Gilkey represents and

shows to the Court:

1st. That at a general election held in and for Oconto County, on the 6th day of November, 1888, for the purpose of electing, among other officers, a
2 County Superintendent of Schools for Oconto County, Wis., exclusive of the City of Oconto, your petitioner received legal votes, 603; W. A. McKinley received votes, legal and illegal, as follows: 617, as appears by the returns of the votes from the different towns in said election district and as appears by the canvass of said returns by the County Canvassing Board.

2nd. That it appears from a separate poll list accompanying the returns, that in the town of Pensaukee, to wit: in precinct No. 3, (one of the
3 precints in said election district), that 35 women voted for said office of Superintendent of Schools without any right to do so, and that said votes were counted and included in the returns from said district, and were so counted as legal votes by the county canvassers at their canvass of said returns, completed Nov. 12, 1888.

3rd. Your petitioner further represents and alleges, upon information and belief, that all but 2 of said illegal votes, to wit: 33 of them, were cast for the claimant, W. A. McKinley, and the other two for one Burbank, also a candidate for said office; and that if said illegal votes so cast for
4 said McKinley as aforesaid are rejected and thrown out, he, the petitioner, would have a majority of the votes cast for said office; and that he, petitioner, is legally elected to the office of Superintendent of Schools for said district, but that, from the face of said returns, said McKinley is elected and has qualified as such and claims said office.

H. W. GILKEY, *Petitioner.*

STATE OF WISCONSIN, } ss.
OCONTO COUNTY. }

H. W. Gilkey, being duly sworn, says that he is the petitioner above named; that he has heard read the foregoing petition, and knows the contents thereof. That the same is true of his own 5
knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 24th day of November, 1888.

A. REINHART, B. G. GRUNERT,
Attorney for Petitioner. *County Clerk of Oconto County, Wis.*

That on the 26th day of November, 1888, said petition was duly filed with the clerk of the Circuit Court of Oconto County, Wis., in open court, and that on the same day an order to show cause was by said Court issued. Following is a copy of said order: 6

(Title of Cause.)

On reading and filing the petition of H. W. Gilkey, contestant, (a copy of which petition is hereunto annexed,)—

Let the said W. A. McKinley, claimant, appear before this Court at the court house in the City of Green Bay, Brown County, Wis., on the 11th day of December, 1888, at 9 A. M., of said day, or as soon thereafter as counsel can be heard, and answer the petition of the said H. W. Gilkey, contestant herein, or show cause to the contrary, and ordered that a copy of this order be served ten days before the return day. 7

Dated Nov. 26, 1888.

By the Court,
SAMUEL D. HASTINGS, Jr., *Judge.*

That thereafter and on the 30th day of November, 1888, said order was duly served on the said W. A. McKinley, and said order was thereafter and on the 11th day of December, 1888, duly returned to this court; and that the court being then engaged and unable to hear said matter, the same was by consent of parties adjourned to December 17th, 1888, at which time the parties again appeared in court; Contestant by A. Reinhart and claimaint by Webster & Wheeler, at which time the claimant McKinley made his answer to said petition, among other things, as follows:

(Title of Cause.)

He alleges, upon information and belief, that all of the women who voted for any candidate for said office at such election did so by ballot. That such ballot, in addition to the name of such candidate, contained the name of and was voted for no candidate for any other office except for State Superintendent of Schools. That each of such ballots was received by the inspectors of election of said precinct in the same manner as those voted by male electors at such election, and was by said inspectors deposited in a suitable ballot box provided by the proper officers for that purpose in which no ballots other than those so voted by said women were deposited. That, except as above stated, such election so far as the same was participated in by such women as aforesaid, was held and conducted and the votes counted, returned and canvassed, in all respects, as it was so far as participated in by the male voters voting at such election.

The foregoing being all of the answer that was admitted to be true and used upon the trial hereof.

BILL OF EXCEPTIONS.

The issues in this action or proceeding having come on for trial before the Hon. S. D. Hastings, Jr., Judge, presiding, at a special term of this Court on the 17th day of Dec., 1888, at which time it was stipulated in open Court that the statement of facts in the petition of the contestant herein is true. Following is a copy thereof:

(Title of Cause.)

The petition of H. W. Gilkey represents and shows to the Court—

1st. That at a general election held in and for Oconto County on the 6th day of November, 1888, for the purpose of electing, among other officers, a County Superintendent of Schools for Oconto County, Wis., exclusive of the City of Oconto, your petitioner received, legal votes, 603. W. A. McKinley received votes, legal and illegal, as follows, to wit: 617, as appears by the returns of the votes from the different towns in said election district, and as appears by the canvass of said returns by the County Canvassing Board.

2nd. That it appears, from a separate poll list accompanying the returns, that, in the Town of Pensaukee, to wit: in precinct No. 3, (one of the precincts in said election district,) that 35 women voted for said office of Superietendent of Schools without any right to do so; and that said votes were counted and included in the returns from said district and were so counted as legal votes by the county canvassers at their canvass of said returns completed Nov. 12th, 1888.

3rd. Your petitioner further represents and alleges, upon information and belief, that all but 2 of said illegal votes, to wit: 33 of them, were cast for the claimant W. A. McKinley, and the

other 2 for one Burbank, also a candidate for said office; and that if said illegal votes, so cast for said McKinley as aforesaid, are rejected and thrown out, he, the petitioner, would have a majority of the votes cast for said office, and that he, petitioner, is legally elected to the office of Superintendent of Schools for said district, but that, from the face of said returns, said McKinley is elected and has qualified as such and claims said office.

H. W. GILKEY, *Petitioner.*

STATE OF WISCONSIN, OCONTO COUNTY. } ss.

14 H. W. Gilkey, being duly sworn, says, that he is the petitioner above named; that he has heard read the foregoing petition and knows the contents thereof. That the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 24th day of November, 1888.

A. REINHART, *Attorney for Petitioner.*

B. G. GRUNERT, *County Clerk of Oconto County.*

It was also stipulated, at the same time, that the statement of facts in the fourth paragraph of
15 the answer of the claimant is true.

Following is a copy thereof:

(Title of Cause.)

He alleges, upon information and belief, that all of the women who voted for any candidate for said office at such election, did so by ballot. That such ballot, in addition to the name of such candidate, contained the name of and was voted for no candidate for any other office except for State Superintendent of Schools. That each of such

ballots was received by the inspectors of election of said precinct in the same manner as those voted by male electors at such election, and were 16 by said inspectors deposited in a suitable ballot box provided by the proper officers for that purpose, in which no ballots other than those so voted by said women were deposited. That, except as above stated, such election, so far as the same was participated in by such women as aforesaid, was held and conducted and the votes counted, returned and canvassed, in all respects as it was so far as participated in by the male voters voting at such election.

And that this case be tried upon the aforesaid petition and the aforesaid fourth paragraph of the claimant's Answer; and that thereupon said 17 contestant's case was presented by A. Reinhart, his attorney, and the claimant's case by Messrs. Webster & Wheeler. After which said case was submitted to the Court, and that thereafter and on the 29th day of December, 1888, the Court found and filed its findings of facts and conclusions of law, as follows:

Title of Cause.)

This case being at issue, and having been tried by the Court at said term by consent of parties, A. Reinhart, Esq., appearing for the contestant, and Messrs. Webster & Wheeler appearing for the claimant, the Court now finds the following 18 facts, to wit:

1st. That at the general election held Nov. 6th, 1888, there were cast for the above named claimant, in Oconto County, for County Superintendent of Schools of said County, six hundred and seventeen (617) ballots, thirty-three of which were cast by women.

2nd. There were cast for the above named contestant at said election for the same office six hundred and three (603) ballots, all of which were cast by male voters.

3rd. The ballots so cast by women, as above stated, in addition to the name of said claimant which appeared thereon as candidate for said office, contained no name, and was voted for no candidate for any other office except for State Superintendent of Schools, and each of said ballots was received by the inspectors of election of the precinct where they were cast in the same manner as those voted by the male electors at said precinct, and were by said inspectors deposited in a suitable ballot box provided by the proper officer for that purpose, in which no ballots other than those voted by said women were deposited. In all other respects said election for the office of County Superintendent of Schools in said county, so far as the same was participated in by said women as above set forth, was held and conducted, and the votes counted, returned and canvassed as it was so far as participated in by the male voters voting at said election.

——o——

AS CONCLUSIONS OF LAW,

The Court finds:

1st. That the women casting said ballots did so lawfully.

2nd. That, as to the office of County Superintendent of Schools, said election was one pertaining to school matters.

3rd. That the election was lawfully conducted, notwithstanding the ballots cast by said women were deposited in a ballot box by themselves, and

were properly received and counted.

4th. That the claimant was at said election duly elected to said office and is entitled to hold the same.

5th. That the claimant is entitled to judgment, for the dismissal of the petition of contestant and for costs.

Let judgment be entered accordingly and the costs inserted when taxed.

By the Court,

SAMUEL D. HASTINGS, Jr.

Dec. 29th, 1888. *Judge.*

That thereafter, and on the same day, judgment was entered herein, as follows:

(Title of Cause.)

The Court having made and filed its findings of fact and conclusions of law separately herein, whereby it finds for the above named claimant:

That he was duly elected to the office of County Superintendent of Schools for Oconto County, at the general election held in said county, Nov. 6, 1888, and is entitled to hold said office; and that the said claimant is entitled to judgment herein, for the dismissal of the petition of the above named contestant and for costs.

Now, therefore, on motion of Webster & Wheeler, attorneys for said claimant, it is ordered and adjudged that said petition be and is hereby dismissed, and that the claimant recover of the contestant the sum of————————dollars the costs and disbursements of this proceeding.

By the Court,

SAMUEL D. HASTINGS, Jr.

Attest, *Judge.*

R. L. HALL, *Clerk.*

Dec. 29th 1888.

That afterwards, and on the 17th day of Jan., 1889, the costs and disbursements herein were by the Clerk of this Court taxed at the sum of $36.99 and said amount inserted in the judgment, and that on the 18th day of January, 1889, the claimant duly served the contestant with notice of the entry of said judgment, and thereafter, on the
24 22d day of January, 1889, the contestant filed the following written exceptions to said conclusions of law and findings of facts:

(Title of Cause.)

EXCEPTIONS.

I. Take notice, that the contestant excepts to the first of the conclusions of law found herein by S. D. Hastings, Jr., the Judge who tried this case.

II. That he also excepts to the second of said conclusions of law.

III. That he also excepts to the third, fourth and fifth of said conclusions of law.

IV. That he also excepts to said conclusions of law, generally, in that said conclusions are
25 not warranted by the facts, as stipulated herein.

V. That he also excepts to the findings of fact No. 3, in so far as the Court finds that the ballots of women were by the inspectors deposited in a suitable ballot box provided by the proper officers for that purpose, for the reason that the same is not warranted by the evidence.

A. REINHART,
Attorney for Contestant.

Dated, Jan 22, 1889.

And because the said matters, rulings, stipulations, decisions and exceptions do not appear in the record of the proceedings herein, I have on

this 15th day of March, 1889, at the prayer of the 26
contestant settled, signed and do hereby certify this bill of exceptions, which contains all the evidence and testimony given or submitted on the trial hereof.

SAMUEL D. HASTINGS, Jr., *Judge.*

The Contestant appeals from said judgment against him.

A. REINHART,
Contestant's Attorney.

STATE OF WISCONSIN.

IN SUPREME COURT

H. W. GILKEY,
Contestant and Appellant,
vs.
W. A. McKINLEY,
Claimant and Respondent.

APPELLANT'S BRIEF.

This is an appeal from a decision of the Circuit Court of Oconto County, rendered Dec. 29th, 1888, in favor of the claimant, upon an agreed state of facts, (see fols. 1 to 9 inclusive of case,) and presents for the consideration of this Court only a question of law. If the 33 votes of women cast for claimant were legally cast and legally counted, the claimant was elected to the office contended for, and the judgment in favor of claimant, in the Court below, was right and should be affirmed. If said votes were illegally cast and illegally counted, or either, then said judgment is erroneous, and should be reversed.

Chaper 211, Laws of 1885, provides that women, possessing certain qulifications, may vote "at an election pertaining to school matters."

In the case at bar, women voted at an election, to wit:— a general election, not pertaining to school matters, but an election for presidential electors, also an election for State officers,—Congressmen, members of assembly and also all county officers, as well as an election for county superintendent of school.

Such an election is not an election pertaining to school matters. It is an election required by law to be held in all the States in the union upon the same day for presidential electors at least, and, in a majority of the States, for all of the officers herein before enumerated, and is in no sense "an election pertaining to school matters." What is "an election pertaining to school matters?"

All elections pertaining to school matters, are such elections as are held in school districts, namely—

First. The employment of teachers, male or female; the wages to be paid; the number of months of school; term, time and vacation.

Second. The election of school district officers.

Third. The selection of school-house sites; the building of school houses; the voting of the necessary appropriations therefor, and all such business as refers or appertains directly to school matters.

The foregoing, it seems to us, constitute the "elections pertaining to school matters," contemplated by the foregoing act. Indeed, it would seem that this Court took that view in a case reported in 71st Wis., page 239; and on page 253 of said case we find the following: "an election for the choosing of any school officers or school employee would be "an election pertaining to school matters."

Now, what is the meaning of "school officers, or school employees?"

School officers are elected at a school-district

meeting, and school employees are teachers, janitors, etc.

This is the only construction that can be put upon said chaper 211, Laws of 1885, in the light of the aforesaid decision, for in that decision this Court holds that at an election like the one at bar—That is, when by statute the school commissioner, or other school officer, is to be voted for upon the same ballot or piece of paper upon which are the names of other persons voted for by such elector, (as in this case,) it would seem that the inspectors are not authorized to receive the votes of women, even for such school officers.

The election at bar was held under sec. 32, R. S., which was the section under consideration in that case, and requires all ballots to be deposited in one box and all persons to be voted for to be upon one ballot or piece of paper.

This Court also in that case uses the following language: "It may therefore require further legislation to secure the full benefits of the rights sought to be conferred by chapter 211, Laws of 1885. In this respect it may be like many provisions of our State and National constitution, which do not execute themselves, but require legislation, in order to become effective."

From the foregoing decision, as well as from other considerations, we are satisfied that the Court must hold: that, under existing laws, women can only vote at school district meetings. An election for the choosing of any other officer is not an election pertaining to school matters.

This Court has declared, in same case (page 253,) and can it be affirmed that an election for the choosing of a county superintendent of schools, at the same time of the general election in the fall, when a great many other officers are

to be elected, is an election pertaining to school matters. It is, at most, an election pertaining to school matters and a great many other matters as well.

It was conceded, upon the argument in the Court below, that the votes of women could not be received and deposited in the box, and the law only provides for one box, (sec. 32, R. S.,) and the Court below so held; but it appears from the answer of the defendant, as admitted, that the inspectors of election kept a separate ballot box for the reception of the 33 votes of women, and the Court below held that that fact made the votes legal. In other words, the Court below held that the inspectors of election could and did supply the additional legislation deemed necessary by this Court and having bridged the gap. That their receipt of the votes was in all respects legal, as well as the counting, returns, etc., of said votes; and this, notwithstanding the statute expressly provides that all the ballots voted at such election should be deposited in the box.

In fact, the Court below in his written opinion filed herein, holds that under sections 30, 31 and 32 of the R. S., the inspectors of election may, if they decide that the exigency of the case requires it, keep as many ballot boxes for the reception of the votes, and keep them separate or otherwise, as they shall determine, etc.

And he argues that if this is not so, then the election for the judiciary is not held under sec. 32 aforesaid. The construction of sections 30, 31 and 32 aforesaid by the learned Circuit Judge of the Court below, is clearly erroneous and cannot be sustained, for the reason, among others, that by said sections no power whatever is given to the inspectors except to conduct the

election as therein provided, each and every step to be taken by said inspectors in conducting an election being therein provided.

Section 30 provides that the clerk of each town, city or village shall, at the expense of such town, city or village, provide suitable ballot boxes for each pole therein: with a suitable lock and key and an opening through the lid, of certain size, etc.

Section 31 provides that the inspectors of election, or one of them, immediately before proclamation is made for opening of the poles, shall open the ballot boxes in the presence of the people there assembled, turn them upside down, so as to empty them of every thing that may be in them, and lock them, etc.

These two sections provide for ballot boxes and the manner in which they should be handled. In these two sections the term "boxes" is used, and it is used for the reason that there are very many elections held under the law where two ballot boxes must of necessity be used, such as the electing of the judicary; the submission of an amendment of the constitution to the people; the submission of an act of the legislature to the people prior to its becoming a law. Thus it will be seen that each precinct must have ballot boxes, and because the word "ballot boxes" is used in sections 30 and 31 aforesaid, the Court below comes to the conclusion that ballot boxes may be used instead of the "box" as provided in sec. 32, under which the election at bar was held.

Section 32 aforesaid is as follows: "Each elector shall publicly, at the poles where he offers to vote, deliver in person to one of the inspectors of election a single ballot or piece of paper, on which shall be written or printed the names of

all persons voted for by such elector, at such election, with a pertinent designation of the respective office which each person so voted for may be intended to fill, and the inspector receiving the same shall, without opening it, or permitting it to be opened or examined, deposit it in the box."

Thus it will be seen that, under sec. 32 aforesaid, the inspectors of election are required to deposit all the ballots received by them in the "box," meaning of course one box, and no authority is given for the keeping of a separate ballot box by the inspectors.

Let us assume, for the sake of the argument, that the inspectors have the right to decide how many ballot boxes they will keep, for the reception of a particular kind of ballot, etc., as decided by the learned Circuit Judge herein, irrespective and irregardless of the law.

Then, of course, in the first place, upon the organization of the boards in the different election precincts, they must first decide, judicially, whether or not the exigency of the case has arisen for a departure from the provisions of the law under which said election is held. Having decided that question, either for or against obeying the law, they will then proceed, ministerially, to hold an election either under the law or outside of the law, and in obedience to their will only. Now, we come to the next board of inspectors. They must also first act as a Court as to the exigency of the case, and so on to the end of the chaper. And out of, we will say, twenty election precinct boards, how many of them will decide that the exigency of the case has arisen to make it necessary to keep more than the number of ballot boxes authorized by the law. We maintain that mortal man can form no idea how

the boards will decide; perhaps, like the case at bar, only one precinct out of the twenty will so decide, and that precinct keep the extra ballot box. In the other nineteen, the law will be observed, instead of the will of the inspectors.

It must, it seems to us, be manifest to this Court, as well as to all persons, that it never was the intention of the legislature to vest any such power in the inspectors of election. To vest such a power in them would have a strong tendency to create chaos and confusion, and introduce uncertainty and prevent uniformity in the conducting of elections, to say nothing of the danger of the power being abused for partisan purposes. It was the intention of the law-makers that all elections should be held and conducted in strict conformity to the law under which they are held, and not outside of, and in defiance of the law, like the case at bar.

But let us return to that portion of the learned Circuit Judge's opinion wherein he asserts that if the inspectors of election had not the right to keep the separate ballot box for the reception of the 33 votes of women, then the election for the Judiciary is not held under sec. 32 aforesaid.

The Judicial election is not held under sec. 32 aforesaid, but is held under sections 86 and 89 of Chaper 7, R. S. Section 86 fixes the time of holding the judicial election, to wit: the first Tuesday of April, (being the time of holding the general election in the spring.)

Section 89 prescribes the manner of conducting said election; the manner of canvassing said votes; also the returns, etc. And expressly provides that said votes shall be deposited in a ballot box by themselves. And all that Chapter 5, in which sec. 32 aforesaid is found, is used for,

is the manner of receiving the votes, and the qualification of voters.

Thus it will be seen that the learned Circuit Judge was in error when he assumed that the election for the judiciary was held under sec. 32 aforesaid.

Now, in our opinion in this matter there is no middle ground—either the women, as the law now stands, can not vote even for school officers at a general election; or, if they can vote, they can vote for all officers to be elected at said election. And their ballots must be deposited in the box (and not outside of the box as in this case.) In any event, the ballots of said women in this case were null and void, for the reason that there was no authority for the inspectors to receive the votes. And this Court has so held in 71st Wisconsin Reports, page 254, hereinbefore cited. Nor had the inspectors any authority to deposit said votes in a separate ballot box. The keeping of a separate ballot box for a part of the ballots, or for a particular kind of ballot, is in conflict with sec. 32 R. S. aforesaid—unless there is a provision of law therefor, as in case of the election of Judges, or the submission of some act for a vote of the people prior to its becoming a law, and the like. In all of which cases the act itself provides for the keeping of a separate ballot box; the kind of ballots to be voted; also provides for the canvassing of said votes, etc.

Again, if the learned Circuit Judge is right in this case there would be no need of any provision of law for the keeping of a separate ballot box in the case of the election of judges, the submission of an act to the people, or for a vote upon an amendment of the constitution.

Cases might be multiplied of unnecessary legislation, under the Court's ruling herein. In fact, if the Court below is right, there is no law for the conducting of an election, but the will of the inspectors and as he says, for the reason, that the election laws are directory and not mandatory.

It is a well recognized principle of statutory construction, that election laws are to be liberally construed when necessary to reach a substantially correct result, and to that end their provisions will, to every reasonable extent, be treated as directory rather than mandatory. Citing 7th of Western (Ind.) R., pages 233 and 236, and cases there cited.

In the present case, the election laws should be strictly construed; for the reason that the 33 votes of women were evidently received by a trick of the trade. There were over 1,200 votes cast at said election, and only 33 of them by women. And their votes decided the election. In the precinct where the votes of women were cast, the claimant and his wife resided. Between the two they evidently marshalled together 33 women who would vote for him, the claimant. The inspectors of election, conspiring with them, received the votes, and they were counted and returned as legal votes. At no other precinct in said district were any votes of women received. To count these 33 votes would be to uphold a trick, thereby disfranchize the vote of the whole district. Without these votes Gilkey, the contestant, is elected. With them the claimant, McKinley, is elected. It would seem that there was no language strong enough to denounce and stamp the transaction, as a fraud of the first water. It was not generally known, we think, in the precinct where the votes were cast, that women would be allowed to vote for county

superintendent of schools for the reason that if it was there should be some votes for the contestant.

But, as before stated, the whole programme was carried through as though it would not bear the light of day. Should the election laws be construed as directory and not mandatory in the present case, for the purpose of upholding a trick, and would not a substantially correct result be reached by rejecting the 33 votes of women, even if this Court had not decided that the inspectors of election could not receive them in a case like the one at bar?

In conclusion, we think this is the first time that any Court has attempted to construe the election laws in such a manner, as to authorize the keeping of a separate ballot box for the reception of ballots that could not be put in "the box," without the shadow of authority therefor, and in defiance of a positive provision of the statute; also holding legal the canvass of said votes, their return, etc. without any law therefor except the will of the inspectors; and justifying the same, upon the theory that the election laws are directory and not mandatory. Indeed, we think, with a few more of these decisions, the election laws will entirely disappear and the will of the inspectors will be the only law needed.

A. REINHART,
Attorney for Contestant.

8

STATE OF WISCONSIN.

In Supreme Court.

H. W. GILKEY, *Appellant,*

vs.

W. A. MCKINLEY, *Respondent.*

STATEMENT OF FACTS.

At the General Election held in this State Nov. 6th, 1888, Respondent and Appellant were voted for as rival candidates for the office of County Superintendent of Schools in and for Oconto County.

At the trial of this action "it was stipulated in open Court that the statement of facts in the petition of the contestant (Appellant) is true:" (Fol. 10, Case.) "It was also stipulated, at the same time, that the statement of facts in the fourth paragraph of the answer of the claimant (Respondent) is true," (Fol. 14, Case) "And that this case be tried upon the aforesaid petition and the aforesaid fourth paragraph of the claimant's answer:" (Fol. 16, Case.)

The facts stated in the petition are, substantially, that at said election the Appellant received 603, and Respondent 617 votes "as appears buy the returns of the votes from the different towns in said election district (Oconto County) and as appears by the canvass of said returns by the County Canvassing Board;" that it appeared from a separate poll list accompanying the returns, that in the town of Pensaukee, to wit: in precinct No. 3, (one of the precincts in said election district) 35 women voted for said office of Superintend of Schools and that said votes were counted and included in the returns from said district and were so counted as legal votes by the county canvassers at their canvass of said returns, completed Nov. 12th 1888; that all but 2 of the 35 votes so cast by women, were cast for Respondent and that upon the face of the returns Respondent was elected and had qualified and claimed the office.

The facts stated in the fourth paragraph of the answer are, substantially, that all of the women who voted did so by ballot; that each ballot contained on-

ly the names of the candidates for State and County Superintendents of Schools voted for: that it was received by the inspectors of election in the same manner as those voted by male electors at such election and was by said inspectors deposited in a suitable ballot box provided by the proper officers for that purpose, in which no other ballots than those so voted by said women were deposited; that in all other respects the election, so far as it was participated in by the women voting, was held and conducted, and the votes counted, returned and canvassed, as it was so far as participated in by the male voters voting at the election. (Fols. 8, 9, Case.)

The Appellant claimed in his petition that the votes cast by women at the election were illegal and should have been thrown out by the canvassers and that, if thrown out, he would have had a majority of the legal votes cast for the office at that election and with the view of having them so declared and obtaining the office, he resorted to the remedy provided by Chap. 464, L. of 1885.

The Court found the facts as stipulated and as conclusions of law found

"1st. That the women casting said ballots did so lawfully.

2d. That as to the office of County Superintendent of Schools said election was one partaining to school matters.

3d. That the election was lawfully conducted, notwithstanding the ballots cast by said women were

deposited in a ballot box by themselves, and were properly received and counted.

4th. That the claimant was at said election duly elected to said office and is entitled to hold the same.

5th. That the claimant is entitled to judgment for the dismissal of the petition of contestant and for costs."

Appellant filed exceptions to the 1st, 2d, 3d and 4th conclusions of law and to the 3d finding of fact "in so far as the Court finds that the ballots of women were by the inspectors deposited in a suitable ballot box provided by the proper officers for that purpose, for the reason that the same is not *warranted* by the *evidence*."

Judgment was entered for Respondent in accordance with the Court's Conclusions and Appellant then settled a Bill of Exceptions and brought the Case to this Court by appeal.

POINTS AND AUTHORITIES.

I.

The exception filed to the 3d finding of fact was doubtless inadvertent as the findings are all based, and the case was tried on *stipulated* facts instead of on evidence. Appellant's brief begins with the recital "This is an appeal from a decision * * * * * * * upon an agreed state of facts and presents for the consideration of this Court only a question of law."

II.

The claim made by Appellant that the votes cast

by women at the election were illegal, is based upon the following contention: that they possess the right of suffrage only in virtue of chap. 211, Laws of 1885; that the right there conferred is to vote only "at an election pertaining to school matters:" that such an election must be one "pertaining to school matters" *alone*: that the general election at which these votes were cast was *not* "an election pertaining to school matters" *alone* and the votes should not therefore have been received.

It is conceded that, if the proposition is correct in law, Appellant was elected to and should have the office.

This then is the question: "May women, under any circumstances, as the law now stands, vote for a County Superintendent of Schools?"

If they may, they must do so at a *general* election, for at such an election only is that officer elected. Section 698 R. S.

The affirmative contention must be that *as to such office*, such an election is one "pertaining to school matters."

It will not do to say that the limited right of suffrage conferred on women by Chap. 211, Laws of 1885, can only be exercised at elections *relating alone to school matters*, for the franchise, in terms, extends to "*any* election *pertaining* to school matters."

Is not an election at which an officer is directly voted for who is a school officer *only:* whose official duties relate to school matters *alone:* whose office, if

abolished, would, in the absence of some substitute provision, stop the entire machinery (except in cities etc., having an independent system) of the public school system of the state—is not such an election, *as to that office*, one "pertaining to school matters" within the meaning of this act? This view is directly supported by *Brown vs. Phillips et al. 71 Wis. 239—(253)* where it was held that the word "election" as used in the act of 1885 must mean "the act of choosing a person to fill an office or employment *in school matters*; otherwise such election would not pertain or relate to school matters. An election for the choosing of *any* school officers or school employees would be an election pertaining to school matters within the meaning of the act."

If the statute provided that such officer should be voted for at a time when no other officers were to be elected, could not women vote at such an election? If the Superintendent was to be elected at the annual school district meetings, could not women vote for him then?

If so, upon what ground? clearly because his election: the election of a County Superintendent of Schools is essentially and exclusively one "pertaining to school matters."

Because he is required by law to be elected at one *time* rather than at *another*, does that deprive *his* election of its distinctive character as "one pertaining to school matters?" If so, then an election "pertains to school matters" or not, according to the circumstances under which it is held, rather than according to the *character* of the *office* or *duties* of the *officer*.

The Govenor is elected at a general election: do we not say, as to his election, the election pertains to state matters? Does it pertain to state matters any the less because at the same election, county officers and congressional representatives are voted for? If the school district officers were by law required to be voted for at the same election, would it not be, *as to them*, an election pertaining to school matters? Can it be doubted that under the grant of suffrage by the act of 1885, women might vote at such an election for such officers? It will hardly be affirmed but that, at school district meetings, under the district system that obtains in the state, women might vote for the election of the district officers—director, treasurer and clerk; if by law these officers should be required to be elected hereafter at the *general* election at which the state and county officers are elected, would such a change operate to defeat a further exercise by women of the suffrage right conferred by the act of 1885? This undoubtedly would result if the contention of counsel is correct, that such right can only be exercised at an election at which school officers and school matters *alone* are to be voted for, and a right, conferred by the constitution, would thus be made to depend for its exercise *upon the legislative will* and could be defeated by a piece of legerdemain, for it would only be necessary to provide by law, by legis-

lative enactment, for the election of school officers at general elections, and the abrogation of the franchise would be accomplished. It cannot be supposed that a right, the establishment of which was only secured after the solemnities have been observed that, *ex necessitate legis*, accompany the adoption of an amendment to the constitution, was intended to be made to depend for its exercise upon so fickle and vacillating a tenure as subsequent legislative will. If it was, then a great state appears in the role of having, in terms, by a constitutional amendment, removed the disabilities of a sex, but of having left the fetters conveniently at hand, again to be riveted, in restraint of the right, by any legislature adverse to its exercise.

If, when this amendment became operative, this officer was by law required to be voted for at school district meetings, it is not denied that the disability of sex was so far removed by the amendment that women might, without further legislation, exercise the right immediately; it is a grant *in presenti:* whatever they may do in virtue of the act, may be done instantly its adoption is perfected. They could, at all school district meetings thereafter, vote for all school officers, this with the rest, if by law County Superintendents were to be voted for at such meetings. Suppose, after the right had been enjoyed for years, the legislature should enact that County Superintendents should thereafter be elected at *general* elections; would their right to vote for him at *such* elections be destroyed? What questions would con-

front the Court if it were asked to so hold? It would be said that "because women may not vote for a school officer at a general election, the act requiring him to be voted for at such an election was void because it defeated an existing constitutional right of suffrage." This would be the contention, and, if such should be held to be its effect, why would not such an act be void? But the Court would struggle to save the act and save it if possible. This is the established rule of construction. If the act and the franchise could both be saved, both would be saved, and the problem would be, "can the franchise still be exercised notwithstanding the officer must be voted for at a general election? If so, the contention that the act is void fails.

Whether the right could be enjoyed at a general election would depend upon whether *the existing election machinery* afforded facilities for its exercise without its having any effect upon the election of other officers voted for at the same election, with whose election the newly enfranchised class has nothing to do.

If the act contained a proviso to the effect that, "where by law any school officers are required to be voted for at a *general* election, a separate ballot box and poll list shall be kept for the reception and record of the ballots cast for such officers by women" could any objection be made to their voting for such officers at such an election? Such a provision would relieve the situation of all doubt for it would effectually prevent the election of all other officers voted

for at the same election from being in any way affected by the ballots cast by women.

But the act contains no such provision: it provides no *new* machinery for the enjoyment of the right it confers: it stops with the investiture of the right.

In the absence of a general statue broad enough to provide the necessary machinery for the enjoyment of the right at a general election, and in the absence of any statute *forbidding* the election officers, the inspectors and clerks, any discretion to provide for such cases, what valid objection could be urged to their doing so? If they did so in fact, there being neither express authority or prohibition, would any court say, if the means adopted were effectual and suitable, that the votes of women cast at a general election for County Superintendent of Schools should not be counted? If a suitable box with suitable appliances for safety was actually used for the reception of the votes cast by women, in all respects like that kept for the reception of the ballots cast by male voters: if all ballots cast by women, and none others, were deposited in that box by the inspectors, and a separate poll list kept of those voting,—if it be conceded that a County Superintendent is an officer for whose election women might vote under proper circumstances, what court would say their votes, cast for such officer at a general election, under such circumstances, could not be counted?

But it is conceived that the general statutes relating to election machinery are sufficient.

Section 30, R. S. 1878, provides "There shall be provided and kept by the clerk of each town, city or village, * * * * * * *suitable ballot boxes* for each poll therein," etc. By "suitable" is meant *such ballot boxes as all of the necessities of an election may require.* If a case arises, as here, where a limited right of suffrage exists and is sought to be exercised, and it cannot otherwise, without affecting the election of other officers, be done, it is the clerk's duty to provide a suitable and separate ballot box for the reception of the ballots. This it is conceded was done in this case and the right was enjoyed, under existing law as to election machinery, and the election in other respects was in no way interferred with or affected. What more is needed?

It was intimated in *Brown vs. Phillips et al., Supra,* page 254, in speaking of existing election machinery, that it might "require further legislation to secure the full benefits of the right sought to be conferred by" the act of 1885, but it is not seen that more is necessary since here the right was fully enjoyed without introducing any uncertainty as to other officers being voted for, into the election. Even in the case there suggested by the Court "where the statutes require such commissioners, or other school officers to be voted for upon the same 'ballot or piece of paper' upon which are the names of other 'persons voted for by such elector,' the expedient here resorted to of using a separate poll list and ballot box for the ballots cast by women, would save such votes for

the officer they were qualified to vote for, for the presence of other names upon the ballot, for other officers they were *not* qualified to vote for would only invalidate such ballots, *pro tanto.*

Sec. 75, R. S. practically makes all statutes prescribing the manner of conducting elections, directory.

It would require irregularities serious enough, it is conceived, to import fraud, to defeat "the real will of the plurality," in view of this statue. "And even where the statute provisions are mandatory, they do not necessarily defeat an election actually held, if the means exist of determining the result." *Farrington vs. Turner, 53 Mich., 27; Stemper vs. Higgins, 38 Minn., 222.*

That statutes prescribing the manner for conducting elections are directory merely, was early held in this state; *State ex rel. Spaulding v. Elwood, 12 Wis., 551,* where it was held the failure to keep a separate poll list, required by law to be kept, did not invalidate the election. And see *Am. and Eng. Encyclopedia of Law, Vol. 6, page 325,* where the cases are collected. See page 327, same work for cases relating to the failure to comply with statury provisions in regard to ballot boxes.

The rule of the authorities seems to be that, if the method adopted by the election officers for determining "the real will of the plurality" accomplishes that result with *certainty,* it is, no matter how informal, sufficient.

It is therefore contended then that, if women were

so far enfranchised by the act of 1885 as to be entitled to vote for a County Superintendent of Schools, it was competent and proper for the election officers to keep a separate poll list for such as voted and a separate ballot box for the reception of their ballots, and it is also contended that "the act of choosing a a person to fill *any* school office is an election "pertaining to school matters" whether chosen at a general election or otherwise.

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