No. 67728

WILLIAM S. NORRIS VS CITY ETAL

BILL TO RESTRAIN THE CITY FROM LETTING

CONTRACT TO THE AUTOMATIC VOTING MACHINE CO

CIRCUIT COURT NO 2.

SECOND CASE
NORRIS

SEE
67007
67780
68164
68404

HOWARD W. JACKSON, ETC., ET AL.

VS.

WILLIAM S. NORRIS.

HOWARD W. JACKSON, ETC., ET AL.

VS.

HATTIE B. DALY.

IN THE

Court of Appeals

OF MARYLAND.

JANUARY TERM, 1938.

GENERAL DOCKET

NOS. 3 AND 4.

BRIEF ON BEHALF OF MAYOR AND CITY COUNCIL OF BALTIMORE AND R. WALTER GRAHAM, COMPTROLLER OF BALTIMORE CITY.

CHARLES C. G. EVANS,
Deputy City Solicitor,

WILLIAM H. MARSHALL,
Assistant City Solicitor,

Solicitors for Mayor and City Council of Baltimore and R. Walter Graham, Comptroller of Baltimore City.

The Daily Record Co. Print, Baltimore.

HOWARD W. JACKSON, ETC., ET AL. VS. WILLIAM S. NORRIS. HOWARD W. JACKSON, ETC., ET AL. VS. HATTIE B. DALY.	IN THE **Court of Appeals** OF MARYLAND. JANUARY TERM, 1938. GENERAL DOCKET NOS. 3 AND 4.

BRIEF ON BEHALF OF MAYOR AND CITY COUNCIL OF BALTIMORE AND R. WALTER GRAHAM, COMPTROLLER OF BALTIMORE CITY.

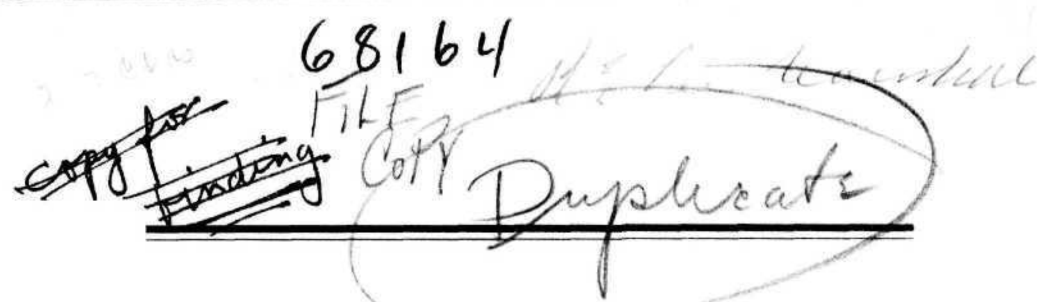
For the nature of the cases, questions for this Court's decision, the decision of the Trial Court, the conclusions sought to be maintained, the facts and argument, this Honorable Court is respectfully referred to the brief filed in this Court on behalf of the Voting Machine Board in the above entitled cases, which brief is hereby adopted and filed as the brief of the Mayor and City Council of Baltimore and R. Walter Graham, Comptroller of Baltimore City, two of the appellees in the above entitled cases.

Respectfully submitted,

CHARLES C. G. EVANS,
Deputy City Solicitor,

WILLIAM H. MARSHALL,
Assistant City Solicitor,

Solicitors for Mayor and City Council of Baltimore and R. Walter Graham, Comptroller of Baltimore City.



HOWARD W. JACKSON, ETC., ET AL. vs. WILLIAM S. NORRIS.	IN THE **Court of Appeals** OF MARYLAND.
HOWARD W. JACKSON, ETC., ET AL. vs. HATTIE B. DALY.	JANUARY TERM, 1938. GENERAL DOCKET NOS. 3 AND 4.

BRIEF ON BEHALF OF APPELLANT VOTING MACHINE BOARD.

PAUL F. DUE,
Solicitor for Voting Machine Board.

The Daily Record Co., Print, Baltimore.

HOWARD W. JACKSON, ETC., ET AL. vs. WILLIAM S. NORRIS. — HOWARD W. JACKSON, ETC., ET AL. vs. HATTIE B. DALY.	IN THE **Court of Appeals** OF MARYLAND. — JANUARY TERM, 1938. — GENERAL DOCKET NOS. 3 AND 4.

BRIEF ON BEHALF OF APPELLANT VOTING MACHINE BOARD.

NATURE OF THE CASE.

These cases involve appeals and cross-appeals from a decree of the Circuit Court No. 2 of Baltimore City, enjoining and restraining all of the defendants below from proceeding further under a contract dated September 8, 1937, for the purchase of voting machines, from buying or accepting delivery of any of said voting machines referred to therein, and from spending or pledging any public funds therefor (R. p. 336).

The defendants so enjoined and restrained, are the Automatic Voting Machine Corporation (hereinafter referred to for convenience as the "Automatic Corporation"), manufacturer of voting machines, the eight members of the Voting Machine Board, as created and established by Chapter 94 of the Acts of 1937, the members of the Board of Supervisors of Election of Baltimore

City, the Mayor and City Council of Baltimore and the Comptroller of Baltimore City (R. pp. 54, 55).

Each of these proceedings was brought by a taxpayer; and the grounds of attack upon the validity of the contract are, with certain exceptions hereinafter noted, substantially the same. The lower Court resolved all questions presented in both cases in favor of the defendants, with one exception, which is the basis of its decree, namely, that the voting machines purchased do not permit the voter to write in the name of a candidate of his personal choice, which right, the lower Court held, is guaranteed by the Declaration of Rights and Constitution of the State of Maryland (R. pp. 335, 336). The appeal of the defendants below raises the question of the legality of this ruling (R. pp. 338-343). The cross-appeals of the respective taxpayers raise the question of the legality of the Court's ruling upon all other grounds of objection to said contract made by them (R. pp. 340, 342). These other grounds are numerous and involved and relate generally to the alleged failure of the voting machines purchased to comply with the election laws in respect to voting a first and second choice where there are three or more candidates for any State-wide office in a primary election; to the alleged failure of the voting machines to provide *nine rows* of levers or devices for voting for nine different political parties, as provided in Section 44 of the Specifications; for the alleged failure of the ballot labels on said machines to contain the size and character of printing required by law, particularly in the case of voting for candidates for first and second choice; and for other reasons more particularly set forth immediately hereafter under the heading "Questions Presented for the Court's Decision."

QUESTIONS PRESENTED FOR THE COURT'S DECISION.

I.

Do the provisions of Article 7 of the Declaration of Rights of Maryland and Section 1 of Article 1 of the Constitution of Maryland guarantee to the voters of this State the right to write upon the ballot, or upon the ballot label of any voting machine, the name of a candidate of their personal choice for any office, if such candidate's name is not printed on the said ballot or ballot label?

Trial Court's Ruling.

The Trial Court held that the Declaration of Rights and Constitution guarantee to the voter the right to write-in the name of the candidate of his personal choice; and because the machines purchased were not so equipped, the Court held that the contract therefor was unlawful.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Declaration of Rights and Constitution of Maryland do not guarantee to the voter the right to write-in the name of the candidate of his choice.

That the Legislature, in 1924, amended Section 80 of Article 33 of the Code of Public General Laws and struck out the provision previously contained therein which permitted write-in voting. That this legislative construction of the Declaration of Rights and Constitution of Maryland has since been continuously acquiesced in by the successive Attorneys General of Maryland, by all election officials, by the respective candidates, and by the people of Maryland. That the Legislature has established a procedure whereby any voter in Maryland may secure the

printing on the ballot of the name of the candidate of his personal choice (Section 51 of Article 33 of the Code of Public General Laws); and since the procedure established by the Legislature under said Section 51 of Article 33 is reasonable, the voter has no constitutional right to write-in the name of anyone not printed thereon.

II.

If the Declaration of Rights and Constitution of Maryland guarantee write-in or personal choice voting, is it unlawful for the Voting Machine Board to purchase a voting machine which does not include equipment therefor, but to which it is feasible to add such equipment?

Trial Court's Ruling.

The Trial Court held that write-in voting was guaranteed by the Constitution and that since the sample voting machine submitted by the Automatic Corporation does not contain such equipment, its purchase by the Voting Machine Board is unlawful, even though the record showed that it was feasible to add the necessary equipment to permit write-in voting.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Trial Court was in error in its ruling that the Voting Machine Board had no power *to purchase* a machine which did not contain equipment for write-in voting, when it affirmatively appeared from the record that the said machine, by the addition of said equipment, would provide for write-in voting.

That although the Court may have had authority to enjoin the *use* of a machine not equipped for write-in

voting, if the latter is guaranteed by the Constitution, it did not have the right to enjoin the purchase of such a machine by the Voting Machine Board.

That the Legislature had conferred upon the Voting Machine Board full and complete power, authority and discretion in the premises, and if the Board determined to purchase a voting machine not equipped with write-in voting, with the view of adding such equipment thereafter, the Court had no authority to enjoin it from doing so.

III.

If the Declaration of Rights and Constitution of Maryland guarantee write-in or personal choice voting, is the Automatic Corporation obliged, under the terms of its contract, to furnish a machine which will permit every voter to vote at any election for any person for whom he is lawfully entitled to vote, which would necessarily include his personal choice candidate, in view of the assumption of both the Automatic Corporation and the Voting Machine Board, under advice of the Attorney General, that write-in voting is unlawful in Maryland?

Trial Court's Ruling.

While the Trial Court made no specific reference to this point, the effect of its ruling was to hold in the negative.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That under Section 43 of the Specifications and Subsection (d) of Section 224-F of the Voting Machine Act, the Automatic Corporation is obliged to provide voting machines which will "permit each voter to vote at any

election for any person * * * for whom * * * he is lawfully entitled to vote," which necessarily includes personal choice voting.

That it was never contemplated by the Voting Machine Board or the Automatic Corporation that this provision of the contract should require the said corporation to furnish a machine equipped for write-in voting. That the Voting Machine Board, on the strength of advice from the Attorney General that write-in voting was illegal, advised the Automatic Corporation that equipment for write-in voting was not required. That the contract cannot be reformed to require the Voting Machine Board to accept a machine which does not permit write-in voting, although the Voting Machine Board has authority under the law to contract for a machine without write-in voting for the contract price, if it be decided that the Automatic Corporation is not obliged to furnish the same, because of this mutual mistake of law. That the Voting Machine Board likewise has authority under the law to advertise for new bids, if it be determined that the Automatic Corporation is not obliged to furnish write-in voting, or to let another contract with the Automatic Corporation or its competitor, without competitive bidding.

That the question of whether or not the Automatic Corporation will be obliged to furnish this write-in equipment at its own expense depends upon whether this Court will allow the contract to be rescinded because of this mutual mistake of law. The necessary effect of the decision of the Trial Court was to free the Automatic Corporation of this obligation, although the Opinion does not pass upon this question.

IV.

Does the plan designated as Plan A for voting for first and second choice, where three or more persons are candidates for State-wide office in the same party primary, meet all the legal requirements of the Voting Machine Act and the Election Laws?

Trial Court's Ruling.

The Trial Court held that Plan A was valid in all respects.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Trial Court was correct in its ruling and that the said plan is in substantial compliance with Section 203 of Article 33, which is all that is required under the provisions of Sub-section (d) of Section 224-F of the Voting Machine Act.

V.

May the ballot labels of the voting machines lawfully carry the name of any candidate more than once?

Trial Court's Ruling.

The Trial Court held that they may do so.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Court was correct in this ruling. That this criticism is directed at the Plan A and Plan B method of first and second choice voting.

That it is impossible to construct a voting machine which will not require the repeating of a candidate's name in first and second choice voting.

That the Voting Machine Act does not prohibit such a repetition of the name of any candidate.

VI.

Did the Voting Machine Board have authority, if it so elected, to permit the Automatic Corporation, at no additional cost to the City, to furnish a voting machine equipped to vote personal choice voting in accordance with Plan B?

Trial Court's Ruling.

The Trial Court held that the change in the machine necessary for this purpose was not such a substantial departure from the plans and specifications as to require further competitive bidding.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Trial Court was correct in its ruling that the Voting Machine Board had the right to accept a machine equipped to vote Plan B, if it so desired.

The Voting Machine Board, however, contends that since it is not bound by any rules of competitive bidding, it made no difference legally whether a substantial change in the machine was required to vote Plan B or not, although in fact no substantial change was necessary.

VII.

Does the Voting Machine of the Automatic Corporation have nine rows of levers or devices for voting for

nine different political parties as required by Section 44 of the Specifications?

Trial Court's Ruling.

The Trial Court ruled that the voting machine has nine such rows of levers or devices, etc.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Trial Court was correct in its ruling.

An examination of the machine itself shows that it has nine rows but that the ballot which the Voting Machine Board required the bidder to place upon its sample machine needed only eight rows of levers or devices, and for this reason the Automatic Corporation utilized one of the rows for repeating the offices and questions involved.

That at the trial below the said Automatic Corporation demonstrated that if it be necessary to repeat the offices and questions, that it is possible to do so by a device offered in evidence which permits the use of all nine rows for purposes of voting, with different questions and different office designations over each row.

VIII.

Does the Voting Machine of the Automatic Corporation violate the "letter and spirit" of Section 224-A of said Voting Machine Act that the "ballot labels shall be printed in black ink, on clear, white material of such size and arrangement as to suit the construction of the machine and further that the designation of the party or principle which each candidate represents shall appear just above the name of each such candidate and provided

further that the ballot labels shall be so arranged that *exact uniformity* (so far as practicable) will prevail as to size and face of printing of all candidates' names and party designations?''

Trial Court's Ruling.

The Trial Court held that the voting machine purchased complied with the law in this respect.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Trial Court was correct in its ruling.

The question above is framed exactly as it appears in Sub-paragraph (d) of Paragraph 12 of the Daly bill of complaint. The plaintiff does not specify in what manner the ''letter and spirit'' of said Section 224-A is alleged to be violated, and since no testimony was offered and the point was not argued below, this Board can only surmise from the fact that the words ''exact uniformity'' are underscored in said bill of complaint, that this is the basis of the allegation.

As pointed out in the answer to the bill of complaint, this criticism is directed at the writing of the name ''Eby'' in larger type than the name ''Germershausen''. The fact that the law requires exact uniformity only ''so far as practicable'' is the complete answer to this ground of complaint. For the reason there is nothing to add to this statement, there will be no further consideration of this point under ''Argument''.

IX.

Does the ballot label on the voting machine of the Automatic Corporation provide sufficient space for placing

"the designation of the party or principle which each candidate represents * * * just above the name of each such candidate" in accordance with Section 224-A of the Voting Machine Act; and is said space large enough also to include the place of residence of each candidate for State-wide office in accordance with the provisions of Section 63 of Article 33?

Trial Court's Ruling.

The Trial Court held that the sample machine did not violate the provisions in question.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Trial Court was correct in its ruling.

It will be noted from the said bill of complaint that there is no allegation that the information in question cannot be placed upon the ballot label of the voting machine in question. It will be noted from examination of the sample machine which contains Plan B that the information in question is shown thereon which is complete proof that the machine does not violate the sections of law in question. For the reason that there is nothing to add to this statement, there will be no further consideration of this point under "Argument".

X.

Can the voting machine of the Automatic Corporation provide adequate direction to the voter as alleged to be required by Section 224-A of the Voting Machine Act, namely, that below the titles of the offices on the ballots there shall be printed the words "vote for one, vote for two, etc." in accordance with the provisions of Section 63 of Article 33 of the Annotated Code?

Trial Court's Ruling.

The Trial Court held that the voting machine of the Automatic Corporation complied with provisions of the law in question.

Appellant's Contention.

The Appellant Voting Machine Board contends:

That the Trial Court was correct in its ruling.

It will be noted that the allegation is not that the voting machine *cannot* contain adequate direction, but that it *does not* contain it.

This criticism is directed to the fact that the Automatic Corporation in printing the ballot label on its sample machine omitted the words "vote for one" in those places in which the voter has a choice of voting for one of several persons for the reason that the machine permits the voter to vote only for one person. From the sample machine, offered in evidence with Plan B printed thereon, it will be noted that there is *adequate room* for this provision and that this information appears there. It will also be noted that where there are more than two candidates to be voted for, the sample machine originally submitted contained the words "vote for two, vote for three, vote for six." For the reason that there is nothing to add to this statement, there will be no further consideration of this point under "Argument".

STATEMENT OF FACTS.

The Maryland Legislature, by Chapter 94 of the Acts of 1937 (referred to hereinafter for convenience as the "Voting Machine Act") amended Sections 224 and 224-A of Article 33 of the Code of Public General Laws of Maryland (1924 edition and 1935 supplement, respective-

ly) and added nineteen new sections to said Article 33, designated as Sections 224-E to 224-W, inclusive.

The purpose of the Voting Machine Act was to require the acquisition of a sufficient number of voting machines, at the expense of the Mayor and City Council of Baltimore, to insure the use of voting machines throughout the City of Baltimore at all primary, general, special and other elections to be held in said City after January 1, 1938 (Sec. 224-A, Voting Machine Act).

The Mayor and City Council of Baltimore purchased fifty voting machines in 1928 (R. pp. 233, 19, 43, 44, 89, 104, 132) under authority of Chapter 513 of the Acts of 1914, codified as Sections 222-224, inclusive, of Article 33, Code of Public General Laws (1924 edition). The Voting Machine Act directed the use of said fifty voting machines in all future elections (Sec. 224-A).

Although Chapter 238 of the Acts of 1933 "directed" the Board of Supervisors of Election of Baltimore City to use the fifty voting machines theretofor purchased by the Mayor and City Council of Baltimore "in all future elections", the said machines have, in fact, never been used in primary elections (R. p. 233), and have therefore been used only in general elections. The reason for this is that until the passage of the Voting Machine Act, primary ballots had to be preserved for four months after a primary election (R. p. 234), (Section 86, Article 33, Code of Public General Laws (1924 edition). This section is now repealed in any jurisdiction using voting machines, because it is in conflict with the Voting Machine Act, which requires voting machines to be locked against voting for only ten days next succeeding primary elections (Section 224-A).

For the purpose of purchasing said voting machines, the Legislature created a Board composed of the members for the time being of the Board of Estimates of Baltimore City (five in number) and the members for the time being of the Board of Supervisors of Election of Baltimore City (three in number), which Board is hereinafter referred to for convenience as the "Voting Machine Board" (Section 224-A, Voting Machine Act). The Legislature vested in said Voting Machine Board full and complete power, authority and discretion to purchase the necessary additional voting machines (Section 224-A); and repealed "all laws or portions of laws inconsistent with" said Voting Machine Act (Sec. 3).

In accordance with authority contained in the Voting Machine Act, the Mayor and City Council of Baltimore, by Ordinance No. 694 approved April 13, 1937, authorized the issuance of $1,250,000.00 of securities to meet the requisitions of the Voting Machine Board. Following the passage of that Ordinance a suit was instituted by a taxpayer in the Circuit Court No. 2 of Baltimore City, attacking the validity of the Voting Machine Act and of the use of voting machines. This Court, on appeal, affirmed the decree of the lower Court, holding the Voting Machine Act constitutional. *William S. Norris, et al., vs. Mayor and City Council of Baltimore*, 192 Atl. 531. See Daily Record, May 29, 1937.

Following the decision of this Court in the case of *Norris vs. Mayor and City Council of Baltimore*, supra, the Voting Machine Board, in June, 1937, prepared certain specifications designed to supplement the specifications referred to in the Voting Machine Act itself, pursuant to authority contained in Section 224-A thereof, and advertised for sealed bids for furnishing 910 voting machines, etc. (R. pp. 144, 145).

Prior to the publishing of said specifications the Automatic Voting Machine Corporation and the Shoup Voting Machine Corporation (hereinafter referred to for convenience as the "Shoup Corporation") were given an opportunity to appear before the Voting Machine Board and object to any of the provisions of the specifications, which, for any reason, they felt were unsatisfactory. At one of these meetings the Shoup Corporation raised the question of whether the voting machines to be purchased should be equipped to permit write-in or personal choice voting (R. p. 236).

As the names imply, "write-in" or "personal choice" voting means allowing a voter, who is unwilling to vote for any of the candidates whose names are printed on the ballot label of the voting machine, to write thereon the name of some other person as the candidate of his personal choice for the office in question (R. pp. 78, 327, 329).

Although the Supervisors of Election of Baltimore City had asked for and received a ruling from the Attorney General less than a year before, namely, in October, 1936, to the effect that write-in voting was not lawful in Maryland (R. pp. 214-216, 261), the said Board, out of an excess of precaution, sent another written request to the Attorney General for an opinion on this subject on July 22, 1937 (R. pp. 216, 217) and received a reply on July 24, 1937, in which the Attorney General confirmed his stand of the previous October holding that write-in or personal choice voting was unlawful in Maryland (R. pp. 218, 219).

In view of these rulings by the Attorney General, no provision was contained in the specifications requiring the machines furnished to be equipped for write-in or personal choice voting. The Voting Machine Board

merely required the contractor to furnish voting machines "in strict accordance with and to meet the requirements of all the terms, conditions and provisions of" (the Voting Machine Act) "any and all other laws and the contract documents" (Section 43 of the Specifications) (R. p. 194). Certain description of the size and type of voting machines was required by Section 44 of the Specifications (R. pp. 194-197); each bidder was required to submit detailed descriptive matter relating to a voting machine (Section 45 of the Specifications) (R. p. 197); and each bidder was also required to set up sample voting machines of each type bid upon, which were to be taken as "*representative* of the voting machines to be furnished by the successful bidder, subject to all the provisions of the contract documents" (R. pp. 197-199). In spite of the fact that the specifications are silent upon the subject of write-in or personal choice equipment, this Board admits that the bidders were advised of the fact that under the rulings of the Attorney General write-in or personal choice voting was not lawful in Maryland and such equipment would not be required (R. pp. 33, 49, 99, 249).

Bids were publicly opened and read on August 11, 1937, at which time it appeared that there were only two bidders, the Automatic Corporation and the Shoup Corporation. The Automatic Corporation, as one of the two alternative bids, offered to furnish and deliver 910 voting machines known as forty candidate machines of the type and size described in the specifications as type A, size 1, at $826.95 each, or a total of $752,524.50. The bid of the Shoup Corporation for a similar type of machine was $1,047.00 each or a total of $952,770.00 (R. p. 145). The bid of the Automatic Corporation on this machine, which was ultimately selected, was $200,245.50 lower than the bid of the Shoup Corporation.

Upon the opening of bids and the disclosure of the Automatic Corporation as the lower bidder, the Shoup Corporation requested a hearing of the Voting Machine Board, contending that the sample machine of the Automatic Corporation did not comply with the specifications (R. pp. 145, 146). Open hearings were held by the Voting Machine Board on August 24 and 26, 1937, at which counsel and representatives of both voting machine companies were heard (R. pp. 21, 22, 71, 96, 276-284). At this time the only grounds of objection made by the Shoup Corporation (R. p. 155) were:

A. That the method provided for first and second choice voting (Code, Art. 33, Sec. 203) as it appeared on the sample machine of the Automatic Corporation, described as "Plan A", was in violation of Sec. 224-F of the Voting Machine Act, in that it permitted what was described as "group voting". A full discussion of Plan A and this alleged group voting appears under the Argument which follows, but it suffices for the purpose of this statement to say that this Plan A permits a voter to vote a first choice for any candidate for state-wide office, where three or more candidates are seeking the nomination of the said office in a party primary, by the use of *one* lever, in the alternative, said voter can, by the use of *one lever only*, vote for the persons of *both* his *first and second choice* for said office. It was contended that under said Section 224-F, sub-section (i) *two* levers must be provided for this purpose (R. p. 153).

B. That under Plan A the ballot label relating to first and second choice voting did not furnish *sufficient space* to contain, under each voting device, the *full names* of both candidates, the *party designation* in *two places* and the *places of residence of both candidates*, in "plain, clear

type so as to be clearly readable by persons with normal vision," as alleged to be required by Sections 224-A and 224-G, sub-section (a) of the Voting Machine Act and Section 63 of Article 33 of the Code.

When these objections were made to Plan A, the Automatic Corporation offered to the Voting Machine Board to furnish at no extra cost, a voting machine designed and equipped to vote first and second choice voting in the same manner in which it was voted by the Shoup Corporation, and which was therefore conceded to be lawful by those attacking the Automatic Corporation's bid (R. pp. 22, 42, 154, 156, 157, 244, 247, 289). This method is described in the Record as "Plan B", and consists simply of having one space provided for voting for the individual for first choice and, following his name, as many spaces are provided for voting for candidates for second choice as there are additional candidates in the field. Below that appear the names of the other candidates in similar fashion. The voter therefore votes for *one candidate* for first choice by the use of *one* lever and for another candidate for second choice by the use of *another* lever, thus requiring the voter to use *two levers* (R. p. 166).

When this situation arose, the Voting Machine Board, through those of its members constituting the Board of Supervisors of Election, wrote the Attorney General concerning this matter and requested an opinion in the premises (R. pp. 152-156). No mention is made of personal choice or write-in voting in that request, the Board stating that the only questions arising under the election laws were those above set forth (R. p. 155). The Board apparently considered this matter of write-in voting settled by the Opinion of the Attorney General of July 24,

1937; and it will be noted in this connection that the first of the taxpayers' suits, namely the Daly suit, as originally filed, did not even raise the question of the constitutionality of a machine that did not provide for personal choice voting (R. pp. 6-13). Later said bill was amended to make this objection to the contract (R. pp. 14-17).

The Attorney General's opinion was received by the Voting Machine Board on September 8, 1937 (R. p. 157). That opinion, in effect, held that the voting machine law requires a separate voting device for each candidate and that Plan A therefore failed to comply with the law. The Attorney General, however, also advised that Plan B method of personal choice voting was in his opinion entirely valid (R. p. 163).

Upon receipt of the said Opinion the Voting Machine Board went immediately into executive session; and after a full discussion of the matter, the Board concluded that the bid of the Automatic Corporation should be received, because even under the most unfavorable view, it had to be conceded that the voting machine of the Automatic Corporation could vote a lawful ballot under Plan B, which said Corporation had offered to supply at no additional cost. After discussing the relative merits of the two machines the Board determined to award and did award the contract to the Automatic Corporation (R. pp. 146, 167, 168, 208, 209).

Following said award, the taxpayer's suit seeking to enjoin the carrying out of the contract was filed by William S. Norris and shortly thereafter another suit was filed by taxpayer Hattie B. Daly.

At the trial of these cases below it was disclosed that the additional equipment necessary to permit the Voting

Machine of the Automatic Corporation to vote Plan B consisted of a few short channels and additional straps (R. p. 241), which the Trial Court estimated as weighing a few ounces (R. p. 247), and which a representative of the Automatic Corporation estimated it would cost his company $1.94 per machine to produce (R. pp. 244, 245), although there would be no additional charge therefor to the City (R. p. 244). Both the sample machine submitted with the Automatic Corporation's bid, No. 33068, equipped and arranged to vote Plan A and another machine, equipped and arranged to vote Plan B, No. 30332, were offered in evidence (R. pp. 231, 259) as well as a third machine, not identified by number, containing write-in equipment (R. p. 258). Those sample machines, by permission of the Chief Judge of this Court, will be exhibited at the trial of these cases.

A representative of the Automatic Corporation also testified that write-in equipment was not included in his company's machine, because they were informed by the Voting Machine Board that it was not required; but that the cost of write-in equipment of the character that appears on the third sample machine referred to above, would increase the bid $82.00 per machine (R. p. 249).

The Trial Court, after a full hearing on the entire matter, decided every question raised in favor of the validity of the voting machine of the Automatic Corporation, except the question of whether the Declaration of Rights and the Constitution of Maryland guarantee the voter the right to personal choice or write-in voting (R. p. 335). From such decree the Voting Machine Board, Automatic Corporation and the Mayor and City Council of Baltimore and the Comptroller all appealed (R. pp. 338-340, 341-343); and cross-appeals were filed in each case by the

respective taxpayers raising the question of the validity of the other questions that had been decided adversely to them by the lower Court (R. pp. 340, 342).

ARGUMENT.

I.

THE PROVISIONS OF ARTICLE 7 OF THE DECLARATION OF RIGHTS OF MARYLAND AND SECTION 1 OF ARTICLE 1 OF THE CONSTITUTION OF MARYLAND DO NOT GUARANTEE TO THE VOTERS OF THIS STATE THE RIGHT TO WRITE UPON THE BALLOT, OR UPON THE BALLOT LABEL OF ANY VOTING MACHINE, THE NAME OF A CANDIDATE OF THEIR PERSONAL CHOICE FOR ANY OFFICE, IF SUCH CANDIDATE'S NAME IS NOT PRINTED UPON THE SAID BALLOT OR BALLOT LABEL.

The Declaration of Rights of Maryland, Article 7, provides:

> "That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose elections ought to be free and frequent, and every male citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage."

Section 1 of Article I, title ELECTIVE FRANCHISE, of the Constitution of Maryland, provides:

> "All elections shall be by ballot; and every citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the State for one year, and of the Legislative District of Baltimore City, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote in the ward or election district in which he resides, at all elections hereafter to be held in this State."

In 1924 the Legislature repealed and re-enacted with amendments Section 62 of Article 33 of the Code, and in doing so eliminated the following provision which had been in the law continuously since 1896:

> "Nothing in this Article contained shall prevent any voter from writing on his ballot and marking in the proper place the name of any person other than those already printed for whom he may desire to vote for any office, and such votes shall be counted the same as if the name of such person had been printed upon the ballot and marked by the voter."
>
> Chapter 202, Acts of 1896, amending Section 49 of Article 33 of the then Code of Public General Laws of Maryland.

The Legislature in 1924, failed, however, to make any change in Section 80 of Article 33 of the Code, which referred to Section 62 of the Code as authorizing the name or names of any candidates to be written in by the voter on the ballot. Not only did the Legislature fail to make any such change, but it repealed and re-enacted with amendments said Section 80 of Article 33 in 1927, still making the same reference to Section 62 of the Code as authorizing write-in voting.

Chapter 370, Acts of 1927.

In 1931 the Legislature repealed and re-enacted with amendments Section 80, omitting any reference to write-in voting.

Chapter 120, Acts of 1931.

On May 29, 1926, the Attorney General rendered an opinion holding that in view of the amendment of Section 62 of the Code in 1924, it was no longer permissible "for a voter to write on the ballot the name of any person for whom he may desire to vote". The Attorney General

held that the language in Section 80 referred to above had become nugatory (R. p. 220).

> Opinions of the Attorney General, Vol. 11, p. 96.

The opinion concluded with the following statement, which we quote because we believe it to state the better view on the subject of the necessity of write-in voting under our Constitution:

> "You are entirely correct in your assumption that a voter may not use a sticker, and in the opinion of the Attorney General, no person is authorized to cast his vote other than for the candidates printed on the ballot. *There are ample provisions contained in the election law by which voters may secure the printing of the name of the candidate of their choice upon the ballot, so that the elimination of the blank spaces would seem to deprive the voters of none of their constitutional rights.*" (Italics ours.)

> Opinions of the Attorney General, Vol. 11, p. 96.

It was conceded by counsel for the plaintiffs that from the time of the amendment of Section 62 of Article 33 in 1924 to date this opinion of the Attorney General has been uniformly acquiesced in by succeeding Attorneys General, candidates, election officials and the people of Maryland alike.

In October, 1936, the "Union Political Party" petitioned for the writ of mandamus to require the Secretary of State to certify, under Sections 49 to 52 of Article 33 of the Code, the names of its nominees for office to be voted for at the election to be held on November 3, 1936.

> George D. Iverson, Jr. vs. E. Ray Jones, Secretary of the State of Maryland, Daily Record, Nov. 13, 1936, 187 Atl. 863.

The petition was dismissed for failure of the Union Party to show a compliance with the said Code provisions. The Court pointed out that the only manner in which they could have qualified their nominees was by petition, under Section 51, which they had not followed. The opinion, unfortunately, makes no reference to having the names of the candidates of the Union Political Party written in upon the ballot, which was not necessary to be determined in that case. Shortly thereafter the question was referred to the Attorney General for opinion by the local Board of Supervisors of Election and the Attorney General held that—

> "under the decision of the Court of Appeals, relative to distinguishing marks on ballots, as well as because of the unequivocal language of the statute now in force, I am firmly of the opinion that the effect of writing in a name or names on the ballot would be to cause its rejection" (R. pp. 214-216).
>
> Opinions of Attorney General, Volume 21, pages 354-356.

When the Voting Machine Board was preparing specifications the question was raised of whether the voting machines to be purchased must have provision for write-in voting. Because of the importance of the question, since the mechanism for write-in voting is intricate and expensive, the Board of Supervisors of Election again communicated with the Attorney General on July 22, 1937, asking for advice on this specific question, and on July 24, 1937, received his reply, which is filed as an exhibit in these cases, and which, after referring to the opinion of October 17, 1934, stated (R. p. 219):

> "Under the present law, therefore, it is our opinion that write-in votes are illegal in this State."

In view of the aforegoing, the Voting Machine Board concluded that it was not only unnecessary to purchase a machine equipped for write-in voting but that the purchase of such a machine might be attacked as unlawful. Hence it appears that although the specifications are silent on the subject of write-in voting, it is freely admitted by the Board that, in view of said opinions of the Attorneys General, bidders were advised provisions for write-in voting were not required.

The Voting Machine Board held several hearings at which numerous objections were made to the awarding of the contract to the Automatic Corporation, but these objections did not include this one on constitutional grounds; and, in fact, the Norris bill as originally drawn made no reference to this ground of objection. The question was raised in the Daly bill, however, and the Norris bill was thereafter amended to include this objection.

Although there are no decisions of the Court of Appeals directly affecting this question, and we must, therefore, examine the authorities of other jurisdictions, we feel that the opinions of the Attorneys General for the past thirteen years are entitled to grave consideration in the final determination of this question.

The question here involved, as we have stated before, is whether the Legislature can fix, within reasonable bounds, a mode or procedure to be followed by the voter in getting the name of the candidate of his choice on the ballot, or whether there is to be read into the Constitution (because it must be admitted the Constitution is silent on the subject) a limitation on the part of the Legislature to regulate in any manner or to any extent the

alleged right of the voter to express his choice, in spaces to be provided under each office upon the ballot for this purpose. Whatever may be the practice in other states, and indeed such practices no doubt greatly affected the rulings of the courts in a number of those cases relied upon by the plaintiffs, there has been no such practice in Maryland since the adoption of the present ballot law during the last decade of the nineteenth century. So well accustomed were the people of Maryland to thinking in terms of the procedure laid down by the Legislature that at no time since the Legislature has withdrawn the privilege of write-in voting has there ever been any attempt to contest its authority in the premises, prior to the institution of these proceedings.

The two leading cases upon the constitutionality of write-in voting are *Chamberlain vs. Wood*, 15 S. Dakota, 216, 56 L. R. A. 187, and *State vs. Dillon*, 32 Florida, 545. The South Dakota Court takes the view which is urged by these defendants, whereas the Florida case takes the opposite view.

In *Chamberlain vs. Wood*, supra, there was an election contest in which one of the candidates had failed to comply with the provisions of law necessary to get his name on the ballot, but claimed to be elected because of certain write-in votes. The statute, as in Maryland, permitted the candidate to get his name upon the ballot by securing the signatures of a number of electors. In holding against the candidate with the write-in votes, the Court stated at pages 222 to 224:

> "It will be noticed that in neither of these sections is it provided when, how, where or under what conditions the elector shall exercise the right of suffrage. The framers of the constitution seem to have de-

signedly left the right of suffrage at this point to be regulated and governed by such laws as the legislature might deem proper to enact. The constitutional convention and the legislature are equally the representatives of the people, and the written constitution marks only the degree of restraint which, to promote stable government, the people impose upon themselves; but whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. The legislature, just as completely as a constitutional convention, represents the will of the people in all matters left open by the constitution. *Com. v. Reeder*, 171 Pa. 505, 33 Atl. 67, 33 L. R. A. 141. *Unless, therefore, the legislature is inhibited from enacting the law we are considering, it is as much the will of the people as though expressed in the constitution. Let us ask, therefore, what provision is there in the constitution inhibiting the law-making power from providing when, how and under what regulations and conditions the elector may exercise the right of suffrage? The constitution has not, as we have seen, prescribed any conditions or rules governing the exercise of the right; nor has it inhibited the legislature from prescribing such rules, regulations and conditions as it might deem proper and for the public interests.* The law-making power has taken the elector at the point where the constitution has left him, and has provided when, in what manner, and under what restrictions he may exercise the right of suffrage, and in so doing has provided: First, that he must exercise that right by using an official ballot; second, that he must designate in the manner specified his choice of candidates whose names are upon the official ballot, and whose names can only be placed there by a compliance with the law; third, it has, in effect, denied to the elector the right to write the name of a candidate for whom he

desires to vote upon the official ballot, or otherwise deface the same, by declaring that 'no elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him.' The law, in form, applies equally to all electors without discrimination, and one elector therefore possesses all the rights, and no more, of every other elector. *The legislature, therefore, having in effect limited the right of the elector to voting for candidates whose names are printed on the official ballots, he can only exercise the right in the manner prescribed. But the elector is not thereby necessarily deprived of the right of suffrage, as he has the same right as any other elector to secure the printing of the name of his candidate upon the official ballot in the manner prescribed by law, namely, by nomination of some political party, or by securing the signatures of twenty electors, in the case of a county office, to a certificate. This may occasion the elector some inconvenience and labor, but these constitute no objection to the law.* In effect, the law requires many acts to be done by the elector not required under former laws, but these requirements have been generally held to be constitutional. We see no reason why the law as laid down by the courts in regard to those requirements should not be applicable to this case."

The Court further stated, at pages 226 and 227:

"*The right claimed is, for all practical purposes, a mere theoretical or abstract right.* This is apparent from the fact that, though the election law of this state has been in effect for more than ten years, this is the first case, so far as the records of this court disclose, in which the right has been claimed; and in this case it appears from the record that the plaintiff had obtained the proper certificate, but through some inadvertence it was filed with the auditor one day too late, hence his name was omitted as a candidate from the official ballot. We have not overlooked the cases

of *Sanner vs. Patton,* (Ill. Sup.) 40 N. E. 290; *People vs. Shaw,* (N. Y. App.) 31 N. E. 512, 16 L. R. A. 606; *Bowers vs. Smith,* (Mo. Sup.) 17 S. W. 761; *State vs. Dillon* (Fla.), 14 South. 383, 22 L. R. A. 124, cited by counsel for appellant in support of his contention. *But in neither of these cases, except the one cited from Florida, was the constitutional question we have been considering involved, and the only question before the court in each of those cases was whether or not the law under consideration authorized the writing of the name of the candidate upon the official ballot.* The comments of the judges, therefore, upon the constitutionality of the law, were *dicta,* simply, and not binding upon the court in which the decisions were rendered, and are entitled to very little weight in this Court. In the Florida case the Supreme Court of Florida seems to have held that part of the law we are considering unconstitutional, but the decision of that question does not appear to have been required in that case." (Italics ours.)

In *McKenzie vs. Boykin,* 71 Southern, 382 (Miss. 1916), there was involved a similar question, namely, whether the Legislature could limit write-in voting to those cases in which the candidate had died. In holding that it could, the Court stated very plainly what is contained in effect in the Attorney General's opinion of 1926 and the case of *Chamberlain vs. Wood,* supra, namely, that if the legislature provides *reasonable regulations* for allowing a voter to get the name of the candidate of his choice on the ballot, such voter is not deprived of any constitutional rights because he is not allowed to write in the name of his candidate upon the ballot.

The Court, in *McKenzie vs. Boykin,* supra, held as follows at pages 384 and 385:

"The law provides a simple expedient whereby the names of candidates who are not party nominees

may be placed upon the ticket in district offices by requiring a petition to be signed in the case of election of beat officers by only fifteen qualified electors. *This restriction is placed upon the electors in order that the Australian ballot may be preserved in its integrity.*

"It is urged, however, in the argument of counsel that if the Legislature required the names of fifteen electors to have printed the name of a no-party candidate upon the ticket, for member of the board of supervisors, *a fortiori,* the number could be increased by the Legislature to such an extent that elections would be placed entirely in the hands of political parties, and that the right of the voter to vote for whom he pleases, and the right of the non-partisan to run for office, would be denied. *The answer to all this is that the Legislature has not done that, but that the restriction provided is a reasonable restriction, and one that does not arbitrarily restrict the voter's right of choice, and is therefore constitutional. It would be an entirely different question if the restrictions placed upon the voter were unreasonable, and were such as to practically deny him the exercise of his legitimate choice.*

* * * * * *

"In the case of *City of Jackson vs. State,* 102 Miss. 663, 59 South. 873, Ann. Cas. 1915 A 1213, a different situation and a different question entirely is presented. No official ballot is provided for in the Act and in that case the statute under consideration did not provide for any other method of placing names on the ballot than through party nominations, and, not having provided for any other method than party nominations, the voter retained undoubtedly the right to write the name of his choice upon the ballot, for the voter has a constitutional right to express his choice, *and if no other reasonable method is provided by law, he has the right to write the name of his choice on the ballot."* (Italics ours.)

In the case of *State ex rel. Mize vs. McElroy,* 44 La. Ann. 796, there was involved the question of an election in which the name of one of the candidates had been written across the face of the ballot. In sustaining the act of the Legislature which provided that the elector should vote only for the names of the persons printed on the ballot, the Court held, at page 798:

> "The right of suffrage being a political and not a natural right, it is within the power of the State to prescribe how it shall be exercised.
>
> "The manner of voting, provided by statute, is one of the reasonable regulations."

While many cases are referred to by the Trial Court, as authority for the contention that write-in voting is guaranteed by the Constitution, it is submitted that the only case which takes that view and which is directly in point is *State ex rel. La Mar vs. Dillon,* supra. The other cases, in the order in which they appear in the opinion of the lower Court, can be distinguished on the following grounds:

The Statute in question provided expressly or by necessary implication, that the voter could write-in on the official ballot the name of any person for whom he desired to vote, and it was unnecessary to determine the question of the constitutionality of legislation which did not permit write-in voting.

Cohen vs. Isensee, 188 Pac. 279
People ex rel. Goring vs. President, 144 N. Y. 616
People vs. Shaw, 133 N. Y. 493.

In *Littlejohn vs. People,* 52 Colo. 205, referred to at length by the Trial Court, it appears that *no provision whatever* was afforded a voter to have the name of the

candidate of his choice placed upon the ballot. This clearly distinguishes that case from the instant case.

> "There is nothing in the statute that gives him" (the voter) "the power to signify whom he desires to be a candidate *either by petition, convention, primary or otherwise.*" P. 221.

In *Independence Party Nomination*, 208 Pa. State 108, the question was not one of write-in voting, but of the right of the Independence Party to have the names of its candidates printed on the ballot, on the ground that it had polled 2% of the largest vote for any office, as required by statute.

In *State vs. Johnson*, 87 Minn. 221, there was actually involved only the question of legality of ballots in primary elections which contained no space for write-in voting. It was held such ballots were valid. The expressions of doubt as to whether such a ballot would be lawful in a general election are therefore obiter.

In *State vs. Runge* (Wisconsin), 42 L. R. A. 239, the question was not one of write-in voting, but of the alleged right of a candidate nominated by two parties to have his name placed twice on the ballot.

In *Fletcher vs. Wall*, 172 Ill. 426, the statute expressly authorized write-in voting, and the only question involved was the right of a voter to attach to the ballot a *slip of paper* listing certain candidates not printed thereon. The right to do so was denied.

In *Sanner vs. Patten*, 155 Ill. 553, 40 N. E. 290, the law provided for writing in the name of the candidate of the elector's choice in a blank space.

In *People vs. McCormick*, 261 Ill. 413, the question involved was not write-in voting but the right of the legislature to prescribe qualifications for a constitutional office.

In *Barr vs. Cardell*, 155 N. W. 312, the Court held that the statute involved was open to the construction that it conferred the privilege of write-in voting.

In *Patterson vs. Hanley*, 136 Cal. 265, the question was one of identifying marks. The statute expressly authorized write-in voting.

In *Vorhees vs. Arnold*, 108 Iowa 77, the question was one of identification marks on ballots. The law permitted write-in voting.

In *Oatman vs. Fox*, 114 Mich. 652, the law permitted the writing or pasting of a person's name on the ballot. The case relates only to the manner of pasting a name on the ballot.

In *Price vs. Lush*, 10 Mont. 61, the question was one of the right to have the person's name *printed* on the ballot. Write-in voting was permitted by statute.

In *DeWalt vs. Bartley*, 15 L. R. A. 771, 146 Pa. 529, an attack was made generally on the constitutionality of the Australian ballot, which, incidentally, was declared valid. The opinion shows that write-in voting was permitted by the statute.

In *Bowers vs. Smith*, 111 Mo. 45, 20 S. W. 101, the Court construed the statute as recognizing write-in voting by requiring the sufficient blank space for such writing next to the printed names of the candidates for each office.

In *State vs. Hostetter,* 137 Mo. 636, the principal question was the eligibility of a woman for a certain office. The statute permitted write-in voting.

In *Cole vs. Tucker,* 164 Mass. 486, the question was whether a voter could use his own printed ballot which the election officials refused to accept and in which action they were sustained.

In *Capon vs. Foster,* 12 Pick 485, 29 Mass. 485, the question was one of the constitutionality of a statute requiring the registration of voters, which was upheld.

In *Howser vs. Pepper,* 8 N. D. 484, the question was one merely of distinguishing marks. The statute permitted write-in voting.

The opinion of the Trial Court quotes Cooley on "Constitutional Limitations", page 1359, as holding "that the voter cannot be restricted to the candidates whose names are printed on the official ballot." It will be noted that the language quoted is not from the text but from the small type in a note appearing on page 1359; and it will also be noted that the author, after citing *State vs. Dillon,* supra, as the authority, recognizes that there is a contrary view by citing *State vs. McElroy,* 44 La. Ann. 796, as authority therefor. As stated, only the two cases are cited.

It is submitted that the election laws of Maryland provide ample opportunity for any voter genuinely interested in the election of any candidate to secure the printing of such candidate's name on the ballot (Article 33, Section 51 of the Code). If the office to be filled be statewide, the voter must secure two thousand signatures; if it be confined to a Congressional District or to the City of Baltimore, he must secure fifteen hundred signatures;

if it be for the entire cities of Annapolis, Frederick, Cumberland or Hagerstown, he must secure seven hundred and fifty signatures; and for all other elections he needs only five hundred signatures. These requirements as to signatures have not been changed since 1922, or before the legislature repealed the provisions of law authorizing write-in voting. It must be conceded that anyone, to have a chance for election to any of the offices in question must have a following far greater than the figures mentioned, to have any chance of election.

In *Pope vs. Williams*, 98 Md. 59, this Court sustained the validity of the statute providing that a citizen of the United States who had come to this State more than a year prior to the election and had resided in this State continuously for more than a year, nevertheless should not be entitled to vote unless he had filed a declaration of intention to become a citizen of Maryland more than a year prior to the election. This, in spite of the fact that no such limitation appears in the constitutional provision cited above, namely Section 1 of Article I of the Constitution.

This Court held that the requirement in question was reasonable and did not hinder or deter anyone from acquiring or exercising his right to vote (p. 69). By analogy, the provisions of our Election Laws which permit any voter to get the name of the candidate of his choice printed upon the ballot, are likewise a reasonable regulation which is not prohibited by the Constitution.

An examination of all the cases which indicate, even though it may have been unnecessary for the Court so to decide, that write-in voting is guaranteed by the Constitution will show that with two or three exceptions they were decided some time between 1890 and 1900 when the

Australian ballot was first introduced into this country. Courts then apparently were apprehensive of the effect of the use of the Australian ballot and went out of their way to indicate that write-in voting must be permitted. On the other hand, experience has proven that they were unduly apprehensive and that, so far as Maryland is concerned, the right was considered of such slight value that the Legislature finally abolished it thirteen years ago.

It is submitted that if the Courts in these other jurisdictions had not been called upon to make their decisions until the present time, they would not have attempted to inject into the constitution this alleged right, which is not, in fact, there. Write-in voting could result in endless confusion and chaos. It is not inconceivable that there would be elected to office candidates who were not qualified therefore under the Constitution.

If the personal choice candidate had a common name, such as John Smith, there would be no way of knowing which John Smith was referred to. Some limitation upon this alleged right of personal choice voting would necessarily have to be found, if it were indulged in to any considerable extent, for the reasons stated. There would have to be some means of identifying the personal choice candidates of the respective voters; and it is certainly not unreasonable or unconstitutional to provide machinery requiring, as the law does, the full name, residence address, business address, etc., of anyone seeking office to be a matter of record before the day of election.

The Code provisions, therefore, that set up these regulations are entirely reasonable and within the discretion of the Legislature, as is the requirement that if a voter wishes to secure the election of any candidate, he must see that his name is printed on the ballot.

Whatever may be the practice in other States, the people of Maryland are not "write-in minded". The privilege of doing so, once extended by the Legislature, is so little used, if used at all, that when it was abolished the chief law officers of the State, election officials, candidates for election and the people of Maryland universally acquiesced therein.

It is therefore submitted that there is no constitutional or other necessity for resurrecting this practice and for limiting what has always been considered the right of the Legislature, namely, that of making reasonable regulations affecting this subject.

II.

EVEN IF THE DECLARATION OF RIGHTS AND CONSTITUTION OF MARYLAND GUARANTEE WRITE-IN OR PERSONAL CHOICE VOTING, IT IS NOT UNLAWFUL FOR THE VOTING MACHINE BOARD TO PURCHASE A VOTING MACHINE WHICH DOES NOT INCLUDE EQUIPMENT THEREFOR, BUT TO WHICH IT IS FEASIBLE TO ADD SUCH EQUIPMENT.

The Trial Court, having found (a) that write-in voting was guaranteed by the Constitution, and (b) that the sample machine submitted by the Automatic Corporation does not contain such equipment, held that such machines were illegal for use in elections and that the Voting Machine Board could not lawfully buy them, as will appear from the Decree (R. pp. 335, 336):

> "That *the contract* entered into by and between said Board and the Automatic Voting Machine Corporation and dated September 8th, 1937, for 910 voting machines IS *null and void, in that said machines are so constructed as to deny to a qualified voter* of Baltimore City *the right* guaranteed by Article 7 of the Declaration of Rights and Articles 1, Section 1 of the Constitution *of voting for any person of his choice*

> at elections held in Baltimore City after January 1, 1938, which Constitution itself requires and it affirmatively appears that said qualified voters must vote for candidates whose names are printed upon the said voting machine ballot, otherwise not vote. *Wherefore, the use of such machines and the purchase thereof for use in such elections is unlawful.* Therefore the Defendants, each and every, are hereby perpetually enjoined and restrained from proceeding further under said contract of September 8, 1937, and from buying or accepting delivery of any of said voting machines referred to therein, and from spending or pledging any public funds therefor;" (Italics ours).

It is submitted, that if it be conceded that the Declaration of Rights and Constitution guarantee the privilege of write-in voting, and if it be further conceded that the Automatic Corporation is not required to furnish write-in equipment under its contract, then, although the Trial Court was correct in its ruling that the *use* of said voting machines in the elections referred to is *unlawful*, it does not follow that the *purchase* of such machines is *unlawful*, in view of the fact that they *can be made to comply with the law* by the purchase of the necessary additional write-in equipment (R. pp. 248, 258).

The question of the validity of this limitation that the Trial Court placed upon the discretion, power and authority vested in the Voting Machine Board is, apart from the constitutional question, the most important one in this case.

Although the Opinion and Decree do not so state, it is submitted that the Trial Court apparently fell into the error of so limiting the powers of the Board, upon the assumption that the law required the Board to observe the principles that apply where competitive bidding is re-

quired by law, and concluded if the machine contracted for did not meet every legal requirement, it was not lawful to purchase it and make a supplemental contract for the purchase of any additional equipment necessary to supply the deficiency (R. pp. 235, 254). It is undisputed that the sample voting machines *can be equipped* for write-in voting, for which the Automatic Corporation says it must make an additional charge of $82.00 per machine. If the Voting Machine Board, with knowledge of the fact that write-in equipment was necessary, in the exercise of its discretion, had determined to purchase a machine without write-in equipment, with the intention thereafter of purchasing said equipment under a supplemental contract, there can be no doubt that under the Voting Machine Act it had full power to do so.

Section 224-A of the Voting Machine Act provides in part as follows:

> "A Board composed of the members for the time being of the Board of Estimates of Baltimore City and the members for the time being of the Board of Supervisors of Election of Baltimore City is hereby constituted, and is *authorized, empowered and directed to purchase a sufficient number of voting machines* for use in all polling places throughout the City of Baltimore at all primary, general, special and other elections, held or to be held in said City after the 1st day of January, 1938. * * * Said Board is *authorized and empowered to determine* by majority vote *such specifications supplementary to the specifications hereinafter set forth as it may deem proper* for voting machines acquired, or to be acquired, by it, *and to select in its discretion the type and make of such voting machines,* and, in its discretion, to employ engineers or other skilled persons to advise and aid said Board in the exercise of the powers and duties hereby conferred upon it. * * *" (Italics ours.)

Section 3 of the Voting Machine Act provides:

> "That all sections of this Article and all laws or portions of laws inconsistent with or in conflict with the provisions hereof *are hereby repealed to the extent of such inconsistency or conflict.*" (Italics ours.)

It is difficult to conceive of wider discretion or broader authority than is conferred upon the Voting Machine Board by the language quoted. The plaintiffs in both cases recognized the fact that they might find themselves in just the position in which they now are, namely, of being obliged in some manner to limit the power and authority of the Voting Machine Board, so as to compel it to conform to the customary statutory requirements governing competitive bidding, in order to prevent it from purchasing the machines without write-in equipment and making a supplemental contract therefor.

To this end, it is alleged in the amendments to the Norris bill that contract in question is void and illegal because the provisions of Article 78, Section 3 of the Code of Public General Laws creating the State Central Purchasing Bureau have not been followed (R. pp. 14-16).

In the Daly bill, however, the contention is made that the Voting Machine Act and Sections 14 and 15 of the Baltimore City Charter "require the voting machines * * * to be purchased * * * in accordance with the contract therefor *to be awarded upon competitive bidding to the lowest responsible bidder*" (R. p. 59. See also pp. 76, 87, 88, 90).

If the Voting Machine Board is bound by the provisions of either Article 78 or those of Sections 14 and 15 of the Baltimore City Charter, then it is obvious that the

said Board has exceeded its authority. The lower Court held that the provisions of Article 78 were not applicable to this contract (R. p. 324), and apparently entertained the same views about Sections 14 and 15 of the Charter, although the Opinion is silent upon this subject. The Trial Court, nevertheless, was apparently of the impression that the principles of statutory competitive bidding applied, either because of some reason of public policy or because, the Board having called for competitive bids, it was thereby obliged to follow all of the rules of statutory competitive bidding. In referring to the change from Plan A to Plan B, the Court states in its opinion, in effect, that the change in equipment is so minor and the cost thereof so slight, none of which is borne by the City, that there is not "such a material departure from the specifications, or such a shifting of specifications after the award, as to make the contract illegal under the doctrine expressed in Konig vs. Baltimore, Ibid." (R. p. 326).

As will be shown hereafter, there is no ground either statutory or otherwise for requiring the application of the principles of competitive bidding referred to in the language quoted, to the contract in question.

It requires only a glance at Article 78 of the Code to show that it does not in any manner affect or limit the power and authority of the Voting Machine Board.

First of all, it will be observed that competitive bidding is not mandatory under the provisions of Article 78 (Section 3).

Secondly, the Purchasing Bureau is authorized "to prescribe rules and regulations * * * under which contracts for purchases may be made" (Sec. 3).

Thirdly, the Bureau is required to "determine and formulate standards of all materials, supplies, merchandise and articles of every description to be purchased" by the State Boards referred to therein (Section 3).

Each of these last two provisions is utterly repugnant to the provision in Section 224-A of the Voting Machine Act, authorizing and empowering the Voting Machine Board "to determine by majority of vote such specifications supplementary to the specifications hereinafter set forth as it may deem proper for voting machines acquired".

Then, too, the amounts expended under authority of the Central Purchasing Bureau are paid by the State Comptroller, upon approval of the Bureau, from the appropriation to the respective State Departments by the General Assembly in the Budget Bill (Section 4).

The expense incurred by the Voting Machine Board and the cost of such voting machines under Section 224-A of the Voting Machine Act is to be audited by the Comptroller of Baltimore City, upon the requisition of said Board, and paid by warrant drawn upon the proper officers of said City.

Apart from these specific objections, even a casual reading and comparison of Article 78 with the Voting Machine Act will show that the Legislature could never have intended to subject the Voting Machine Board to the authority of the State Purchasing Bureau in the purchase of said voting machines.

The fact that Sections 14 and 15 of the Baltimore City Charter in no wise affect this contract, is equally clear. In the first place those sections refer to contracts of De-

partments, Officers, Boards, etc. of the Mayor and City Council of Baltimore; and by no stretch of the imagination can the Voting Machine Board come under this classification. The machines are purchased for purely a State function, namely, "Elections" and the Board is even composed in part of State officers.

In *Thrift vs. Ammidon*, 126 Md. 126, this Court held that the said Charter provisions had no application to the purchases made by the Board of Police Commissioners for Baltimore City, even though they are referred to in said Charter, because, among other things they do not constitute one of the Executive Departments of the City set up in Section 31 of the Baltimore City Charter. In this connection see *McEvoy vs. Mayor and City Council of Baltimore*, 126 Md. 111, at p. 122.

In addition to the aforegoing, Sections 14 and 15 of the Charter are absolutely repugnant to the Voting Machine Act in that they require the contracts referred to therein to be awarded by a City Board known as the Board of Awards. If the Legislature had felt that the approval of the Board of Awards of this contract was necessary or desirable, it would no doubt have so provided in the Voting Machine Act.

If, as contended, the provisions of Article 78 and Sections 14 and 15 of the Charter do not apply, then there is no statute requiring the Voting Machine Board to engage in competitive bidding. There is also no authority for requiring competitive bidding on any grounds such as public policy (*Mayor and City Council of Baltimore vs. Weatherby, et al.*, 52 Md. 442, 450, 451. *Thrift vs. Ammidon*, supra).

On the contrary, it is well recognized that where there is no Charter or statutory requirement, Boards of this character need not engage in competitive bidding.

In McQuillin on Municipal Corporations, Volume 3, page 862, section 1288, headed "Necessity for Competitive Bids Where Not Required by Statute, Charter or Ordinance" it is stated:

> "*In the absence of charter or statutory requirements, municipal contracts need not be let under competitive bidding,* so that where a statute merely permits competitive bidding but does not require it, it is not necessary that the municipal authorities shall let the contract in that way. *In such cases the corporate authorities are only required to act in good faith and to the best interest of the municipality.*" (Italics ours.)

Among the numerous authorities cited for the above statement is the case of *Thrift vs. Ammidon*, supra. An abundance of authority appears in the said text book in support of the above statement and, so far as counsel for the Voting Machine Board is aware, there is no authority to the contrary.

The following are typical of cases cited by McQuillen:

Lee vs. Ames, 199 Ia. 1342, 203 N. W. 790, 793.
Henderson vs. Enterprise, 202 Ala. 277, 80 So. 115, 118.
Elliott vs. Minneapolis, 59 Minn. 111, 60 N. W. 1081.
Yarnold vs. Lawrence, 15 Kan. 126.
Price vs. Fargo, 24 N. D. 440, 445, 139 N. W. 1054, 1058.
Schefbauer vs. Kearney Twp., 57 N. J. L. 588, 31 Atl. 454.
Fitzgerald vs. Walker, 55 Ark. 148, 17 S. W. 702.

Van Antwerp vs. Mobile, 217 Ala. 201, 115 So. 239.

Underwood vs. Fairbanks, Morse & Co., (Ind.) 185 N. E. 118, 123.

Dunn vs. Sious City, 206 Iowa 908, 221 N. W. 571.

Assuming that it was not necessary for the Voting Machine Board to engage in competitive bidding, does the fact that it called for bids wed it to such a procedure? The case of *Mayor and City Council of Baltimore vs. Weatherby*, supra, is exactly in point. There this Court approved a contract awarded by the Board of School Commissioners to the high bidder where sealed bids had been advertised for, because the only ordinance requiring competitive bidding did not affect contracts of the character in question.

The case of *Lee vs. City of Ames*, supra, also is directly in point. Bids were asked for paving and also for extra excavation. The statute required competitive bidding for paving but not for excavation. After all bids were in, the council which awarded the contract allowed a bidder upon paving and excavation to reduce his bid on the latter to that of his lowest competitor. The Court approved the action of council, but said that the council could have awarded the contract for grading to the said high bidder, if it had seen fit, without any reduction in its contract price for excavation.

Concerning the necessity for competitive bidding where the statute did not require it, the Court said:

> "We have no statute in this state requiring contracts for excavation and grading of streets preparatory to paving to be let under competitive bidding. In the absence of statutory requirement, the city

was not required to let the contract for 'extra excavation' under competitive bidding, as is required in paving. 3 McQuillin on Municipal Corporations, #1186; *Price vs. Fargo,* 24 N. D. 440, 139 N. W. 1054; *Elliott vs. Minneapolis,* 59 Minn. 111, 60 N. W. 1081; *Middle Valley Trap Rock Co. vs. Bd. of Freeholders,* 70 N. J. Law, 625, 57 A. 258. It is well settled that a municipal corporation need not, in making its contract, advertise for bids and let to the lowest bidder in the absence of an express statutory requirement, *and where a city is not required to advertise for bids, neither is it required to let to the lowest bidder in case it does adopt such course.* 20 Enc. of Law (2nd Ed.) 1165, and cases cited. The council was not required to call for bids for the extra excavation. It was not obliged to let said work to the low bidder on sealed proposal. There being no statute requiring contract for grading to be let in pursuance of competitive bidding, the counsel could handle the matter as it saw fit, if it acted in good faith and without fraud * * *." (P. 1349, 1350). (Italics ours.)

It is submitted that the authorities cited demonstrate conclusively that the Voting Machine Board is not required to engage in competitive bidding, and that even though the cost of the additional equipment necessary for write-in voting is very material, there is nothing to prevent such Board, in the honest exercise of its discretion, from making a supplemental contract with the Automatic Corporation therefor.

Counsel for the Voting Machine Board does not wish to imply by this argument that the said Board, if it has authority to do so, will proceed by making a supplemental contract for the purchase of write-in equipment. Counsel for the Board has no authority whatever to commit the

Board to any course of action in the event that write-in voting is required; and it is difficult to see how the Board itself could elect, at any time before the final determination by this Court of the questions raised in these cases, how it will proceed. The only point made here is that the ruling of the Trial Court that the Voting Machine Board cannot lawfully purchase a voting machine which is not, but can be, equipped for write-in voting, at some additional cost, is a limitation upon the power, authority and discretion of said Board which the lower Court had no authority to impose; and in order for the Board to act intelligently and avoid another law suit, if that part of the ruling of the Trial Court requiring write-in voting is sustained, it is absolutely imperative that the powers of the Board in this respect be definitely and accurately defined.

III.

IF THE DECLARATION OF RIGHTS AND CONSTITUTION OF MARYLAND GUARANTEE WRITE-IN OR PERSONAL CHOICE VOTING, THE AUTOMATIC CORPORATION IS OBLIGED, UNDER THE TERMS OF ITS CONTRACT, TO FURNISH A MACHINE WHICH WILL PERMIT EVERY VOTER TO VOTE AT ANY ELECTION FOR ANY PERSON FOR WHOM HE IS LAWFULLY ENTITLED TO VOTE, WHICH WOULD NECESSARILY INCLUDE HIS PERSONAL CHOICE CANDIDATE, UNLESS A COURT OF EQUITY SHOULD REFUSE TO COMPEL THE INSTALLATION OF SUCH EQUIPMENT AT THE EXPENSE OF THE AUTOMATIC CORPORATION, BECAUSE OF AN ACKNOWLEDGED MUTUAL MISTAKE OF LAW.

Under the contract, the Automatic Corporation agrees to furnish voting machines in strict accordance with all of the conditions, covenants, stipulations, terms and provisions contained in the specifications (R. p. 208).

Under Section 43 of the Specifications, the said Corporation agrees to furnish voting machines in strict ac-

cordance with all of the terms, conditions and provisions of the Voting Machine Act and any and all other laws (R. p. 194).

Section 224-F, Sub-section (d) of the Voting Machine Act provides that every voting machine purchased shall "permit each voter to vote, at any election, *for any person* and for any office for whom and *for which he is lawfully entitled to vote* * * *."

If the right to vote for the candidate of the voter's personal choice, as urged by the plaintiffs (R. pp. 17, 77, 78) is guaranteed by the Constitution, then the legal effect of the language referred to above is to require the Automatic Corporation to furnish voting machines equipped for write-in voting.

There is no use to repeat here, at length, what is set forth in the statement of facts in detail, namely, that both the Voting Machine Board and the Automatic Corporation, on the strength of advice from three Opinions from two Attorneys General of Maryland, were of the very definite impression that write-in voting was not permitted in Maryland.

While the contract itself is silent on the question of write-in voting, it is admitted that the representatives of the Automatic Corporation were advised of these rulings of the Attorney General; and if write-in voting is required by law, the failure of the Voting Machine Board to specify and of the Automatic Corporation to bid upon the same, is due to a mutual mistake of law, that is, to the mutual mistake of the legal effect of the language employed in the contract and specifications referred to above.

Due to this mutual mistake of law, representatives of the Automatic Corporation testified they made their bid approximately $75,000.00 less than they would have made it if they had understood that write-in equipment was required by law (R. p. 249).

The question whether the Automatic Corporation because of said contract provisions, should be required to furnish machines equipped for write-in voting at the contract price, was raised below (R. p. 33), and it is clear that the Trial Court's attention was directed thereto (R. p. 249); but the Trial Court never touched directly upon this question in its opinion or decree, although the necessary implication of both is that the Automatic Corporation is not required to furnish a machine equipped for write-in voting.

What is the legal effect of this mutual mistake of law? It is obvious that there is no question of *reformation* involved. In *Godwin vs. Conturbia*, 115 Md. 488, 496, the Court had before it the question of whether a certain deed of trust was revocable *at*, or *after* the expiration of a certain period. In referring to the power of Courts of Equity to *reform* contracts where there has been a mistake of law this Court quoted at some length from *Abraham vs. North German Ins. Co.*, 40 Fed. 722, as follows:

> "If * * * the parties actually mistake or misunderstand the principle of law applicable to the subject matter of the contract, and reach an agreement relying upon this mistake of law, there is no ground upon which a Court of Equity can *reform* the contract." (Italics ours.)

Immediately following the language quoted, the Court, in *Abraham vs. North German Ins. Co.*, supra, states why

a Court of Equity cannot reform the contract, under the circumstances outlined:

> "The Court cannot know whether the parties, if they had correctly understood the law, would have entered into any contract on the subject, or what terms they might have reached touching the same. While the Court might, therefore, be entirely satisfied that the parties, had they in fact correctly understood the principles of law applicable to the case, would not have made the contract they did make, the Court cannot know what contract they would have made, if any; and therefore, in such case, the Court cannot *reform* the contract, although it might be justified in *setting it aside.*" (Italics ours.)

The language quoted is precisely in point here. The contract cannot be reformed to provide that the Voting Machine Board *must* accept a voting machine which does not permit a voter to vote for every person for whom he is lawfully entitled to vote. Whether the Board might, of its own volition, make such a contract, with a view to purchasing the write-in equipment under supplemental contract, as pointed out under the previous paragraph of this argument, is another question. But there can be no doubt that equity will not *reform* the contract to *compel* it to do so, under authority of the cases just stated.

See also:

Kiser vs. Lucas, 170 Md. 486, 501.

The only question then, and a very perplexing one, is whether a Court of Equity will require the Automatic Corporation, under the language of the contract and specifications, to furnish, at an additional cost of $75,-000.00, machines equipped for write-in voting, in view of the acknowledged mutual mistake of the Voting Machine

Board and said Corporation *of the legal effect* of the language in the contract.

In Williston on Contracts, Section 1581, page 2797, it is stated:

> "There is no portion of the law of mistake more troublesome than that relating to mistake of law. It is impossible to coordinate the cases so as to produce satisfactory results, because the rule distinguishing mistake of law from mistake of fact is found on no sound principle."

To borrow a phrase from Judge Walsh's opinion in *Boyle vs. Maryland State Fair*, 150 Md. 333, 339, "there is a great deal of learning in the decisions and very little agreement" concerning the question of the legal effect and the consequences that follow from making a contract under a mistake of law.

Text writers state with great positiveness that Equity will not interfere where there has been a mistake of law, and statements appear in the decisions of this Court, which, standing alone, support that theory. On the other hand, it seems to counsel for the Voting Machine Board that this Court, perhaps more than some others, has shown a tendency to grant relief where the failure to do so would be too inequitable, and to refuse it on other occasions when the opposite result would obtain. No case has been found by the writer, within or without the State of Maryland in which the facts could be said to be analagous to those of the case at bar.

The question of a mistake of law, in one form or another, has been before the Court many times. One very large group of these cases which has no application here deal with money paid voluntarily and fairly with a full

knowledge of the facts and circumstances under which it is demanded, but under a misapprehension of the law. They begin with *Baltimore vs. Lefferman,* 4 Gill 425, and continue through *Ferman vs. Lanahan,* 159 Md. 1, 5.

The reason for this rule is obvious. If every disputed matter which had been compromised and settled could be opened up thereafter because one of the parties had mistaken his legal rights, there would be no end of litigation and no possibility of finally settling any disputed question short of a Court's decision. Yet even this rule has its exceptions. *Oxenham vs. Mitchell,* 160 Md. 269, 278, 279.

Some of the cases which fall under the rule aforesaid and which, for that reason, in the opinion of counsel for the Board, require no further notice are:

Baltimore vs. Lefferman, 4 Gill. 425.
Morris vs. Mayor & City Council of Baltimore, 5 Gill. 244.
Balt. & Sus. R. R. vs. Faunce, 6 Gill. 76.
Lester vs. Balto., 29 Md. 415.
State vs. B. & O. R. R., 34 Md. 344, 364.
Awalt vs. Eutaw Bldg. Assn., 34 Md. 435, 437.
Potomac Coal Co. vs. Cumberland & Pa. R. R. Co., 38 Md. 226, 228.
Sisson vs. Mayor & City Council of Baltimore, 51 Md. 83, 99.
George's Creek Coal Co. vs. County Commissioners, 59 Md. 255, 260.
Schwartzenbach vs. Odorless Excavating Apparatus Co., 65 Md. 34, 38, 39.
Mayor & City Council of Balto. vs. Hussey, 67 Md. 112, 115, 116.
Baltimore vs. Harvey, 118 Md. 275
Helser vs. State, 128 Md. 228, 231
Ferman vs. Lanahan, 159 Md. 1, 5.

In *Oxenham vs. Mitchell,* 160 Md. 269, the Court includes among cases of the character just described, *Baker vs. Baker,* 94 Md. 633, and while it is agreed that the case belongs in that class, it merits some notice here because it is typical of those cases from which certain language might be taken, which, standing alone, seems to indicate equity will afford no relief from a mistake of law.

Baker vs. Baker, supra, went to the Court of Appeals three times, this being the third case. Without going into the facts, which are very involved, it seems that Charles E. Baker attempted, after certain rulings by the Court of Appeals in the earlier cases, to shift his position and to gain advantage over his brothers and sisters in the distribution of his father's estate on the ground that he had made a mistakeof law.

Beginning at page 633 and ending at page 636, the Court discusses this question of money paid under mistake of law and states that the doctrine is not confined to cases in which attempts have been made to recover back money paid under a mistake of law.

> "It has a much broader application. In general it may be said that a mistake of law, pure and simple is not adequate ground for relief. Where a party with full knowledge of all the material facts, *and without any other special circumstances giving rise to an equity in his behalf,* enters into a transaction affecting his interests, rights and liabilities, under an ignorance or error with respect to the rules of law controlling the case, the Courts will not in general, relieve him from the consequences of his mistake." (P. 634). (Italics ours.)

And at page 635, it is said:

> "*We do not mean to say that there may not be exceptions to the general rule;* but this case does not

fall within any exception. Many of the cases assumed to be within some exception to the rule were not so in reality, but were decided on the distinct ground that the mistake was one of fact and not of law; or else the mistake was treated as analogous to, if not identical with, a mistake of fact. Such for instance, is the case of *Cooper v. Phibbs*, L. R., 2 H. L. 149. A, being ignorant that certain property belonged to himself and supposing that it belonged to B, agreed to take a lease of it from B, at a certain rent. There was no fraud, no unfair conduct and all the parties equally knew the facts. The House of Lords set aside the agreement on account of the mistake. A majority of the Judges called it a mistake of fact; whilst LORD WESTBURY stated that it was what is ordinarily designated a mistake of law, but held that it was really a mistake of fact. We are dealing in the case at bar with a distinctly different situation. *The circumstances that the mistake was a MUTUAL mistake of law does not alter the application of the general principle.* In the case of *Eaglesfield v. Marquis of Londonderry*, L. R. 4 Ch. Div. 693, the Court of Appeal placed their decision distinctly upon the ground that both parties acted *under a common or mutual misapprehension and mistake of the law,* and therefore, *without other circumstances,* equity could not relieve. A mistake of law is no more a ground of relief in equity than it is at law. Upton v. Tribilcock, 91 U. S. 50."

It is to be noted that the Court is careful to make an exception where there are "special circumstances giving rise to an equity" in behalf of one of the parties and also to point out that there are exceptions to the general rule that mistake or want of legal knowledge ordinarily forms no ground for equitable relief; which is simply another way of saying that the Courts treat everyone of these cases on the basis of the particular facts shown,

and where they consider the matter to involve too great hardship they provide some form of relief, otherwise the contracts are permitted to stand.

With this in mind, we can examine what may be termed the leading cases on this subject, where there is not involved the repayment of money paid under a mistake of law.

There is a line of cases, beginning with *Wesley vs. Thames,* 6 H. & J. 25, in which it appears that attempts have been made to secure *reformation* of an instrument and have the Court attach to it a meaning directly contrary to the terms thereof. In the case referred to, there was a deed of mortgage admitted to have been signed by the complaining party, which recited that it was given to secure the payment of $200.00. An attempt was made to prove that the mortgage was, in fact, intended to secure the mortgagee against liability under a bond which he had signed as surety for the complainant. The Court refused to reform the instrument, in the absence of some allegation of fraud, holding as follows:

> "From aught that appears on the face of the bill, the mortgagor and mortgagee did agree, that the deed should be executed in the form that it bears; and to permit them to *prove by parole evidence a different intent,* from that which they deliberately and explicity declared, would be to prostrate the best established rules of evidence; and under the adoption of such principles, testimony extrinsic to the instrument, would in every case be admissible to substitute a new agreement in the place of the one which had been deliberately executed." (P. 29.)

See also:

Watkins vs. Stockett, 6 H. & J. 25.
Harwood vs. Jones, 10 G. & J. 404.
McElderry vs. Shipley, 2 Md. 25, 35.

In all of these cases the refusal to grant relief is based upon the ground that *parole evidence is not admissible* to contradict, add to or vary the terms of a written instrument in the absence of proof of fraud, mistake or surprise.

The first reference to such matters as *a mistake of law* appears to be in *Anderson vs. Tydings*, 8 Md. 427, 440, 441, although the said case also refers to the parole evidence rule. That case and the case of Campbell vs. Lowe, 9 Md. 500, 508, are only authority for the ruling that while a debtor may prefer one creditor over another, if, through a mistake of law he selects such an instrument as cannot have this effect without reformation by a Court of Equity, equity will not grant such relief as against other creditors whose claims stand upon an equal footing.

In *Cooke vs. Husbands*, 11 Md. 492, often referred to by the text writers, the mistake was conceded to be one of fact and the instrument was reformed.

The aforegoing cases are hardly analogous to the instant case, because in all those cases there was no evidence of a *mutual* mistake; and in each case one party was contending that the parties intended to say exactly what the instrument contained. It is hardly possible, in any of these cases, if the defendant had admitted the facts as alleged by the complainant, but had refused to do anything about the matter the Court would have refused relief. *The real ground therefore of refusing relief is not that it is inexcusable to make a mistake of law, so much as that the rules of evidence relating to written contracts will not permit such mistakes to be proven.*

Of all the early cases decided by this Court, the three that are most often referred to by the text writers are

Williams vs. Hogsdon, 2 H. & J. 474; *Lammot vs. Bowley*, 6 H. & J. 500, and *State to the use of Stevenson vs. Reigart*, 1 Gill 1.

In *Williams vs. Hogsdon*, supra, one partner signed a bond purporting to bind both partners. The other partner knew nothing about the bond; and it was therefore not legally binding upon him, although binding upon the one who signed it. The Court stated that a bond given by one partner for a simple contract debt due from the partners to the creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt.

Continuing the Court held (p. 482):

> "It is also established by the Courts of law and equity, that ignorance of the law, as to the legal consequences resulting from such a bond, cannot excuse or form a ground for relief in equity, on the suggestion and proof that the party was mistaken as to the legal affects of such a bond, imagining at the time that it could not operate as a release to the other debtor, and that his responsibility still exists."

It will be noted that the case in question does not involve a *mutual* mistake of law but rather a mistake by A of the legal effect of a bond given by B which purports to bind B and C, but of which C has no knowledge.

In *Lammot vs. Bowley*, 6 H. & J. 500, it appears that Bowley, to whom a certain piece of property had been devised under a will, stood by and knowingly permitted another to sell the land in question, thinking that such other took under the will. Legal proceedings later established that Bowley took the land in question under the will, and he then brought ejectment proceedings to

oust the purchaser. This suit was an attempt to enjoin the ejectment proceedings, and relief was refused.

Here there was a mistake of law by two parties, namely the purchaser of the property and Bowley, although it did not arise out of a contract between them.

The Court held that it would not stay proceedings in the ejectment case and that Bowley's rights were not affected by his knowledge of the sale of the property, and his long acquiescence under it, as in so doing he acted under a mistake of his own title. In doing so, the Court refers at length to this question of the effect of a mistake of law, quoting language of Chief Justice Marshall in support of the legal proposition that equity will sometimes grant relief where there is a mistake of law. Because of the importance of the case we quote from it rather fully, as follows (525-526):

> "In *Hunt vs. Rousmanier,* 8 Wheat. 214, the Chief Justice, in speaking of the case of *Lansdowne vs. Lansdowne,* says, if it be law, it has no inconsiderable bearing on this cause. There are certainly strong objections to this decision in other respects; but as a case in which relief has been granted, or a mistake in law, it cannot be entirely disregarded. He then goes on to say—'Although we do not find the naked principle that relief may be granted on account of ignorance of law, asserted in the books, we find no case, in which it has been decided, that a *plain and acknowledged* mistake in law, is beyond the reach of equity'. We have here, then, the high authority of this most distinguished man, and eminent Judge, that a party acting under a *clear and unequivocal mistake of his legal rights,* is entitled to relief in a Court of equitable jurisdiction; and that the doctrine of a Court of Chancery is not, as has been contended, that equity will not administer relief upon that ground, upon the principle that

every man is bound to know the law. It is not intended to say, that the plea of *ignorantia juris* would in *all* instances be available in civil cases, (in criminal it never can be,) because some legal propositions are so plain and familiar, even to ordinary minds, that it would be doing violence to probability to impute ignorance in such cases, but it is only meant to say, that where the legal principle is *confessedly doubtful*, and one about which ignorance *may well be supposed to exist*, a person acting under a misapprehension of the law in such a case, *shall not forfeit any of his legal rights*, by reason of such mistake. So *Newland*, in his treatise on contracts, says, that a mistake or misapprehension of the law, is a ground of relief in equity; as if a man purchases his own estate, and pays for it, the Court will order the purchase money to be refunded, on the ground that there was a plain mistake. It appears then, from what has been observed in the foregoing opinion, that some of the most enlightened and celebrated men, whose characters are recorded in judicial history, have given the sanction of their illustrious names to the doctrine, that no man, acting under a plain and acknowledged mistake of his legal rights, shall forfeit those rights, in consequence of such misapprehension. The authorities in support of this principle, might be multiplied to an almost indefinite extent, but it is deemed unnecessary further to enlarge upon the subject."

In *State vs. Reigart*, 1 Gill 1, a grandfather bequeathed certain property to a granddaughter, as her property, and not as bequeathed to her husband, father, brothers or stepsisters. The girl's husband made a contract with the grandfather's executors, under which he received said estate, in trust for his said wife. The husband failed to invest under the terms and conditions under which he received the legacy. It was held his estate was liable to

the wife therefor. Point was made that the grandfather's executors had no authority to demand that the husband execute the agreement he made with him.

The Court held:

> "We do not think that the husband can shelter himself under a mistake of the law; he not only appears to have taken legal advice upon the subject of his marital rights, in relation to the legacy, but if he had not, there is, we think, nothing in this case to except it out of the operation of the general rule, that ignorance of the law cannot be made available with a full knowledge of all the facts. The case of *Bowley and Lammott* was decided upon a principle wholly inapplicable to this case. That was a case where a forfeiture of title would have been incurred, if the general rule, that a knowledge of the law in civil cases shall be presumed, where there is a full knowledge of the facts, had been permitted to operate; it was to charge the party with a fraudulent concealment of title, in the absence of actual knowledge, upon the legal presumption, which imputed knowledge. In that case, *the application of such a principle was looked upon as being too monstrous and unjust, to receive for a moment the countenance or sanction of the Court; it was a doctrine most glaringly unjust, and alike repudiated by the rules of morality, a refined sense of justice, and the principles of law.* It was therefore rejected" (29, 30).

Although said case of *State vs. Reigart*, supra, is often quoted by the text writers as authority for the general rule that equity will not relieve from a mistake of law, the language quoted illustrates what has been said before, namely, that if the result of the doctrine is too unjust Courts of Equity will consider the case an exception.

In *Cumberland Coal & Iron Co. vs. Sherman*, 20 Md. 117, the Court permitted the company to rescind the contract and have property reconveyed to it, upon terms consistent with equity, where it appeared that certain stockholders *had ratified said contract* for the sale of a portion of a company's lands and, at the same meeting, upon discovering objections to the contract, instead of rescinding it, solicited not as a matter of right, but as a concession, a release for modification of the contract.

The Court held that the act of confirmation was rather an accident than a deliberate act and, as stated, permitted the company to rescind the contract.

In the opinion the Court refers to both the case of *State to the use of Stevenson vs. Reigart*, supra, and *Lammot vs. Bowley*, supra, and says as to the former:

> "The *exceptions to or modifications of* the maxim 'ignorantia legis excusat neminen', in equity, *were not adverted to* in the case of *Stevenson vs. Reigart;* the general principle was incidentally referred to, in connection with the facts of that case, which was a case at law" (p. 151).

The Court continues and quotes with approval the language hereinabove referred to from the case of *Lammot vs. Bowley* to the general effect that equity will administer relief in certain cases involving a mistake of law.

In *Kearney vs. Sascer*, 37 Md. 264, where the defense was made on mistake of fact and another on mistake of law the Court of Appeals refused to grant relief under either. In that case there was not involved any contract or instrument to be reformed, but an administrator d. b. n., made no defense to a writ of scire facias issued against him for the purpose of reviving a judgment

against the former administrator, but voluntarily confessed an absolute judgment of fiat, and then four years afterward, upon execution being issued, applied to a Court of Equity for relief by injunction. Without going into the facts, the case shows no equitable ground for relief although it recognizes that there are exceptions to the rule that Courts of Equity will not ordinarily grant relief on the ground of a mistake of law, citing among other cases *Lammot vs. Bowley,* supra, and *Cumberland Coal & Iron Co. vs. Sherman,* supra.

In *Broumel vs. White,* 87 Md. 521, both parties purchased lots on opposite sides of what was alleged to be a public street. Through error, one house was built partly on the bed of the street. In an earlier case it had been decided that if there had been a dedication there had been no acceptance by the City of Baltimore. In the present case one property owner, White, attempted to enjoin the other property owner, Broumel, from maintaining her dwelling on what is alleged to be the bed of Chestnut Street. The Court refused to grant the injunction and held that while the facts of the case showed dedication yet, whenever Chestnut Street shall be opened the appellant Broumel is entitled to the fair value of her buildings on the bed of the street.

At pages 526 and 527, the Court stated:

> "It was said by MAULE, J., in *Martindale v. Falkner,* 2 C. B. 719, that '*There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so.*' In *Lammot v. Bowly,* 6 H. & J. 525, the court said: 'It is not intended to say that the plea IGNORANTIA LEGIS would in all instances be available in civil cases (in criminal it never can be) because some legal propositions are so plain and familiar, even to ordi-

nary minds, that it would be doing violence to probability to impute ignorance in such cases; but it is only meant to say that where the legal principle is confessedly doubtful, and one about which ignorance may well be supposed to exist, a person acting under misapprehension of the law in such a case shall not forfeit any of his legal rights, by reason of such mistake." (Italics ours.)

Another case often cited in the Maryland Reports on this question is *Gebb vs. Rose*, 40 Md. 387, in which the opinion was written by Judge Alvey. There, a married woman attempted to convey a piece of her property, which was not to her separate use, to her husband in trust with the life estate to herself, then to her husband and then absolutely to the plaintiff, Mary Catherine Gebb. After the death of both wife and husband, the heirs at law of the wife instituted an action of ejectment against Mary Gebb. In this case Mary Gebb asked for an injunction to restrain the action of ejectment and to have the trust in the deed in question declared valid. Mary Gebb had served the husband and wife for over thirty years and had been treated by them in all respects as an adopted child. Judge Alvey held that the deed in question was void since the law required the husband to join with his wife in the deed. When it was urged that the imperfection of the deed was caused by ignorance and mistake, the Court stated (p. 394):

"But, to say nothing of the nature of the consideration displayed on the face of the instrument itself, this is not a case for the exercise of the equitable jurisdiction for the correction of mistakes. The mistakes here, *if it can be called such*, was one of law simply; a want of knowledge as to what the law required to make a deed good and effective. *Such mis-*

take or want of legal knowledge forms no proper ground for the assistance of a Court of Equity, in the absence of actual fraud and imposition."

In *Carpenter vs. Jones*, 44 Md. 625, a doctor, claiming to be the largest creditor of the estate of the deceased, addressed a letter to the Orphans' Court in which he stated he "would ask the appointment of Mr. J. N. Davis as administrator of the estate" (p. 629). Whereupon Mr. Davis was appointed administrator, the Orphans' Court construing the letter as a declaration by the appellant of his willingness to decline the administration. Thereafter the appellant doctor attempted to have the letters in question revoked on the ground of mistake in the said letter. Both the Orphans' Court and the Court of Appeals refused to revoke the letters.

The Court said:

> "The mistake complained of, is a mistake in law—being a legal effect of the paper. There is no mistake relied upon and cannot be. The paper was written by the appellant, and the facts and statements contained in it are not alleged to be erroneous and otherwise than stated. Mistake in facts will always be remedied by the Courts as far as can be done consistently with right and justice—*but where the mistake is purely a mistake in law, they refuse to interfere.*"

The case of *Euler vs. Schroeder*, 112 Md. 155, is of no real value. A badly drawn bill of complaint *failed to state any facts* from which it appeared either that the parties made a mutual mistake of fact or law or that the defendants took undue advantage of the plaintiff. The most that can be said for the case is that one party made a mistake of the legal effect of an agreement without any

elements of fraud, etc. by the other party to the contract for which Pomeroy's Equity Jurisprudence, Section 43, is cited as authority that no relief will be granted.

The case of *Godwin vs. Conturbia,* 115 Md. 488, has already been referred to as authority for the fact that equity will not *reform* the contract of the instant case. In that case there was involved the question of the construction of a deed of trust as to whether a grantor had reserved the right to revoke the trust *at* or *after* three years from the date thereof.

The Court held that the instrument should be reformed.

At page 495, the Court states:

> "It has been suggested on behalf of the appellant that this doctrine is not applicable here, because, as it is argued, a misapprehension as to the meaning of language which has been used by design and not by inadvertence constitutes a mistake of law from which the parties are not entitled to be relieved. This theory, in our judgment, is not available under the conditions here presented. The questions in this case arise from doubts entertained as to the meaning of a particular combination of words in the connection in which they are used, *and not as to the legal effect of language whose ordinary import is free of difficulty. The terms under consideration have no defined legal significance, and if an error has occurred in the description of the power of revocation, it was not occasioned by a misconception of any rule of law.* An inaccuracy in the statement of a stipulation does not always and of necessity involve a mistake as to its legal effect. This distinction is thus stated in *Abraham v. North German Ins. Co.,* 40 Fed. 722. *'If * * * the parties actually mistake or mis-*

understand the principle of law applicable to the subject-matter of the contract, and reach an agreement relying upon this mistake of the law, there is no ground upon which a court of equity can reform the contract * * * When, however, the mistake lies not in a misunderstanding of the principles of the law as controlling the subject of the contract, or the rights of the parties connected therewith, but merely in the terms proper to be used in defining the actual contract of the parties, such a mistake, though in one sense a mistake of law, is one that a Court of equity will reform'."

In considering the above decision, it must be remembered that it is dealing primarily with reformation and not with rescission.

It must be admitted that the legal question of whether voters in Maryland are "lawfully entitled to vote" for candidates of their personal choice is not free of difficulty, and that the said right has not heretofore had the legal significance placed upon it by the Trial Court.

Finding no direct reference to the effect of a mistake of law upon a contract in the "Restatement of the Law" of Contracts, Section 500, Chapter 17, page 958, the writer turned to "Tentative Draft No. 1" of the American Law Institute on the subject of "Restatement of Restitution and Unjust Enrichment."

From the introductory note it appears that "The Restatement of this Subject deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss."

While this probably implies that the contract in question *has been executed* and the legal question involved

is the right of one of the parties to recover money or property on the theory that the other party is unjustly enriched, whether such enrichment result from a mistake of fact or a mistake of law, nevertheless the comment, particularly upon the history of the subject of "Mistake of Law," and the very careful and complete "Explanatory Notes" in the appendix bear sufficiently upon the instant case to justify bringing them to the Court's attention. The general tenor of "Topic 3. Mistake of Law" is to the effect that Courts are more inclined all the time to find some ground of relief where there has been a pure mistake of law and to get away from the doctrine that because the mistake is one of law and not of fact, equity will afford no relief. In the "Introductory Note" at pages 148, 149, it is said:

"TOPIC 3. MISTAKE OF LAW.

"The principle underlying recovery for a benefit conferred because of a mistake of fact is that it is just for one who has benefited by the mistake of another to return what he has received, except where he is entitled to the benefit of his bargain or where there are other circumstances which would make restitution inequitable as between the parties, or inexpedient because opposed to public interests. There has been much dispute as to whether or not the same principle should underlie the right to restitution for mistake of law. Until the nineteenth century no distinction was made between mistake of fact and mistake of law and restitution was freely granted both in law and in equity to persons who had paid money to another because of a mistake of law.

"In 1802, however, Lord Ellenborough in the case of *Bilbie v. Lumley*, 2 East 469, refused restitution to an underwriter who had paid the insured, mistakenly believing that non-disclosure of essential facts

did not prevent liability. Lord Ellenborough gave his decision after asking counsel if they could cite cases where there could be recovery by one who knew the facts, and rested it on the ground that 'every man must be taken to be cognizant of the law', thereby implying that mistake of law is not a basis for restitution. The ignorance of counsel led them to make no reply; *the judicial paraphrase of the established rule that a person is not excused from liability for doing an act which is otherwise unlawful because he is ignorant of the law, led to an entire change in the law. The phrase is demonstrably untrue and has only a limited application to persons seeking to excuse themselves from what otherwise would be a tort or crime; it is entirely misapplied when used with reference to restitution cases.* However, the result was accepted in the case of *Brisbane v. Dacres*, (5 Taunt. 143, C. P. 1813) in which, by a divided court, it was decided that an officer who made payment of prize money to a superior, both parties mistakenly believing that the law required this, could not recover. Both of these cases can be supported on their facts; unfortunately, however, they were made the basis of a broad rule denying restitution in all cases where the facts were known and the only mistake was one of law. *Before long, however, the injustice which would result from the universal application of such a broad rule led to many limitations upon it and by a process of attrition it has been limited to cases similar to that of Bilbie v. Lumley, that is, to cases where a benefit has been conferred upon another because of a supposed duty to him in response to an honest demand by the other* (see sec. 40). *The failure to recognize the limited application of the rule has been due in part to the fact that in many of the situations in which the unlimited rule has been invoked, restitution would have been denied had there been a mistake of fact instead of law* (see sec. 39).

Under section 42 of the said Note, the case of Konig v. Mayor of Baltimore, 128 Md. 465 is referred to as follows:

> "Recovery allowed where the plaintiff benefited the defendant in the anticipation of getting a return which was not made because the agreement was found to be void. Konig v. Mayor of Baltimore, 128 Md. 465, 97 Atl. 837 (1916) (contract for filtration plant. Court of equity refuses to grant injunction to prevent city from making payments since the city in fact got benefits. Also said that although ignorance of law is no excuse, *contractors cannot be supposed to know the details of municipal charters*):"

* * * * * *

The writer has gone into this matter at this length because the question of whether the Automatic Corporation is required under its contract to furnish this additional $75,000.00 worth of equipment at its own expense is a serious one, and one incidentally, which must be determined in this suit. As counsel for the Board, the writer is naturally anxious to secure for it every possible advantage which the contract affords and to which it is legally entitled, even though as a result great hardship is worked upon the Automatic Corporation. It must be admitted, however, that if contracts cannot be supposed to know the details of the Baltimore City Charter, as stated in *Konig vs. Mayor and C. C. of Baltimore*, supra, they can hardly be expected to have a knowledge of the State Constitution, superior to that of the Governor and the members of the General Assembly of Maryland who repealed write-in voting, the various Attorneys General who have held that write-in voting was unlawful, and the candidates for election, election officials and people of the State, who have, for the past thirteen years, uniformly

acquiesced in the view that write-in voting is not permitted in Maryland.

In the last analysis, the question of whether it is equitable or inequitable to require the strict and rigid enforcement of the contract is one for this Court, and not for the counsel for the Voting Machine Board, to determine; and nothing stated herein is to be taken as a concession that write-in voting is not required, if this Court shall be of the opinion that such is the result of said contract.

IV.

THE PLAN, DESIGNATED AS PLAN A, FOR VOTING FOR FIRST AND SECOND CHOICE, WHERE THREE OR MORE PERSONS ARE CANDIDATES FOR NOMINATION FOR STATE-WIDE OFFICE IN THE SAME PARTY PRIMARY, MEETS ALL OF THE LEGAL REQUIREMENTS OF THE VOTING MACHINE ACT AND THE ELECTION LAWS.

First and second choice voting is a part of a scheme designed to eliminate all except one candidate for the nomination of any political party for State-wide office, where there are three or more of such candidates and where none of them has a majority of votes in the party's convention. (Sec. 203, Art. 33, Code of Public General Laws.)

Plan A, as referred to throughout the record, is the plan or method adopted by the Automatic Corporation for first and second choice voting upon the sample machine submitted by that corporation with its bid. This Plan permits a voter to vote for first choice alone by the use of one lever; but the ballot label is so arranged that where he wishes to vote for first choice and second choice also *only one action* is required, namely, the pulling down of *one* lever under that part of the ballot label which

shows that he thereby expresses his first choice for one candidate and his second choice for another.

Plan A is attacked on two grounds:

FIRST, that it permits a voter by the use of *one* voting device to vote his first and second choice or preference for the office to be filled; and,

SECOND, that the space provided on the ballot label for first and second choice voting is *too small* to permit the printing of the information alleged to be necessary to be printed therein in "plain, clear type so as to be clearly readable by persons with normal vision, * * *".

It should be noted here that while a number of exhibits of Plan A appear in the Record, they affect only *the scheme of printing;* and *the method of voting* for first and second choice by the use of *one lever* is unchanged.

As authority for the contention that Plan A is invalid because it permits a voter to vote for his first and second choice by a *single* act, that is, by pulling down a *single* lever on the face of the voting machine the plaintiffs cite two provisions of law, namely, Section 224-F, Sub-section (i) of the Voting Machine Act, and Section 203 of Article 33 of the Code (R. pp. 10, 11, 79-81), as follows:

> "224-F. Every voting machine acquired or used under the provisions of this sub-title shall:
>
> "(i) Have voting devices for separate candidates and questions, which shall be arranged in separate parallel rows or columns, *so that,* at any primary election, one or more adjacent rows or columns may be assigned to the candidates of a party, and shall have parallel office columns or rows transverse thereto;" (Italics ours.)

And Section 203 of Article 33 of the Maryland Code provides:

> "In case there are more than two candidates for any state office, there shall be provided on the ballot *two squares* opposite the name of each of said candidates, which shall be designated from left to right as 'First Choice' and 'Second Choice', respectively, so that each voter may indicate his first and second choice or preference by placing a cross-mark *in the appropriate squares* as aforesaid. Such cross-marks to be made in the same manner as other cross-marks for voting at primary elections under this Article for Baltimore City and the several Counties of this State, respectively." (Italics ours.)

The same attack upon Plan A, namely, that it permits a voter to vote for *first and second choice* by the use of only *one* lever was made by representatives of the Shoup Corporation before the Voting Machine Board (R. pp. 71, 145, 146). An opinion as to the validity of Plan A and Plan B, referred to hereafter, was requested of the Attorney General by the Board of Supervisors of Election (R. pp. 152-156); and the Attorney General ruled that Plan A was illegal and Plan B legal (R. pp. 157-164). The Attorney General, after much consideration, held that Section 224-F, Sub-section (i) required *separate voting devices* for first and second choice voting, and that inasmuch as Plan A permitted this to be done by the use of a *single* lever, such Plan was unlawful. In arriving at this conclusion, the Attorney General conceded that there was force in the contention that the language preceding the words "so that" in Sub-section (i) was modified by that which followed, which, the Automatic Corporation contended, showed the purpose for which the Legislature required voting devices for separate candidates.

Another and far more important criticism of the conclusion reached in said opinion, however, is the fact that it *completely overlooks* the legal effect of the Sub-section (d) of Section 224-F of the Voting Machine Act. This sub-section, to which the attention of the Attorney General was directed when the Opinion was requested (R. p. 155), but which apparently escaped attention when the Opinion was written, reads as follows:

> "224-F. Every voting machine acquired or used under the provisions of this sub-title shall:
>
> "(d) Permit each voter to vote, at any election, for any person and for any office for whom and for which he is lawfully entitled to vote, and to vote for as many persons for an office as he is entitled to vote for, *including a substantial compliance with the provisions of Section 203 of this Article*, and to vote for or against any question which appears upon a ballot-label;" (Italics ours.)

It is significant that of all of the sections of the old election laws, the Legislature singled out Section 203 and stated that in reference thereto, it was only necessary that the voting machines furnished should be in "substantial compliance" therewith.

What, then, are the provisions of Section 203 which the Legislature had in mind as requiring greater elasticity for the manufacturer in planning the machine and wider discretion in the Voting Machine Board in selecting the same? Sec. 203 is concerned principally with setting up and explaining an elaborate system for selecting the party's nominee for state-wide office where there are three or more candidates therefor *after the primaries have been held.* Examine the section in this light, and you find that the only provisions thereof to which the

Legislature could possibly have referred in requiring only a substantial compliance therewith, are the following:

> "In case there are more than two candidates for any State office, there shall be provided on the ballot two squares opposite the name of each of said candidates, which shall be designated from left to right as 'First Choice' and 'Second Choice,' respectively, so that each voter may indicate his first and second choice or preference by placing a cross-mark in the appropriate squares as aforesaid. Such cross-marks to be made in the same manner as other cross-marks for voting at primary elections under this Article for Baltimore City and the several counties of this State, respectively.
>
> "If the voter marks the same candidate for first choice and also for second choice, then such ballot shall only be counted for 'First Choice' for said candidate and shall not be counted at all for 'Second Choice'; if for second choice only it shall be counted for first choice.
>
> "The tally sheet for such candidates for State offices shall be so arranged as to show plainly and distinctly how the individual voters voting for any certain candidate * * * indicated their second choice or preference from among the remaining candidates * **."

Which of the provisions cited could the Legislature have had in mind in requiring only a substantial compliance therewith? Surely not the reference to "*cross marks*"—the Legislature would not have picked out *one isolated section* of the many that relate to cross marks and say that as to *it alone* a substantial compliance was all that was necessary. As to the second paragraph quoted, while the voting machines are constructed so as

to avoid the voter's falling into the errors referred to therein, these provisions would nevertheless have to be complied with, if it were possible to make such mistakes on the machines.

As to the requirements of the third paragraph quoted, the tally sheets must show how the individual voters for any certain candidate indicated their second choice. This goes to the very root of the system of first and second choice voting and must be literally complied with.

This leaves the first *sentence* quoted above as the only part of Section 203 that could possibly have been referred to when the Legislature authorized a *substantial compliance* therewith. And yet the plaintiffs insist upon a *literal* compliance with this section and rely upon it as part of their authority for the contention that Plan A is illegal (R. pp. 10, 11, 79-81).

The only question remaining is whether Plan A is in substantial compliance with Section 203; and concerning this we submit there can be no doubt whatever. This whole attack on Plan A is on purely technical grounds and with the desire to eliminate the Automatic Corporation's machine from competitive bidding. As shown above, one of the most important provisions of Section 203 is the requirement that the tally sheet show "how the individual voter voting for any certain candidate * * * indicated their second choice or preference from the remaining candidates." No method could be devised, we submit, which would tend to accomplish this result more satisfactorily than Plan A. Concerning this phase of the matter the Trial Court states in its opinion (R. p. 326):

> "Getting back to Plan A, the simpler and more convenient of the two:—unquestionably it definitely and accurately registers first choice votes and the desired alternative second choice votes, which are automatically linked with the respective and desired first choice votes. The voter cannot make a mistake. The ultimate object of Section 203 of Article 33 is as fully, fairly and accurately accomplished thereby as is possible in paper-ballot voting."

Not only is Plan A simpler than Plan B so far as the actual voting is concerned, but the machinery necessary for Plan A is much simpler than Plan B. Plan A requires no additional equipment (R. p. 267). This was readily conceded by experts of the Shoup Corporation in the trial below (R. pp. 267-269, 306).

One practical advantage of Plan A, mechanically, is that it takes no additional time to set it up in fixing the ballot for an election, whereas Plan B requires from ten to fifteen minutes for each machine (R. pp. 246, 285); and that, when it is remembered that the ballot must be set up and arranged on over 900 machines within a limited period of time, is a very real element to consider in making a choice of the two plans.

In conclusion, it is submitted that the Legislature never intended that an isolated clause in Sub-section (i) of Section 224-F should be *divorced* from the *rest* of the language of said sub-section and thus permit the *undoing indirectly* of that which the Legislature had *directly and expressly authorized to be done* by Sub-section (d) of said Section 224-F, namely, the purchase of a voting machine that is in "substantial compliance" with Section 203 of Article 33, relating to first and second choice voting.

The second ground of attack on Plan A, as stated before, is that the space provided on the ballot label for first and second choice voting is too small to permit the printing of the information alleged to be necessary to be printed therein in "plain, clear type so as to be clearly readable by persons with normal vision * * *." (R. pp. 81, 82).

The plaintiffs contend that that part of the ballot label on which a voter, by the use of one lever, votes for his first and second choice for said office, must contain the following information:

(a) The full names of both candidates;

(b) The party designation of both candidates; and

(c) The places of residence of both candidates (R. pp. 81, 82).

No provision of law has been cited for the proposition that the *full* name of each candidate must appear under each such voting device. Section 224-A is cited as authority for the fact that "a designation of the party or principal which each candidate represents shall appear just above the name of each such candidate." Section 224-A is also cited as authority for the fact that the form and arrangement of the ballot labels shall be in accordance with the provisions of Sec. 63 of Art. 33, which provides, in part, that "to the name of each candidate for Statewide office or Congress shall be added the name of the County or City in which the candidate resides." Finally, Sec. 224-G, Sub-section (a) is quoted as authority for the fact that the printing shall be "in plain clear type so as to be clearly readable by persons with normal vision."

In submitting its sample machine with Plan A thereon, the Automatic Corporation apparently printed on the ballot label the information it considered necessary to enable a voter to make his choice. See Plaintiff's Exhibit No. 5 in the "Volume of Exhibits" of the Record, which is the last Exhibit thereon and is a picture of the face of the sample voting machine in question. It is not contended, however, even by the plaintiffs that the ballot label is *not sufficient in size to print any other information than appears on the said Exhibit No. 5.*

The Automatic Corporation offered in evidence its Exhibit I, which appears in the "Volume of Exhibits" and which shows four different arrangements of printing of Plan A; all on a ballot label of identical size as that shown on the machine.

There is also in the record itself, at page 165, "Stipulation Exhibit No. 3A", which is another form of printing for first and second choice voting.

If we analyze the above contentions, we find that the printing on any and all of said forms of Plan A is clearly large enough to be readable by persons with normal vision. The Trial Court so found (R. p. 324). There is no provision in the law which says that under this form of voting, the *full name* of each candidate must appear typed under any lever on the ballot label. The place of residence of each candidate appears after his name on that part of the ballot label, where he appears as the first choice only, and also as first choice in connection with the three other candidates. On one copy of said Plan A, being the third in its Exhibit I as appears in the "Volume of Exhibits", the party designation appears on each ballot label just above the name of the candidates referred to thereon.

In Sub-section (h) of Section 224-G, it is provided that "in primary elections, the ballot labels, containing the names of candidates seeking nomination by a political party, shall be segregated on the face of the machine in adjacent rows or columns by parties."

Sub-section (c) of said Section 224-G provides as follows:

> "(c) The ballot-label for each candidate *or group of candidates*, nominated or seeking nomination by a political party, shall contain the name or designation of the political party." (Italics ours.)

In view of the provisions of the Voting Machine Act quoted, it would seem that the Legislature may have intended, in the case of primary elections, that a single party designation for each party, as shown on the sample machine, will be sufficient. It is not necessary, however, in order to sustain Plan A, that such a conclusion be reached because the designation of the party which each candidate represents does appear just above his name on the third Plan A under "Defendants' Exhibit I."

The plaintiffs also overlooked the provision of Subsection (d) of Section 224-F, which requires only a "substantial compliance with the provisions of Section 203 of Article 33" dealing with first and second choice votes.

Although it is alleged in the brief of the plaintiff that the said ballot label under Plan A is too small to permit the information alleged to be necessary in "plain, clear type so as to be clearly readable by persons with normal vision", it will be noted that no effort was made by counsel for the plaintiffs in the trial below to demonstrate that this is true. The Trial Court in overruling this objection, stated (R. p. 324).

"It is enough to say that all such allegations *were in no way supported by satisfactory proof;* and an inspection of the machines and equipment offered in evidence, affirmatively shows all such allegations were groundless. They relate to details easily carried out, such is the adaptability of the apparatus, in any style the Election Supervisors prefer; details which in most cases must be adjusted to meet the varying conditions as to number of candidates, etc., etc., arising in every election. For the official ballots at no two elections are the same." (Italics ours.)

The Voting Machine Board, by its action in making a contract which specifies neither Plan A nor Plan B (R. pp. 208, 209), deliberately left open for its future election, depending upon this Court's ruling thereon, the question of whether it would require a machine equipped to vote Plan A or Plan B. Since the Automatic Corporation guarantees to furnish a machine which complies with the provisions of the Voting Machine Act and any and all other laws (Sec. 33 of the Specifications), (R. p. 194), the Voting Machine Board is amply protected in the premises.

In view of the foregoing, it is submitted that Plan A, in regards to both voting devices and printing is lawful in all respects and is simpler than Plan B; and the Voting Machine Board therefore should be permitted to purchase voting machines so equipped.

V.

THE BALLOT LABELS OF VOTING MACHINES MAY LAWFULLY CARRY THE NAME OF ANY CANDIDATE MORE THAN ONCE.

In the Norris bill the contention is made that the Automatic Corporation's voting machine is "illegal in that

it contains the name of each candidate in several different ballot labels on the face of said board and under several different vote indicators and in several rows and columns; in violation of the above quoted provision of Art. 33, Sec. 203, which provides that the name of the candidate shall appear only once and that two separate squares be provided opposite his name for the designation of a first or second choice. See Section 63 (made applicable by 224 (a).)" (R. p. 11).

While the above criticism applies only to Plan A and might have been answered under Paragraph IV of the Argument, it has been treated separately for purposes of convenience. The plaintiff Daly contends, with the defendants, that there is no legal prohibition against a candidate's name appearing more than once on the ballot label; and all counsel for all parties agree that it is physically impossible for any voting machine to provide for first and second choice voting without repeating the names of the candidates (R. pp. 322, 323).

The statement of the above ground of complaint is a little confusing. Actually there appear to be two grounds, one of which is fully answered under Paragraph IV of the Argument, namely, that Section 203, which does require that two separate squares should be provided opposite the name of any candidate for first and second choice need only be complied with *substantially* by virtue of the provisions of Section 224-F, Sub-section (d) of the Voting Machine Act; and there is no use repeating that argument here.

The second ground of attack seems to be on the theory that Section 224-A of the Voting Machine Act provides that "The form and arrangement of ballot labels shall be in accordance with the provisions as to ballots con-

tained in Section 63 of Article 33 of Bagby's Annotated Code, Edition of 1924, * * *'', and that said Section 63 contains a statement to the effect that "If the candidate is named for the same office on two or more certificates of nomination, his name shall be printed on the ballot but once, and to the right of the name of said candidate shall be added the name of one of the parties which such candidate represents * * *''. This provision obviously has no application whatever to first and second choice voting.

As the Trial Court points out (R. pp. 322, 323):

> "The provision of the paper ballot law prohibiting the name of a candidate to appear more than once was enacted to prevent any candidate getting the advantage that a repetition of his name would give; to prevent any voter from voting for the same candidate twice; mischiefs which cannot occur on a voting machine set-up. That is all the Legislature sought to accomplish, and voting machines accomplished that precise result."

VI.

THE VOTING MACHINE BOARD HAD AUTHORITY, IF IT SO ELECTED, TO PERMIT THE AUTOMATIC VOTING MACHINE CORPORATION, AT NO ADDITIONAL COST TO THE CITY, TO FURNISH A VOTING MACHINE EQUIPPED TO VOTE CHOICE VOTING IN ACCORDANCE WITH PLAN B.

It was suggested at the trial of these cases below that the Voting Machine Board, under the principles of competitive bidding had no authority to permit the Automatic Corporation to substitute a machine planned and equipped to vote Plan B for the sample machine submitted with its bid, which was planned and equipped to vote Plan A.

Apparently when the point was made, counsel for the plaintiffs assumed that the change in the machine neces-

sary to accomplish this result was material (R. pp. 238-247).

Now that the fact has been disclosed that the change can be made at a cost to the Automatic Corporation of less than $2.00 a machine, with no extra charge to the City, by the addition of equipment weighing only a few ounces (R. p. 247), it is not known whether or not counsel for the plaintiffs have abandoned this objection. It is perfectly clear, however, that even under the principles of statutory competitive bidding the Voting Machine Board would have authority to make this substitution,

> (*Fuller Co. vs. Elderkin,* 160 Md. 660, 665, 668, 669.)

and the Trial Court so held (R. p. 326).

Even if the change were material both as to the amount and character of machinery required and as to the cost thereof, for reasons stated in the second paragraph of the argument, it is submitted the Voting Machine Board had ample authority to make the exchange.

Another attack upon the Voting Machine Board's accepting an Automatic Machine equipped to vote in accordance with Plan B, which was not referred to in either bills of complaint, was on the ground that the experts of the other bidder, the Shoup Corporation, had demonstrated that the machine equipped to vote Plan B could be made to register a vote for second choice without registering a vote for first choice. The Trial Court, in its opinion answers this objection so clearly and succinctly that there is nothing to add to it:

> "That the machine when set up with a 'Plan B Ticket' display (presently treated) can be made to vote a second choice in a three or more candidate primary election without voting a first choice. It is

true that it was so made to operate by Mr. Shoup, engineer-in-chief for the Shoup Voting Machine Company guided by his superior engineering knowledge, which suggested that by using both hands at once, one to check the first choice lever while he used the other to work the second choice lever the machine could be made to produce an abnormal result.

"It is submitted that the so-called test (or trick) operation is scarcely persuasive of results to be had in actual operation by disinterested voters uninformed as to the interior mechanics of a voting machine and of an ingenious method of throwing it off performance. It is scarcely to be hoped that any machine (much less an intricate, delicate voting machine) can be fabricated for any use which will perform normally under wilful abuse, as distinguished from its designed use. Even jails and bank vaults are not proof against undoing by men sufficiently skilled and determined, though reasonably adequate for normal use." (R. p. 323).

VII.

THE VOTING MACHINE OF THE AUTOMATIC CORPORATION HAS NINE ROWS OF LEVERS OR DEVICES FOR VOTING FOR NINE DIFFERENT POLITICAL PARTIES AS REQUIRED BY SECTION 44 OF THE SPECIFICATIONS.

If the plaintiffs were not so insistent in their contention that the voting machine in question does not have nine rows of levers or voting device as required by Section 44 of the Specifications, there would be no point in repeating here what has been set forth heretofore under "Appellant's Contention" on this point. The machine does, in fact, have nine rows of levers or voting devices and the lower Court so held.

One of these rows is utilized on the sample machine for repeating the offices and questions involved in the elec-

tion in question, because only eight rows were necessary to vote that ticket.

There was offered in evidence and there will be produced at the trial of these cases a device which can be attached to the machine over each of said rows so that the machine is susceptible of voting for nine different parties, if necessary, all of which may have different offices and submit different questions (R. p. 258).

CONCLUSION.

The Appellant Voting Machine Board submits—

(a) That the Declaration of Rights and Constitution of Maryland do not guarantee write-in voting, that the Legislature has provided every voter an ample opportunity of having the name of the candidate of his choice printed upon the ballot, and that the Court should not read into the Constitution a limitation upon this power of the Legislature of making reasonable regulations upon this subject, which has been universally acquiesced in for the past thirteen years by the Attorneys General, election officials, candidates and voters of the State of Maryland;

(b) That if the Constitution guarantees write-in voting, the Trial Court erred in enjoining the Voting Machine Board from *purchasing,* although it might enjoin the Supervisors of Election from *using,* voting machines which do not include write-in equipment, in view of the fact that said equipment can be added, since the Voting Machine Board has absolute authority and discretion in the purchase of said machines and was entitled to elect, if write-in voting is mandatory, whether it would purchase the machines without such equipment for the con-

tract price and make a supplemental contract for such equipment;

(c) That the Automatic Corporation is required under its contract to furnish a voting machine which will permit every voter to vote at any election for any person for whom he is lawfully entitled to vote, which would necessarily include his personal choice candidate, unless excused from doing so by reason of the acknowledged mutual mistake of law affecting the same; that the Voting Machine Board cannot be compelled under the circumstances, through reformation of the contract, to accept a voting machine which does not contain write-in equipment, although, in the exercise of its discretion, it may do so;

(d) That the Voting Machine Board is not required to provide for competitive bidding and has full power and authority to accept Plan A or Plan B, in the absence of fraud or bad faith on its part; that both Plan A and Plan B are lawful, although Plan A is simpler and more desirable, particularly from the standpoint of equipment necessary therefor and time involved in setting up the same; and,

(e) That the voting machine purchased complies in all respects with all of the provisions of the voting machine and other election laws.

Wherefore the Appellant Voting Machine Board urges that the decree of the Lower Court should be reversed with costs.

Respectfully submitted,

PAUL F. DUE,
Special Counsel for the
Voting Machine Board.

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Nos. 3 and 4 Appeals,
January Term, 1938.

- - - - - - -

Howard W. Jackson, etc., et al,

Appellants.

-vs-

William S. Norris,

Appellee.

- - - - - - -

Howard W. Jackson, etc., et al,

Appellants.

-vs-

Hattie B. Daly,

Appellee.

Bond, C.J., Urner,
Offutt, Parke,
Sloan, Mitchell,
Shehan and Johnson, JJ.

Opinion by Parke, J.

Filed-Dec-8-1937

The appeals and cross-appeals on this record present questions in relation to the validity of the contract of purchase of voting machines for use, pursuant to the terms of chapter 94 of the Acts of 1937, in the primary and general elections to be held in Baltimore City, a political division of the State.

The employment of voting machines in primary and general elections was controlled until 1937 by sections 222-224 of Art. 33 of the Code (1924) of Public General Laws, as amended by sections 224A-224D of the Acts of 1935, ch. 532 (Code Suppl. 1935, Art. 33, secs. 224A-224D). The effect of the statutory law was to grant to the respective boards of election supervisors in the State a discretionary power to introduce the machines, with two modifications which required the board in Baltimore City to use, in all future elections after the passage of chapter 228 of the Acts of 1933, the machines that had been theretofore purchased by that municipality and were then available for use, and which, subject to the approval of the local board of county commissioners, made a permissive installation of the machines in two specified election districts of Montgomery County. Supra. In 1937, chapter 94 was passed as an emergency law within the scope and meaning of chapter 5 of the Laws of Maryland, Special Session, 1936, which authorized the borrowing of money by the Mayor and Common Council of

Baltimore for specified exigent purposes. The statute of 1937 was made effective from the date of its passage. The enactment declares the use of voting machines mandatory in all elections in Baltimore City after January 1, 1938, unless a voting machine becomes unavailable because of an accidental happening; and leaves discretionary the installation of voting machines in the counties. The statute further prescribes with respect to Baltimore City the general features and facilities of the machines; the powers, functions and duties of the Board of Supervisors; and many provisions and regulations to assure a fair, honest and free election; a certain and correct vote; and an accurate count and true return of the result.

The Act of 1937 directs the Board of Supervisors of Election for Baltimore City to use the voting machines which the municipality had purchased. The members of the Board of Estimates of Baltimore City and of the Board of Supervisors are together constituted a special board, and as such are "authorized, empowered and directed to purchase a sufficient number of voting machines for use in all the polling places throughout the City of Baltimore." The expenses incurred by this particular board and the cost of the machines are directed to be paid upon the requisition of this board, and after audit by the Comptroller of the City. The board is empowered by a majority vote of its members to

require such supplementary specifications to those set forth in the act as shall be decided to be proper for the voting machines acquired or to be acquired by this board, and to select in their discretion the type and make of the machines. The special board is further given the authority, in its discretion, to employ engineers or other skilful persons to advise and aid them in the exercise of the powers conferred and duties imposed. After their purchase the machines are to be delivered to the Supervisors of Election , who shall have their control and custody. Wherever possible, these provisions are to be construed in harmony with existing laws. sec. 224A. So, it is argued, that this Voting Machine Board has no power to make a valid contract to buy the voting machines, unless the machines are purchased through or with the approval of the Central Purchasing Bureau, and in conformity with the promulgated rules and regulations of that Bureau, and the statutory requirement of a bond to the State, if the seller sells in competitive bidding. Code, Art. 78, secs. 1-8.

The Central Purchasing Bureau was created by ch. 184 of the Acts of 1920, for the purpose of having the various institutions of the State buy through a central agency, and thereby secure lower prices and better quality and results because of the volume bought; of the standardization of materials, supplies and articles customarily required; and

of the check on waste, fraud and extravagance. The functions of the executive and administrative officers who compose the personnel of the Bureau are indicative of the legislative purpose; and there is no suggestion that the boards of election supervisors, which are engaged in a peculiarly important political office, were designed to be grouped with executive official boards, departments and institutions charged with the administrative activities of the State so that the equipment of an election should cease to be provided by the officials immediately responsible for the purchase, control and custody under the law of the election machinery and supplies and be bought by the Purchasing Bureau.

The statutes impose weighty duties upon election officials in order that trickery and fraud may be prevented and freedom and purity of elections may be secured. Their grave responsibility is accompanied by criminal liability denounced by the statute for a failure to fulfil their functions as exacted by law. Considerations which are founded in public policy reject the suggestion that there is an implied legislative intention to divide the authority of the supervisors of election by the interposition of an intermediary and, notwithstanding, retain the full measure of their liability. So, both before and since the passage of the statute with which the Bureau began, the several boards of supervisors of election throughout the State have

been authorized to provide all necessary ballots, ballot boxes and booths; registry books, poll books, tally sheets, blanks and stationary. The expenses of the supervisors of election for the purchase of these and all other necessary supplies, have been uniformly paid by Baltimore City or by the respective counties. Code, Art. 33, secs. 3, 16, 62, 66; Acts 1924, ch. 581, secs. 54-61; 1922, ch. 225; and 1933, ch. 228, 1935, ch. 532. With respect to the equipment, ballots, ballot boxes, booths and supplies either the election law or the supervisors prescribe their kind, quality and form, and these matters are not otherwise delegable.

It is, therefore, reasonable to expect and to find that, within the terms of the statute which grants and defines the scope and power of the Bureau, there is the implied exclusion from its operation of all boards of supervisors of election. The exemption appears from the fact that every State officer, board, department, commission and institution intended to be included is limited to those whose accounts are payable by the Comptroller of the State out of the amounts appropriated therefor by the General Assembly of Maryland in the Budget Bill. Code, Art. 77, sec. 4.

Again, it should be observed that the Act of 1937, ch. 94, creates a new board by combining the members of the board of election supervisors for Baltimore City with the

members of the Board of Estimates of Baltimore City. The official body so constituted is formed for the express purpose of determining the type and make, with any specifications supplementary to those required by the Act, of the voting machines to be acquired by purchase by this board and to be paid for by the Mayor and Council of Baltimore City. In the performance of this exclusive function the board is given the authority to inform their judgment by the expert aid and advice of engineers or other skilled persons. These explicit provisions enforce the conclusion that the General Assembly did not intend the full, material and complete powers of the specially erected board to be rendered meaningless by remitting to the Bureau not only the purchase but also the duty to"determine and formulate standards" of the voting machines. Code, Art. 78, sec. 3. If further support of this conclusion were necessary, it is found in the fact that if the Bureau should buy the machines, and they be delivered, and the invoice approved by the Bureau, the Comptroller could not lawfully pay the account, because there are no funds "appropriated therefor by the General Assembly in the Budget Bill" as contemplated by the statute in respect of the Purchasing Bureau. Ibid. sec. 4.

It is obvious that the contract for the voting machines is to be made by the board created by chapter 94 of the

Acts of 1937 without any recourse to the Central Purchasing Bureau. Nor does the Court find that the newly formed Voting Machine Board, as it may be conveniently called, is within any provision of the Charter and Public Local Laws of Baltimore City which relate to competitive bidding.

The advertisement and competitive bidding required before a contract may be made for any public work, or the purchase of any supplies or materials, involving an expenditure of $500 or more for the city, or by any of the city departments, sub-departments or municipal officers not embraced in a department, or special commissions or boards are made obligatory by sections 14 and 15 of the Charter and Public Local Laws of Baltimore, unless otherwise provided for by the local charter and laws. It is plain that these sections are confined to municipal agencies. It is true that the term "or special commissions or boards" is not specifically described as being confined to those of the municipality, but this is the implication of the context, which is clarified by subsequent sections so as to preclude any other rational construction. Thus in section 25, the mayor is granted "the sole power of appointment of all heads of departments, heads of sub-departments, municipal offices not embraced in a department, and all special commissioners or boards, except as otherwise provided in this Article, subject to confirmation by a majority vote of all the

members elected to the Second Branch of the City Council.****"
See Secs. 22, 27, 28, 30, 31, 36, 222b, 480, 515b, 824a.

The quotation from sec. 25 and the other sections cited establish that secs. 14 and 15 of the Charter do not apply to the contracts made by the Voting Machine Board, which, as has been seen, is not the creature of the municipality, but a statutory board of purely legislative origin, with a large measure of discretion to be exercised as officials of the State in the performance of a function of vital importance to the people of the entire State. Norris v. Mayor and City Council of Baltimore, No. 9, April Term, 1937, 192 Atl. 531, 538.

The authority and power granted the Voting Machine Board in the supplementary specifications which it may adopt for the machines; in the selection, in its discretion, of the type and make of voting machines; and in the employment of experts to inform and aid the Board in performance of its duties are provisions which carry conviction that the right of the Board to select and buy is intended to be exclusive, and to be exercised according to the best judgment of the Board. It follows that the Voting Machine Board is free to buy in good faith machines as it may deem best. It may buy all or some, either with or without competitive bidding. So, if machines are bought, and prove not to answer some requirement, the Board may contract, in

its discretion, to have the omission rectified. This freedom in contract is requisite to the full performance of the important and difficult duties of the Voting Machine Board.

The constitutionality of this legislation was sustained on appeal in Norris v. Mayor and City Council of Baltimore, decided May 26, 1937, and now reported in 192 Atlantic Reporter, 531, and thereafter the Voting Machine Board, after study, advice and deliberation, prepared the specifications for the Voting Machines and advertised for the submission of proposals or bids for furnishing and delivering nine hundred and ten voting machines and doing certain other work as set forth in the specifications.

The Automatic Voting Machine Corporation and the Shoup Voting Machine Corporation were the two competitors in the bidding. The first corporation offered to furnish and deliver 910 voting machines, known as forty candidate machines of the type and size described in the specifications as Type A, size 1, at $826.95 a machine or a total of $752,524.50, and the Shoup Corporation offered to furnish and deliver similar machines at $1047 each or a total of $952,770. The bid of the Automatic Corporation was accepted and the contract made with the Voting Machine Board on September 8, 1937. The following day, William S. Norris, a citizen and voter resident in the City of Baltimore, and a taxpayer in said City and State brought a suit

in equity against the eight members of the Voting Machine Board and the Automatic Corporation to annul the contract. On September 18, 1937, Hattie B. Daly, another citizen, resident and voter of the City and a taxpayer of both City and State filed a suit in equity against the eight members of the Voting Machine Board, the Comptroller of the City and the Voting Machine Company to have the contract declared illegal and void. The two causes were heard together and testimony was taken by the parties before the chancellor. The separate decrees passed in each suit were adverse to the complainants except on the ground that the contract was null and void in that the voting machines bought are so constructed as to deny to a qualified voter the right to vote for any person of his choice, because the voter must vote either for the candidates whose names are printed upon the voting machine ballot or not vote. For this reason, the defendants were enjoined from the performance of the contract. From this decree in the first suit separate appeals were taken by the Automatic Corporation, the members of the Voting Machine Board, the Mayor and City Council of Baltimore; and a cross appeal from certain portions of the decree was taken by the complainant Norris. Similarly, in the second suit, appeals were taken by all the defendants, and the complainant entered a cross appeal from certain paragraphs of the decree in that cause. All the appeals in both causes are brought up on one record.

The chancellor found on the testimony that the Board had acted throughout in the best faith, without the taint of collusion or other fraudulent or wrongful conduct; and had exercised its discretionary powers after careful and diligent investigation and consideration and had reached a reasonable conclusion on all matters of fact. The court here is in full agreement with the chancellor on this finding of facts, and, so, the only inquiry open on this appeal is whether the acts of the Board are within its lawful authority and power. Fuller v. Elderkin, 160 Md., 660.

For convenience of discussion, the objections on legal grounds of each bill of complaint have been combined in one group. After an elimination of those matters which are within the sound discretion of the Board, and which, therefore, are not reviewable; and, for the reasons which have been stated in this opinion, of the contentions that the buying of the machines has to be made by or through the State's Central Purchasing Agency; and that, within the doctrine stated in Konig v. Baltimore, 126 Md., 606, a proposal or bid may not be accepted under the Charter of Baltimore City if it is a departure from those things for which proposals have been, by public advertisement, invited to be made upon prescribed and definite specifications, of the things to be bought, there remain in this group many objections. Most of these are in relation to an alleged

failure of the accepted voting machines to conform to the requirements of the statute and of the specifications which were adopted by the board.

The specifications required the bidder to build a sample of the voting machines to be built, and to place it in the office of the Supervisors of Election. Before either of the bidders submitted their offers each installed its sample of a machine. A doubt was expressed before the Board whether the machine exhibited by the Automatic Corporation was in compliance with the specifications or the election laws, so another sample machine was provided which differed, as will be later stated, from the first sample. Both these machines were introduced in evidence, and the first will be referred to as Exhibit 1 and the second as Exhibit No. 2. The record has photographic exhibits of material details of these machines. In addition, the two machines, together with a third one, were produced in the appellate court and their operation demonstrated. This third machine, which will be called Exhibit 3, differed from Exhibit 2 in that it was equipped with a device which afforded the voter the opportunity to write in the name of his personal choice for any office when the name of his choice did not appear on the ballot as a candidate for that office.

From the testimony on the record, the court finds, as

did the able and experienced chancellor, that many of the objections urged were of a minor nature, which are either not supported by the proof or are shown by an inspection of the machines and equipment in evidence to be groundless. Moreover they relate, in most instances, to details in arrangement and form which, because of the facilities and adaptability of the machines, could be regulated and adjusted by the Supervisors of Election so as to bring them in reasonable conformity with the directory requirements of the statutory law.

There are, however, certain allegations which are relied upon to establish that the type of machines which are bought can not be used in accordance with the election laws. The first is that if there are three or more candidates who are competitors in a primary election for the same party nomination to a state wide office, the ballot displayed by the machine shows the name of every candidate more than once. It is asserted that this is a violation of Art. 33, sec.203 of the Code of Public General Laws. In making this contention, its advocates ignore the distinction that sec. 203 was written for paper ballots and chapter 94 of the Acts of 1937 was drawn with reference to voting machines. So, the latter act recognizes and meets the conditions produced by this difference by declaring that the machine shall be in "substantial compliance with the

provisions of Section 203" and that all laws or portions of laws in conflict with the provisions of the Act are thereby repealed to the extent of such inconsistency or conflict. Acts of 1937, ch. 94, sec. 224F (d); sec. 3. The object of the provision of the election law which prohibited the name of a candidate to appear more than once was to prevent a candidate to gain the advantage of having his name printed more than once, and the evil of a voter to mark his ballot more than once for the same candidate. Where the voter may select in a primary election his first and second choice of the candidate for an office, all types of voting machines carry the name of every candidate more than once, but the difficulty is met, and the same result secured as in the provision of sec. 203 of Art. 33 with respect to the paper ballot, by the statute prescribing and the mechanism of the voting machine assuring the preclusion of "each voter *** from voting for any candidate for the same office or upon any question more than once." Sec. 224-F (e). Thus the General Assembly, by appropriate but different provisions with respect to each method of voting, accomplished the single contemplated result. If there is any conflict, sec. 203 must be held repealed or modified to the extent of the inconsistency.

The next point for consideration is the contention that in primary elections, where there are three or more

candidates for nomination for the same office in the same party primary, the method by which the voter may avail himself of the right to indicate his first and second choice by the ballot presented by the machine bought (Exhibit 1) is illegal. If the voter were to cast a paper ballot, he would receive a ballot with the names of the candidates and opposite every candidate's name would be printed two squares, with appropriate legends informing him to mark the first choice square for his first choice and the second choice square for his second choice. So, if the voter prefers candidate X for first choice and candidate Y for second choice, he makes his mark in the first choice square opposite X's name, and his other mark in the second choice square opposite Y's name. The voter may do no more than vote a first choice. Should he, however, mark no first choice, but vote in the second choice block, his vote is counted as a first choice vote for the candidate opposite that block, because having made but one choice the voter is assumed to have no second choice. It follows that in expressing his first and second choice, the voter must make <u>two</u> marks, if a paper ballot is cast. (Sec. 203, Art. 33, Code of Public General Laws; Acts of 1912, ch. 2, sec. 160K). The statute of 1937 requires by Sec. 224-F (d) that the voting machine selected must permit voting in "substantial compliance with the provisions of Sec. 203" of Art. 33.

The voting machine, which was selected, was placed on exhibition in the office of the Supervisors of Election before the bids were opened. It was ready for operation, and a ballot was shown as it was to be voted. The arrangement of the ballot and the manner of voting are known as "Plan A", and the machine is referred to here as Exhibit 1. The ballot was arranged for a primary election similar to the one last mentioned. Under Plan A the voter might depress one lever and vote for X as his first choice. Thereupon the machine locked and he could not vote his second choice nor could he vote a second choice ballot only. However, if he have a first and a second choice, he may, by pushing down but one lever, vote both his first and second choice.

By these devices the voter expresses his intention. If it be to vote his first and his second choice, and it can be done by a single movement of the lever, why should he be required to express the same intended vote, by two movements when one will do? A mere economy of effort in giving effect to an identical intention with the same result introduces no substantial difference between Plan A and sec. 203. In the machine known as Exhibit 2, there is a different arrangement so that to vote his first and second choice the voter moves a lever for each choice. This arrangement is known as Plan B, which is conceded to

be legal. Both Plan A and Plan B allow the voter to cast a first choice vote, without voting a second choice; and not only prevent the voter from voting for the same candidate for first and second choice, but also make it impossible for the voter to vote only a second choice vote. Thus the machine makes it <u>impossible</u> for the voter to commit the errors which the paper ballot <u>corrects</u> by the provisions that if the voter marks the same candidate for first choice and for second choice, the ballot is only counted for first choice for the candidate, and is not counted at all for second choice; and if the ballot is only marked for second choice, it is counted for first choice. So, under sec. 203 the alternative second choice must be made in union with the voter's first choice if a first and second choice vote is expressed. The voter's second choice is not effective if his first choice get the nomination. His alternative second choice can not operate, until and unless his and other first choice votes fail to nominate that candidate. It thus appears that machines arranged equipped in accordance with Plan A or Plan B are in substantial compliance with sec. 203 and accomplish the same ultimate object. Carr v. Hyattsville, 115 Md., 545.

The third, and most difficult and grave problem, is whether the type of voting machines bargained for is lawful, since it has no provision made for the voter to cast his ballot for any other candidates than those appearing on the voting machine ballot. The determination of this question depends upon the meaning of several constitutional provisions in relation to the exercise of the elective franchise. The first is Article 7 of the Declaration of Rights, which is:

"That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose elections ought to be free and frequent, and every (male) citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage."

And the qualifications for the exercise of the elective franchise are thus prescribed by Section 1 of Article I of the Constitution:

"All elections shall be by ballot; and every (male) citizen *** shall be entitled to vote *** at all elections hereafter to be held in this State***". Constitution of 1867.

These provisions have been substantially in every Constitution of Maryland. Before and at the time of the adoption of the Constitution of 1867, the elective

franchise was exercised by unofficial ballots on which the voters freely wrote the names of their own selection for the offices to be filled or marked out names of candidates, if the ballot was printed. Thus the election was free and the right of suffrage was fully enjoyed. Harris on Election Administration in the U.S. (1934) 165; Steiner on Citizenship and Suffrage in Maryland, 31, 78. This manner of voting continued until the introduction of the Australian Ballot law, which put an end to the use of unofficial ballots. Acts of 1890, ch. 538; Acts of 1892, ch. 236; 1896, ch. 202, secs. 49, 50. The official ballot provided was not designed nor intended to abridge the freedom and initiative of the citizen in the exercise of the right to vote according to his desire. Its purpose was to preserve the integrity and purity of an election by the prevention of fraud, trickery and corruption, and to secure the secrecy of the vote and the voter from intimidation, coercion and reprisal without any abridgment of his rights in the enjoyment of the elective franchise. So, while the ballot became official and formal in arrangement, and the choice of the voter was primarily limited to those candidates for office who had complied with the conditions prescribed by the statute before their names would be placed on the official ballot for the vote of the electors, nevertheless provision was made for the voter to write, in

appropriately provided blank spaces, the names of such persons as he had selected for office. (Acts of 1890, ch. 538, sec. 137, p. 619; 1924, ch. 58, sec. 55.)

It is stated by competent authority that "All but seven states provide for, or permit, the elector to vote for persons who have not been nominated, and whose names are not printed on the ballot." Harris on Election Administration in the United States (1934), p. 176; Brooks on Political Parties and Election Problems (1936) 3rd ed. p. 428. In Cole v. Tucker, 164 Mass., 486, 488, 41 N.E., 681, it is stated:

"The provisions of the statute requiring the use of an official ballot do not touch the qualifications of the voters, but they relate to the manner in which the election shall be held. In general it may be said that the so-called Australian Ballot Acts, in the various forms in which they have been enacted in many of the States of this country, have been sustained by the courts, provided the acts permit the voter to vote for such persons as he pleases by leaving blank spaces on the official ballot in which he may write or insert in any other proper manner the names of such persons, and by giving him the means and the reasonable opportunity to write in or insert such names."

While regulations and methods are necessary to assure the secrecy and purity of elections, and it is the province of the General Assembly to legislate to provide these requisites for the proper functioning of the state and national systems of government, and to leave the citizens satisfied and contented in an unhampered expression of the popular will, nevertheless the statutes enacted are unconstitutional and void should the attempted regulations or restrictions be a material impairment of an elector's right to vote. Cooley on Constitutional Limitations (8th ed.) p. 139, n. 5; 1394, 1368. Southerland v. Norris, 74 Md., 328; Pope v. Williams, 98 Md., 59.

The right to give expression to the elector's choice for office by means of his ballot, and not to be confined to those candidates whose names are printed on an official ballot is an important one. In effect it has been so adjudged since the courts have sustained the constitutionality of the Australian Ballot Acts, provided the acts permit the elector to vote for such persons as he pleases by having blank spaces on the official ballot in which he may write or insert in any other proper manner the names of such persons, and by giving the voter the means and the reasonable opportunity to write in or insert such names. Cole v. Tucker, _supra_.

So, in the Acts of 1890, ch. 538, sec. 136, p. 619,

the official ballot then prescribed was required to have "left at the end of the list of candidates for each different office as many blank spaces as there are officers to be voted for, in which the voter may insert in writing or otherwise the name of any person not printed on the ballot for whom he may desire to vote as a candidate for such office." A similar provision was in continuous effect by re-enactment from 1890 until it was eliminated in 1924 by chapter 581 of the Acts of 1924, now codified in Art. 33, sec. 63 of the present Code. See Acts of 1892, ch. 236, p. 322; 1896, ch. 202, secs. 49, 51; 1901, ch. 2, sec. 4, sub-sec. 49; Supplement to Code, 1890-1900, Art. 33, sec. 49; Code of 1904, Art. 33, sec. 53, p. 1033; Code of 1911, Art. 33, sec. 54, p. 876; vol. 4, (1916-1918) sec. 55, p. 258.

The General Assembly in 1924 failed, however, to amend sec. 80 of Art. 33 (ch. 225, sec. 71, of Acts of 1914) which provided for the count of ballots on which the name or names of any candidates had been written by the voter on the ballot as provided in sec. 53 of the Code of 1904, which authorized the voter to write on the ballot the name of any person for whom he desired to vote. See Acts of 1927, ch. 370. It was not until ch. 120 of the Acts of 1931 that the General Assembly eliminated this provision from sec. 80 of Art. 33 of the Code. (Code, 1935, Sup. sec.80).

Meanwhile the Attorney General of Maryland had in 1926 rendered an opinion that Chapter 581 of the Acts of 1924, had been passed to shorten the ballot by the elimination of blank spaces; and that, as Section 62 of Art. 33 of the Code of 1924 did not authorize the writing of additional names on the ballot by a voter, the provision in Section 80 authorizing the count of such votes was nugatory. In 1936, the Attorney General gave a second opinion in accordance with the former one, and held that for a voter to write on the ballot the name of his candidate and vote would prevent the ballot from being counted. (Opinions of Attorney General, vol. 11, p. 96; vol. 21, p. 354). When the Voting Machine Board was preparing the specifications for the letting of the contract for the machines, it requested the Attorney General for his official opinion on this subject. Under date of July 24, 1937, the reply was that the voting was denied in Maryland.

Whether the General Assembly had attempted to prohibit the form of voting with which these appeals are concerned in 1924, as was the opinion of the Attorney General in 1926, or in 1931, as the second opinion indicates, the legislation and the correspondence would establish that the question was not accepted as settled. The voter enjoyed the right completely before the official ballot was required in 1890, and from then until 1924, at least, the right was

assured him by the General Assembly. If since that time no voter has raised the point of its legality and all the public officials have acquiesced in the failure to provide blank spaces and the means and reasonable opportunity for the voter to write in or insert in any other proper manner the names of his choice, nevertheless, if the right be a constitutional one, it is not thereby lost. Arnsperger v. Crawford, 101 Md., 247, 258-259; Somerset County v. Pocomoke Bridge Co., 109 Md., 1, 7-8.

While there is no precedent of this Court in point, there can be no doubt that the question is a constitutional one of substance. The decisions of other jurisdictions leave no doubt of its fundamental nature and inherent gravity. Supra. "The elective franchise", it is said in Kemp v. Owens, 76 Md., 235, 241, "is the highest right of the citizen, and the spirit of our institutions requires that every opportunity should be afforded for its fair and free exercise." An election is not free, nor does the elector enjoy a full and fair opportunity to vote if the right of suffrage is so restricted by statute that he may not cast his ballot for such persons as are his choice for the elective office. If this right to vote be considered historically, and in relation with the legal and constitutional provisions which existed when the Constitution of 1867 was promulgated and adopted, there can be no denial

that the statutes of 1924 and later are an abridgment and denial of the elective franchise which the Constitution intended to preserve. The proof is not only in the history of the elective franchise, but in the statutes, and especially, in the Acts passed and in force during the period from 1890 to 1924. An impairment of a constitutional right is of major consequence. It was said in Arnsperger v. Crawford, 101 Md., 247, 258: "And we may add that it is the infringement of the constitutional rights of the few in minor matters, which leads to the disregard of the rights of the body of the people in matters of graver import, and that no constitutional right can be so unimportant as to justify a Court in failing to enforce it, when its aid is invoked for that purpose." Here, however, is no minor matter. The right to vote is the right to chose the person for whom the ballot is cast. The election is not free if the elector may not make this choice. Nor does the exercise of this right depend upon either the wisdom, the expediency or the futility of the choice. If the constitutional right exist, the choice is absolute. If the power to chose is not according to the will of the elector, but limited to a choice of the candidates whose names are printed or otherwise appear on an official ballot, the voter's choice is no longer free. His choice is thus circumscribed by an official ballot and he is not free to vote his personal choice.

It is no answer to say that the names on the official ballot are the candidates of political parties or of principles, who have been nominated by conventions or by primary meetings or by a certificate of nomination, which last contains prescribed information with reference to one candidate, and the statement of the signers that they intend to vote for the person so nominated. The number of signatures varies from the lowest of 500, through the rising gradations of 750, 1500 and 2000, in accordance with the relative territorial extent of the political division in which the candidate and signers reside and whose voters elect the incumbent of the office sought by the candidate. Code, Art. 33, secs. 51-58. These provisions are intended to exclude the casting of a vote for any candidate except one thus nominated by conventions, primary meetings or certificate of nomination. In only the case of the voter who had signed a certificate of nomination for a particular candidate, and had thereby agreed to vote for him, would a ballot cast by that voter be the voter's personal choice. If the elector were not such a signer, his choice would be limited to the names on the ballot, which is not the freedom of choice which subsisted before and for years after the official ballot was introduced. Nor is the provision for a nomination by the requisite certificate a sufficient gratification of the constitutional right to vote. The fundamental principle involved is the

personal right of an elector to exercise his individual choice in the casting of his ballot for whom he prefers. For this precious right to reject, which is implicit in his right to choose, there is no equivalent nor constitutional substitute. The elector has the right to refuse to vote for a single official nominee, whatever may be his reason or motive, and the statutory deprivation of his right to vote for his own choice is not compensated by the privilege to make the costly, precarious and laborious efforts to unite the large group of voters, in support of his own or another party's candidacy, which would be necessary for a nomination by certificate. The right of the elector to vote his own ballot is not in the same category as the organization of a political group and the nomination of its candidate. Cohn v. Isensee, 45 Cala. App. 531, 188 P. 279.

In Iverson v. Jones, Secretary, 171 Md., 649, the questions before the court involved solely the matter of the right of candidates of a party to have their names printed on the official ballot. The appeal was dismissed on the ground that if the writ of mandamus were to issue, it would be nugatory, as the time had expired within which the Secretary of State was required to make the necessary certification of the party nominees. The Court, however, did call attention to the delay and to the fact that the

proper methods had not been followed to entitle the candidates of a new party to have their names printed on the ballot. The cited opinion made no reference to the question here presented as it was not raised nor necessary.

Nor may the elector's vote be restricted to one of the candidates on the official ballot upon the theory that this substantially secures to the elector his constitutional rights. It must be considered in this connection that every voter has but a single vote to cast. This vote, whether cast with the majority or the minority, is as important in terms of personal value and constitutional significance as every other vote. The futility of the elector's vote is not the measure of his constitutional right. The civic and political importance of an unabridged and unhampered choice lie in the freedom of the elector to exercise fully this right on any occasion, without the power of the General Assembly to nullify or restrict.

It may well be that the official ballots cast rarely disclose that any voter has made an independent choice of a candidate by writing in the name in the space provided, but this circumstance is not a reason to conclude the right has no practical political utility, since it merely shows that, in full enjoyment of the right to choose his candidate not only from those whose names appear on the official ballot but also from those persons whom he would approve

as candidates, the elector made his choice, and so marked his ballot accordingly. Furthermore, the political importance of the preservation of the right considered is enhanced by its potential value in a civic crisis where, because of want of time or of adverse political conditions, an aroused electorate would have as its sole recourse for the expression of the popular will the right to vote in an election for its own freely chosen candidates. Bradley v. Shaw, 133 N. Y., 493; Barr v. Cardell, 173 Iowa, 18, may be noted as two instances in which the written votes elected their choice.

Turning now to authority, it is found that the problem has been presented in various forms. A number of courts have declared that if the statutes had not permitted the elector to vote by writing in the official ballot his choice, and so had confined the voter to a selection from the names of candidates on the ballots, the statutes would have been unconstitutional. As was said in People v. President etc. (1895) 144 N. Y., 616, 620, 31 N. E. 512, "Constitution confers upon every citizen, meeting the requirements specified therein, the right to vote at elections for all offices that are elective by the people and there is no power in the Legislature to take away the right so conferred." Cohn v. Isensee (1920), 45 Cal. A. 531, 188 P. 279; Patterson v. Hanley (1902), 136 Cal. 265,

68 P. 821; Stewart v. Cartwright, 156 Ga., 192, 118 S. E. 859, 861-862; Barr v. Cardell (1915) 173 Iowa, 18, 155 N. W. 312; Sanner v. Patton (1895), 155 Ill. 553, 40 N. E. 290; People v. McCormick (1914), 261 Ill. 413, 103 N.E. 1053, 1057; Fletcher v. Wall (1898) 172 Ill. 426, 50 N. E. 230; Cole v. Tucker (1895) 164 Mass. 486, 41 N. E. 681; Oatman v. Fox (1897), 114 Mich. 652, 72 N. W. 611; Bradley v. Shaw, (1892), 133 N. Y. 493, 31 N. E. 512; Wescott v. Scull, 87 N. J. L. 410, 96 A. 407, 410; Dewalt v. Bartley (1891), 146 Pa. St., 529, 15 L. R. A. 771; Oughton v. Black (1905) 212 Pa. St., 1, 61 A. 346-348; State v. Anderson (1898), 100 Wis. 523, 76 N. W. 482, 484-485; Bowers v. Smith, (1892) 111 Mo. 46, 20 S. W. 101, 110-111; Park v. Rives, 40 Utah, 47, 119 P. 1034, 1036-1037.

These decisions are carried to their logical conclusion by two cases which hold that an attempted elimination of the right of the elector to cast his ballot for such persons as he pleases is void. State v. Dillon (1893), 32 Fla. 545, 14 So. 383, 22 L. R. A., 124 (cited with approval on another point in Hanna v. Young, 84 Md., 179, 183); Littlejohn v. People (1912) 52 Colo. 222, 121 P. 159.

The decisions which have been cited are generally accepted as establishing the unconstitutionality of statutes which deny to the elector the right to vote for such persons

as he pleases by depriving him of the means and the reasonable opportunity to write or to insert in any other proper manner the names of such persons on the official ballot. McCrary on Elections (ed.) sec. 700; Cooley on Constitutional Limitations (8th ed.), vol. 1, pp. 139-140, n. 5; vol. 2, p. 1370, p. 1376; 20 C.J. Title "Elections", sec. 16, pp. 62-63; sec. 91, p. 105; sec. 162, pp. 140-141; 10 Am. & Eng. Ency. of Law (2nd ed.) 586-587; 9 R. C. L. title, "Elections", sec. 70, 1054.

In conflict with the decisions and authorities given, the following cases are cited: Chamberlain v. Wood (1901) 15 S. D., 218, 88 N. W. 109, 56 L. R. A. 187; and Metze v. McElroy (1892), 44 La. Ann. 796, 11 So. 133, and McKenzie v. Boykin (1916), 111 Miss. 256, 71 So. 382. (Compare Jackson v. Howie, 102 Miss. 663, 59 So. 873; State v. Ratcliffe, Miss. , 66 So. 538. It should be said that the case decided by the appellate court in South Dakota was by a divided court. The tribunal was composed of three members, and the prevailing opinion was written by Corson, J., and the dissent by Fuller, J, the presiding judge. The third member, Haney, C. J., does not appear to have participated, so the affirmance is by a divided court. See 91 Am. St. Rep. 688. The case of McKenzie v. Boykin, _supra_, recognizes the doctrine that the voter's choice must not be unreasonably restricted, but finds that the

privilege of a combination of fifteen voters to require the name of a candidate, who is not a party nominee, to be put on the ticket, is not an unreasonable restriction.

In Metze v. McElroy, supra, it was held that writing the name of a person across the face of the ballot on which his name did not appear as a candidate invalidated the ballot because the voter was not permitted by statute to cast his vote in this manner.

The decisions of the three States named are opposed by a preponderance of authority; and the grounds on which they rest are not persuasive in view of the reasons assigned in support of the majority view.

The conclusion of the Court that it is the constitutional right of an elector to cast his ballot for whom he pleases, and that it is necessary for him to be given the means and the reasonable opportunity to write or insert in the ballot the names of his choice is subject to this limitation that the right is not applicable to primary elections nor to municipal elections other than those of the City of Baltimore. This exception must be made since the provisions of Article 1, sec. 5 of the Constitution have been held to apply solely to the right to vote at Federal and State elections, and municipal elections in the City of Baltimore. Smith v. Stephan, 66 Md., 381, 388-389; Hanna v. Young, 84 Md., 179; Johnson v. Luers,

129 Md., 521, 531, 532; State v. Johnson (1902) 87 Minn. 221; 91 N. W. 604, 840; Willoughby on Constitution of the United States (2nd ed.) sec. 356, p. 646.

The Automatic Company has offered to deliver in performance of the contract, either of the two types of machines which are constructed and arranged according to Plan A and Plan B, but, as these machines do not provide for the elector casting a vote for any other than a candidate whose name appears on the official ballot, the Voting Machine Board has no power to purchase and accept either type of machine, although, except in respect of the defect named, both machines are in substantial compliance with the provisions of Chapter 94 of the Acts of 1937, and the specifications drawn by the Board.

The Chancellor, therefore, ~~rightly~~ decreed the use of the machines would be unlawful and the purchase of such machines would be _ultra vires_. In the conclusion this Court concurs. The testimony on the record is to the effect that the voting machines which the bidder had agreed to furnish could, at an additional expense of $82 a machine, be furnished with the requisite added equipment to enable an elector to cast his ballot for any candidate whom he might choose in preference to those whose names appeared as candidates on the official ballot. This Court does not construe the decrees of the Chancellor to prevent the Voting Machine Board from making another contract with the

Automatic Company whereby the machines of the type known as Plan A and Plan B, when provided with the necessary equipment for the purpose mentioned, may be bought at the suggested advance of $82 a machine over the price of the ultra vires contract. Whether such a course at that price or less is for the public advantage is a question for the Board which, however, is not confined in the purchase to one contractor nor to a particular make or type of machine and form of contract. The Board, in the exercise of the discretion conferred, may, according to its judgment and in the public interest, discharge, within the authority granted, the duty committed either with or without competitive bidding. Supra.

The point is made that because of the provisions of paragraph 43 of the specifications that "The contractor shall furnish and deliver all of said voting machines to be purchased under this contract to the Voting Machine Board in strict accordance with and to meet the requirement of all of the terms, conditions and provisions of Chapter 94 of the Laws of Maryland, Regular Session of 1937, any and all other laws and contract documents," the contract is valid. The position taken is based upon the theory that since this quoted paragraph imports into the contract the requirement of sub-section (d) of section 224-F, Chapter

94 of the Acts of 1937 that every voting machine acquired or used under the provisions of this sub-title shall: "(d) Permit each voter to vote, at any election, for any person and for any office for whom and for which he is lawfully entitled to vote and to vote for as many persons for an office as he is entitled to vote for, including a substantial compliance with the provisions of Section 203 of this Article," the legal effect of the language of the contract is to require the contractor to furnish voting machines which would be supplied with the necessary equipment for the elector to write in his personal choice when other than a candidate whose name appears on the official ballot.

The construction invoked would require the contractor to deliver a machine, which the proponent of this theory must concede was not conceived by any party to the contract to have been within its contemplation. It is now urged as an obligation which is claimed to arise from an alleged mutual mistake of law with regard to the legal effect of the language used in the contract. The Court is unable to agree with this conclusion, but believes the question to be one of interpretation of the contract.

Although, since the passage of the Acts of 1931, ch. 120 (sec. 80 of Art. 33 of Code, 1935 Suppl.), the statutory law has declared that a ballot must be rejected if a voter should write in the name of his personal choice, nevertheless

the quoted language of sub-section (d) is broad enough to provide for the elector to vote "for any person and for any office for whom and for which he is lawfully entitled to vote", which would permit a vote to which every elector is entitled under the Constitution, and for which the statute assured its count until the Act of 1931, ch. 120. So, under the Acts of 1937, ch. 94, the voting machine authorized should permit such a vote to be cast as, in fact, was permitted to be done by the fifty voting machines which had been previously purchased by Baltimore City and which were, by sec. 224A of Chapter 94 of the Acts of 1937, directed to be used in all future elections in Baltimore City.

While the obligation was cast by the statute upon the Voting Machine Board to buy machines in accordance with the terms of the statute, the specifications submitted to the competitive bidders were <u>general</u>, as are the quoted provisions of paragraph 43, and <u>particular</u>, as are, under the caption "Size and Type of Voting Machines", the terms of paragraphs 44 and those found, under the sub-title "Samples", in paragraph 47. By the particulars of the size and type desired as specified in paragraph 44 the machine is required to provide for voting for the candidates of nine different parties, and on at least twenty questions or special measures.

The machine to be furnished in conformity with these

particular specifications of the official body is, therefore, not required to afford the voter an opportunity to write on the ballot his personal choice other than from among the candidates on the official ballot. Again, the machine proposed to be supplied by the bidder was to be completely built and ready for operation and, with its equipment and accessories, was to be set up by the bidder in the office of Supervisors of Election on the day the bidder submits his bid. This sample is demanded by paragraph 47, and it must be what the bidder proposes to furnish and deliver, if awarded the contract. Paragraph 47 concludes with the provision that the sample voting machine, equipment and accessories thus set up shall be taken by all parties concerned to be representative in all respects of the voting machines, equipment and accessories to be furnished and delivered by the successful bidder, subject to all the provisions of the contract documents.

The formal bid or proposal was an offer to deliver a specific machine, equipment and accessories, at a certain price, in accordance with these particular specifications and the sample which had been duly furnished. It was an offer to supply a machine according to sample. The Voting Machine Board opened the bids on August 11, 1937, and having been advised by the Attorney General of Maryland of his opinion that since 1931 a voter was prohibited from

casting a vote for a person other than one whose name was on the official ballot as a candidate, the Voting Machine Board passed a resolution accepting the bid of the Automatic Machine Corporation, and on the 8th of September a formal agreement was made for the purchase of the machines described in the bid or proposal, without the addition of any other terms than those of the proposal.

The contract is void because the Voting Machine Board had no power to enter into a contract for a machine which prevented an elector from exercising his elective franchise under the Constitution. The void contract fails while wholly executory for lack of power in the Voting Machine Board to make the contract. The fact that one party to a purporting executory contract has no power to make the contract attempted cannot result in changing and enlarging the undertaking of a seller by sample so that, by implication, he may become bound to supply an article which is within the power of the purchaser to buy, but different from the sample of the article which the seller agreed to sell. The promisor can not be compelled to deliver things which he has not agreed, nor can he enforce against the buyer, subject to statutory limitations, the acceptance of the thing bought and the payment of the agreed price, if the buyer has no power to buy the thing attempted to be sold. There is a lack of consideration for such a contract and

it must fall.

For the reasons assigned in this opinion, the decrees of the Chancellor passed in both causes on October 14, 1937, will be affirmed.

It may be said by way of summary that the effect of the decision here is to affirm the power and authority of the Voting Machine Board to select and buy the make and type of voting machine required. Baltimore v. Weatherby, 52 Md., 442; Fuller Co. v. Elderkin, 160 Md., 660, 668, 669. In the performance of this exigent duty, the Board is not subject to the control, advice, approval nor ratification of the State Central Purchasing Bureau; and is not affected by the provisions of the Charter of Baltimore City in respect to competitive bidding. The Voting Machine Board may conduct such negotiations and make the contract to buy, with or without competitive bidding, and upon such terms as are authorized and believed by it to be in the public interest.

Decrees in both appeals affirmed, with costs to be paid by the Mayor and City Council of Baltimore.

True Copy:
Test: James A. Young, Clerk

COPY

CITY SOLICITOR'S OFFICE

October 28, 1937.

Hattie B. Daly vs. H. W. Jackson et al.
William S. Norris vs. H. W. Jackson et al.
(Voting Machine Cases)

Bureau of Disbursements,
City Hall,
Baltimore, Maryland.

Attention - Mr. Stiner.

Dear Mr. Stiner:

On or about October 20th, your Department issued a check for $120.75 in payment of one-half of the Court costs in the two cases named above. Through an error in making up the bill for court costs, the proportionate share of appearance fee that the Court would ordinarily turn over to Mr. Marshall was not deducted from the bill for costs. As Mr. Marshall always waives appearance fees when Court costs, or any part thereof, are paid by the City, I am enclosing herewith $4.80 in cash, which was the portion of the appearance fees turned over to him in the division among attorneys in the two cases.

Very truly yours,

H.
Encl $4.80.

Memorandum: The Court Clerk made the following distribution of the $4.80:
In the Hattie B. Daly case: To Mr. Evans - $1.80

In the William S. Norris case: To Mr. Evans - $1.50
To Mr. Marshall - $1.50

EQUITY SUBPOENA

The State of Maryland

To (Seal)

Mayor & City Council of Baltimore City

of Baltimore City, Greeting:

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the second Monday of September, next, cause an appearance to be entered for you, and your Answer to be filed to the Complaint of

William S. Norris

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

HEREOF fail not, as you will answer the contrary at your peril:

WITNESS, the Honorable SAMUEL K. DENNIS, Chief Judge of the Supreme Bench of Baltimore City, the 12 day of July, 1937

Issued the 9 day of September, in the year 1937

John Pleasants
Clerk.

MEMORANDUM:

You are required to file your Answer or other defense in the Clerk's Office, Room No. 235, in the Court House, Baltimore City, within fifteen days after the return day. (General Equity Rule 11.)

TRUE COPY TEST.
John Pleasants
CLERK.

Circuit Court No. 2

5th 193 9 DOCKET No. 428

William S. Norris

vs.

Howard H. Jackson et al

SUBPOENA TO ANSWER BILL OF COMPLAINT

Copy

No.

Filed .... *day of* ...., *193*...

Solicitor.

EQUITY SUBPOENA

The State of Maryland

To (Seal)

Howard W. Jackson

of Baltimore City, Greeting:

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the second Monday of September, next, cause an appearance to be entered for you, and your Answer to be filed to the Complaint of

William S. Norris

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

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WITNESS, the Honorable SAMUEL K. DENNIS, Chief Judge of the Supreme Bench of Baltimore City, the 12th day of July, 1937

Issued the 9th day of September, in the year 1937

John Pleasants

Clerk.

MEMORANDUM:

You are required to file your Answer or other defense in the Clerk's Office, Room No. 235, in the Court House, Baltimore City, within fifteen days after the return day. (General Equity Rule 11.)

TRUE COPY TEST.
John pleasants

CLERK.

Circuit Court No. 2

545
193 A DOCKET No. 46

William S. Norris

vs.

Howard W Jackson

SUBPOENA TO ANSWER BILL OF COMPLAINT

C O P Y

No.

Filed ______ *day of* ______, *193*___

______
Solicitor.

EQUITY SUBPOENA

The State of Maryland

To (Seal)

George Sellmayer

of Baltimore City, Greeting:

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the second Monday of September, next, cause an appearance to be entered for you, and your Answer to be filed to the Complaint of

William S. Norris

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

HEREOF fail not, as you will answer the contrary at your peril:

WITNESS, the Honorable SAMUEL K. DENNIS, Chief Judge of the Supreme Bench of Baltimore City, the 12th day of July, 19 37

Issued the 9th day of September, in the year 19 37

John Pleasants
Clerk.

MEMORANDUM:

You are required to file your Answer or other defense in the Clerk's Office, Room No. 235, in the Court House, Baltimore City, within fifteen days after the return day. (General Equity Rule 11.)

TRUE COPY TEST,

John Pleasants
CLERK.

Circuit Court No. 2

545
1937 A DOCKET NO. 46

William S. Norris

vs.

Howard W Jackson

SUBPOENA TO ANSWER BILL OF COMPLAINT

C O P Y

No. ....

Filed .... *day of* ...., *193*...

....
Solicitor.

EQUITY SUBPOENA

The State of Maryland

To (Seal)

R. Walter Graham

of Baltimore City, Greeting:

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the second Monday of **September**, next, cause an appearance to be entered for you, and your Answer to be filed to the Complaint of

William S. Norris

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

HEREOF fail not, as you will answer the contrary at your peril:

WITNESS, the Honorable SAMUEL K. DENNIS, Chief Judge of the Supreme Bench of Baltimore City, the 12th day of July, 19 37

Issued the 9th day of September, in the year 19 37

John Pleasants
Clerk.

MEMORANDUM:

You are required to file your Answer or other defense in the Clerk's Office, Room No. 235, in the Court House, Baltimore City, within fifteen days after the return day. (General Equity Rule 11.)

TRUE COPY TEST.

John Pleasants
CLERK.

Circuit Court No. 2

545
193 7 A Docket No. 46

William S. Norris

vs.

Howard W Jackson

SUBPOENA TO ANSWER BILL OF COMPLAINT

C O P Y

No.

Filed .... *day of* ...., *193*...

Solicitor.

EQUITY SUBPOENA

The State of Maryland

To (Seal)

R. E. Lee Marshall

of Baltimore City, Greeting:

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the second Monday of September, next, cause an appearance to be entered for you, and your Answer to be filed to the Complaint of

William S. Norris

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

HEREOF fail not, as you will answer the contrary at your peril:

WITNESS, the Honorable SAMUEL K. DENNIS, Chief Judge of the Supreme Bench of Baltimore City, the 12th day of July, 19 37

Issued the 9th day of September, in the year 19 37

John Pleasants
Clerk.

MEMORANDUM:

You are required to file your Answer or other defense in the Clerk's Office, Room No. 235, in the Court House, Baltimore City, within fifteen days after the return day. (General Equity Rule 11.)

TRUE COPY TEST.

John Pleasants
CLERK.

Circuit Court No. 2

645

1937 A DOCKET NO. 46

William S. Morris

vs.

Howard W Jackson

SUBPOENA TO ANSWER BILL OF COMPLAINT

C O P Y

No. ....

Filed .... *day of* ...., *193*...

....

Solicitor.

EQUITY SUBPOENA

The State of Maryland

To (Seal)

Bernard L. Crozier

of Baltimore City, Greeting:

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the second Monday of **September**, next, cause an appearance to be entered for you, and your Answer to be filed to the Complaint of

William S. Norris

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

HEREOF fail not, as you will answer the contrary at your peril:

WITNESS, the Honorable SAMUEL K. DENNIS, Chief Judge of the Supreme Bench of Baltimore City, the **12th** day of **July**, 19 **37**

Issued the **9th** day of **September**, in the year 19 **37**

John Pleasants

Clerk.

MEMORANDUM:

You are required to file your Answer or other defense in the Clerk's Office, Room No. 235, in the Court House, Baltimore City, within fifteen days after the return day. (General Equity Rule 11.)

TRUE COPY TEST.

John pleasants

CLERK.

Circuit Court No. 2

545

193 7 A Docket No. 46

WILLIAM S. NORRIS

vs.

HOWARD W. JACKSON

SUBPOENA TO ANSWER BILL OF COMPLAINT

(C O P Y)

No.

Filed ________ *day of* ________, *193* ___

____

Solicitor.

WILLIAM S. NORRIS, Plaintiff,	:	IN THE
vs.	:	CIRCUIT COURT NO. 2
HOWARD W. JACKSON, et al., Defendants	:	OF BALTIMORE CITY

- - - -

HATTIE B. DALY, Plaintiff,	:	IN THE
vs.	:	CIRCUIT COURT NO. 2
HOWARD W. JACKSON, et al., Defendants	:	OF BALTIMORE CITY

- - - -

STIPULATION

It is hereby stipulated and agreed that the above cases may be heard concurrently by the Honorable Judge Samuel K. Dennis, sitting as the Circuit Court No. 2, and that the testimony taken shall be received as testimony in each case; provided, however, that the cases shall not be regarded as consolidated and that the records of said cases shall for all other purposes remain separate and distinct with right of separate appeal.

____
Solicitor for Plaintiff, William S. Norris

____
Attorney General, Solicitor for Board of Supervisors of Election of Baltimore City, in each case

____
Solicitor for the Voting Machine Board, in each case

____
Solicitor for the Mayor and City Council of Baltimore, in each case

____
Solicitor for the Automatic Voting Machine Corporation, in each case

____

____
Solicitors for Plaintiff, Hattie B. Daly

____
Solicitor for Defendant, R. Walter Graham

COPY

WILLIAM S. NORRIS	:	IN THE
	:	CIRCUIT COURT NO. 2
-vs-	:	OF
HOWARD W. JACKSON, et al.	:	BALTIMORE CITY

---oOo---

TO THE HONORABLE, THE JUDGE OF SAID COURT:

In answer to the amendments filed by the Plaintiff to his original Bill of Complaint, the Mayor and City Council of Baltimore respectfully presents:

1. Answering Paragraph (9a), this Defendant denies that the contract by and between the Voting Machine Board and the Automatic Corporation was improperly awarded and is, therefore, void and illegal, as alleged in said paragraph.

2. Answering Paragraph (10) (F), this Defendant denies that a voter in the election of public officers is entitled to vote for persons selected by him whose names do not appear on the official ballot or ballot label, and denies that the contract between the Voting Machine Board and the Automatic Corporation is illegal and void and that the use of the machines to be purchased and delivered thereunder by the Board of Supervisors of Election of Baltimore City will be illegal.

AND as in duty bound, etc.

Deputy City Solicitor of Baltimore City

WILLIAM S. NORRIS : IN THE

vs. : CIRCUIT COURT NO. 2

HOWARD W. JACKSON, et al. : OF BALTIMORE CITY

- - - -

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Plaintiff prays leave of the Court to file the following amendments to his bill of complaint heretofore exhibited:

x x x x x x

(AFTER PARAGRAPH (9) OF THE BILL OF COMPLAINT)

(9a) That the said contract by and between the Voting Machine Board and the Automatic Corporation was improperly awarded and is therefore void and illegal for the following reasons, that is to say:

(A) That Article 78, Section 3 of the Code reads in part as follows:

"3. From and after January 1st, 1921, every State officer, board, department, commission and institution, hereinafter called the using authority, shall purchase all materials and supplies, merchandise and articles of every description, through or with the approval of the Central Purchasing Bureau.

"Any State officer or employee who shall violate any of the provisions of this Act may be removed by the Governor.

"It shall be the duty of the Bureau to prescribe rules and regulations under which estimates of the needs of using authorities shall be submitted, and requisitions made, and under which contracts for purchases may be made.

"The Bureau shall determine and formulate standards of all materials, supplies, merchandise and articles of every description to be purchased for the using authorities of the State.

"It shall be the duty of the Bureau to contract for or purchase all materials, supplies, merchandise and articles of every description, except those which the Bureau may determine are of a strictly perishable character, or which the Bureau may determine it is impracticable for the using authorities to purchase through or with the approval of the Bureau, or which may be purchased by using authorities under the authority and with the approval of the Bureau.

"Estimates of the amount and quality of materials, supplies, merchandise and all other articles needed by the using authorities shall be submitted at such periods as may be prescribed by the Bureau. When purchases

> are made through competitive bidding, the Bureau shall have power to require the successful bidder to furnish a bond to the State, with good and sufficient surety, conditioned that he will fully and faithfully perform the terms of the contract. The penalty of all such bonds shall be determined by the Bureau. . . . . ."

That acting in accordance with the authority conferred upon it, the Central Purchasing Bureau thereupon promulgated its General Rules and Regulations which said General Rules and Regulations were in force and effect at the time of the passage of the Voting Machine Act and at all times subsequent thereto; and plaintiff attaches hereto a copy of said General Rules and Regulations marked "Plaintiff's Exhibit No. 1A".

(B) That the said contract between the Voting Machine Board and the Automatic Corporation for the purchase of the said voting machines is void and illegal in that the said purchase is not made through or with the approval of the Central Purchasing Bureau.

(C) That the said contract is void in that it totally fails to comply with, and wholly ignores, the General Rules and Regulations promulgated by the Central Purchasing Bureau as aforesaid.

(D) That the said contract is void and illegal in that the Central Purchasing Bureau was not consulted nor did it determine in any way the standards of the voting machines covered by said contract to purchase.

(E) That the said contract is void because the performance bond furnished therewith is made payable to the Voting Machine Board as obligee rather than the State of Maryland as required by Section 3 of Article 78; and the penalty of the said bond was not determined by the Central Purchasing Bureau but by the said Voting Machine Board.

x x x x x x

(AFTER PARAGRAPH (10) SUB-HEADING (E)
OF THE BILL OF COMPLAINT)

(10) (F). That Article 7 of the Declaration of Rights provides in part that

> "Every male citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage";

that Article I, Section 1 of the Constitution of Maryland provides in part that

> "All elections shall be by ballot; and every male citizen . . . . shall be entitled to vote. . . .";

that Section 224 (F) of the Voting Machine Act provides that voting machines acquired or used under the said Act shall

> "(d) Permit each voter to vote, at any election, for any person and for any office for whom and for which he is lawfully entitled to vote.";

that in accordance with the said provisions of the Bill of Rights and the Constitution, and of the Voting Machine Act, a voter in the election of public officers is entitled to vote for persons selected by him whose names do not appear on the official ballot or ballot label; that the sample voting machine offered by the Automatic Corporation under its bid fails to provide a voting device under which a voter can exercise the said privilege guaranteed to him by the Bill of Rights and the Constitution, and the contract for the purchase of the said machine in the elections in Maryland is, therefore, illegal and void; and the use thereof by the defendants, the Board of Supervisors of Election of Baltimore City, for elections would be illegal.

x x x x x x

AND, as in duty bound, etc.

____
Solicitor for Plaintiff

Leave is hereby granted to the plaintiff to file the above amendments.

____
Judge

Dn's 1st copy

WILLIAM S. NORRIS,
Plaintiff,

vs.

HOWARD W. JACKSON,
GEORGE SELLMAYER,
R. WALTER GRAHAM,
R. E. LEE MARSHALL, and
BERNARD L. CROZIER,
Constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and

J. GEORGE EIERMAN,
WALTER A. McCLEAN, and
DANIEL B. CHAMBERS,
Constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and
MAYOR and CITY COUNCIL OF BALTIMORE,
THE AUTOMATIC VOTING MACHINE CORPORATION,

Defendants.

IN THE

CIRCUIT COURT NO. 2

OF

BALTIMORE CITY

- - - -

TO THE HONORABLE, THE JUDGE OF SAID COURT:

The answer of Howard W. Jackson, George Sellmayer, R. Walter Graham, R. E. Lee Marshall, Bernard L. Crozier, J. George Eierman, Walter A. McClean and Daniel B. Chambers, defendants in the above entitled case, constituting the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, respectfully represents:

(1) These defendants admit the allegations contained in the first six paragraphs of said Bill of Complaint.

(2) These defendants admit the allegations contained in the seventh paragraph of said Bill of Complaint, with the exception of the fact the total bid of the Shoup Corporation for furnishing the voting

machines mentioned therein was $952,770.00 and not $952,970, as alleged.

(3) These defendants admit the allegations contained in the eighth paragraph of said Bill of Complaint.

(4) These defendants admit the allegations contained in the ninth paragraph of said Bill of Complaint, but allege that the awarding of said contract to the Automatic Corporation was not made as summarily as implied in said paragraph of said Bill of Complaint, but only after a thorough hearing to all interested parties and after receiving advice from the Attorney General of Maryland, as is more fully hereinafter set forth.

(5) Answering the tenth paragraph of said Bill of Complaint, these defendants deny that the Voting Machine to be furnished by the Automatic Voting Machine Corporation under the contract fails to comply with the general elections laws in any respect. For a full and complete answer to all of the grounds of attack contained in said tenth paragraph of said Bill of Complaint, your respondents respectfully refer to the Court paragraphs 8, et seq. hereof.

(6) These defendants admit the allegations contained in the eleventh and twelfth paragraphs of said Bill of Complaint.

(7) These defendants admit the allegations contained in the thirteenth and fourteenth paragrpahs of said Bill of Complaint with the exception of any implication contained therein to the effect that the contract for purchasing the said voting machine is in any respect illegal, or that the machines themselves "are not constructed in conformity with the election laws".

For a further and affirmative defense to said Bill of Complaint, your respondents respectfully allege:

(8) That in the Bill of Complaint filed in this case so many facts have been ignored, and so many provisions of the specifications and of the law affecting the contract herein involved have received no consideration, as to require a complete re-statement of the same to clarify the issues involved.

(9) That the General Assembly of Maryland, at its regular session in 1937, passed an Act requiring the purchase of a sufficient number of voting machines for use in Baltimore City to insure that method of voting at all elections held there after January 1, 1938. The said Act is Chapter 94 of the Acts of 1937, (hereinafter referred to for convenience as the "Voting Machine Act"). At the time of the passage of said Voting Machine Act, there were in use in Baltimore City 50 voting machines manufactured by the Automatic Voting Machine Company, one of the defendants herein, which had been in use in general elections since 1928. So satisfactory had those machines proven to be, that the Legislature, at the very beginning of the Act, placed its complete and unqualified approval upon them by requiring their use in all future elections of Baltimore City.

> "The Board of Supervisors of Elections for Baltimore City is hereby directed, *in all future elections, to use the voting machines heretofore purchased* by the Mayor and City Council of Baltimore." (Italics ours). Section 224A. Ch. 94, Acts. of 1937.

As will be shown, the 910 voting machines referred to in the Bill of Complaint, which have just been purchased from the Automatic Voting Machine Company, for use in Baltimore City, are, for all practical purposes, identical to the 50 machines heretofore purchased, which are referred to in that part of Section 224A of the Voting Machine Act quoted above. That, therefore, there cannot arise in this case any question of the *legality* of the *voting machines* which have been purchased, and the complaint, at most, is necessarily limited to some alleged *illegal use* of a machine which has already been declared valid by the State Legislature .

(10) For the purpose of making this important purchase the Legislature created a board (referred to for convenience as the "Voting Machine Board") composed of the present members of the city's most important board, the Board of Estimates, and of the present members of the board which will have supervision over the use of these machines, namely, the Board of Supervisors of Election of Baltimore City. In that board of

more C4

eight members the Legislature vested absolute and complete authority and discretion to purchase the type and make of voting machines, which, in the opinion of the board, would best subserve the public interests.

Section 224A. of Ch. 94 creating the board and investing this authority in them reads in part as follows:

> "Board composed of the members for the time being of the Board of Estimates of Baltimore City and the members for the time being of the Board of Supervisors of Election of Baltimore City is hereby constituted, and is *authorized, empowered and directed to purchase a sufficient number of voting machines for use in all* polling places throughout the City of Baltimore at all primary, general, special and other elections, held or to be held in said City after the 1st day of January, 1938. * * * Said Board is authorized and empowered to determine by majority vote such specifications supplementary to the specifications hereinafter set forth as it may deem proper for voting machines acquired, or to be acquired, by it, *and to select in its discretion the type and make of such voting machines*, and, in its discretion, to employ engineers or other skilled persons to advise and aid said Board in the exercise of the powers and duties hereby conferred upon it. * * * "
> (Italics ours)

(11) That although there was no provision in Ch. 94 of the Acts of 1937, requiring, either expressly or by necessary implication, competitive bidding, the said Board nevertheless prepared specifications and advertised for bids for furnishing the machines in question. Copy of the specifications was filed with the Bill of Complaint marked plaintiff's Exhibit No. 1. Bids were received from only two companies, the Automatic Voting Machine Company, the defendant herein, and the Shoup Voting Machine Company, which are the only companies in the United States manufacturing Voting Machines. Of these two companies the Automatic Company is the older and is a pioneer in the business, having manufactured voting machines for many years, which are in use in over 3,000 towns and cities in the United States. The Shoup Company is of comparatively recent origin with voting machines in operation in only two places, namely, the State of Rhode Island, and the City of Philadelphia.

(12) That upon opening bids, it was found that the prices bid

by the Automatic Company for both types of the manually operated machines were more than 20% lower than the bids of the Shoup Company on similar machines. The bid of the Automatic Company for the nine-party forty (40) candidate type of machine, which is the type for which the contract was eventually awarded, was $826.95 each, or a total of $752,524.50. The bid of the Shoup Company for a similar machine was $1,047.00 each, or a total of $952,770.00. The purchase of the Automatic Company's machine therefore represents a saving of $200,245.50, as against the purchase of the Shoup Company's machine.

(13) That after the opening of the bids and the disclosure of the Automatic Company as the low bidder, the Shoup Company asked the Voting Machine Board for a hearing, claiming certain defects or irregularities in the Automatic Company's machine which it was contended invalidated the same. A hearing was granted the Shoup Company by the Voting Machine Board and two sessions were held, on August 24th and 26, 1937, at which it developed that the grounds of the Shoup Company's objections were as follows:

(A) That the sample voting machine, as set up by the Automatic Company permits a voter to vote both a first and second choice in a primary election by the use of only one vote indicator;

(B) That the said voting machined do not furnish sufficient space on the ballot label to print the required names of candidates, and other descriptive matter required by the Voting Machine Act in "plain, clear type, so as to be clearly readable to persons with normal vision;

(C) That the sample machine of the Automatic Company fails to comply with Paragraph 44 of the specifications which requires nine rows of levers or devices for voting nine different political parties, it being contended that the sample in question has only eight rows of voting levers or devices.

(14) That of the three grounds of complaint, ground C above can only be classed as frivolous, it being perfectly apparent to anyone from examination of the sample ballot that it has in fact nine rows of levers or devices for voting nine different political parties. The ground of the

objection grew out of the fact that the sample ballot set up on the machine required only eight horizontal rows of levers or devices, and the other row was utilized for repeating the offices and questions involved, which appeared at the top of the machine.

(15) That upon the said objections being made by the Shoup Company, the representatives of the Automatic Company offered at said hearing to re-arrange their machine in respect to first and second choice voting, so as to eliminate any criticism thereof on grounds A and B in paragraph 13 above, such re-arrangement to be made without any additional cost to the City.

(16) That the Voting Machine Board thereupon requested those of its members constituting the Board of Supervisors of Election of Baltimore City to secure an opinion from the Attorney General as to whether the ballot set up on the sample machine of the Automatic Company violated any provision of the election laws, and also whether the said ballot if re-arranged on said machine in the manner in which the said Automatic Company offered to make a re-arrangement would comply with the election laws; that the Voting Machine Board accordingly passed a resolution on August 26th, 1937, requesting an opinion of the Attorney General on this subject, copy of which is filed herewith, marked "Voting Machine's Board Exhibit No. 1" and prayed to be taken as part hereof; that a copy of the letter of the Board of Supervisors of Election dated August 26th, 1937, forwarding said request for an opinion to the Attorney General is also filed herewith marked, "Voting Machine's Board Exhibit No. 2" and prayed to be taken as a part hereof; that a copy of Plan B, referred to in said resolution and letter, showing the form of ballot the said Automatic Company proposed to re-arrange upon its machine, if desired by the Voting Machine Board, is filed herewith, marked "Voting Machine's Board Exhibit No. 3" and prayed to be taken as a part hereof.

(17) That on September 8, 1937, the Board of Supervisors of Election received an opinion from the Attorney General of the same date holding that the ballot as it appeared upon the sample of the Voting Machine furnished by the Automatic Company did not comply with the election laws, but that the proposed re-arrangement of said ballot, designated as Plan B, did conform

to the requirements of the election laws. Copy of said opinion, marked "Voting Machine's Board Exhibit No. 4", is filed hereto and prayed to be taken as a part hereof.

(18) That upon receipt of said opinion, said Voting Machine Board, in the exercise of the discretion vested in it by the said Voting Machine Act, awarded the contract in question to the Automatic Company for 910 of its voting machines of the nine-party forty (40) candidate type; that upon receipt of the said opinion from the Attorney General, said Voting Machine Board concluded that even if it be assumed that the ballot set up upon the sample machine of the Automatic Company be invalid, that nevertheless the proper re-arrangement of the ballot as tendered by the Automatic Company was valid and for that reason, the said machine, under any circumstances, was "eligible and in all respects qualified for purchase by the Board." The said Voting Machine Board thereupon passed a resolution to that effect reading as follows:

> "Whereas, this Board did heretofore duly advertise for the submission of proposals, or bids, for furnishing and delivering nine hundred and ten (910) Voting Machines and doing other work, in accordance with certain specifications prepared by said Board; and
>
> Whereas, proposals or bids were submitted in response to said advertisement as follows, to wit:
>
> By the Automatic Voting Machine Corporation of Jamestown, New York:
>
> Bids for "Type A - Size 1" Voting Machines and
> "Type A - Size 2" Voting Machines,
> as defined and described in the specifications.
>
> By the Shoup Voting Machine Corporation:
> Bids for "Type A - Size 1" Voting Machines,
> "Type A - Size 2" Voting Machines,
> "Type B - Size 1" Voting Machines, and
> "Type B - Size 2" Voting Machines,
> as defined and described in the specifications; and
>
> Whereas, after said bids had been opened and read, and before any action had been taken in respect thereto, the Shoup Voting Machine Corporation alleged and claimed that the Voting Machines tendered by the Automatic Voting Machine Company as samples failed to comply with the Election Laws of Maryland and with the Specifications; and
>
> Whereas, the Attorney General of Maryland has now advised the Board of Supervisors of Election of Baltimore City that legal elections of all kinds, primary, general and special, can be conducted with the Voting Machines tendered by the Automatic Voting Machine Corporation; and
>
> Whereas, this Board is of the opinion that the bids submitted by the Automatic Voting Machine Corporation are in all respects responsive to the Specifications;
>
> Now, therefore, be it resolved, That the Voting Machines tendered by the Automatic Voting Machine Corporation are eligible and in all respects qualified for purchase by

this Board under the provisions of Chapter 94 of the Laws of Maryland, Regular Session of 1937, and that the bids of the said Automatic Voting Machine Corporation are entitled to be received by this Board as in all respects legal and valid."

(19(That after further consideration and comparison of the merits of the respective machines, the said Voting Machine Board passed another resolution awarding the contract for the said machines to the Automatic Company, said resolution, reading as follows:

> "Resolved, that the bid of the bid of the Automatic Voting Machine Corporation for furnishing and delivering complete as specified nine hundred and ten (910) manually operated, nine-party, 40 bank, 360 candidate type voting machines at and for the sum of $826.95 each, said machines being the kind designated in the specifications as "Type A - Size 1", be and the same is hereby accepted; and Howard W. Jackson, Chairman of this Board, be and he is hereby authorized and directed to execute for and on behalf of this Board, a contract with the said Automatic Voting Machine Corporation, in the form of the contract or Agreement attached to the specifications, for furnishing and delivering said voting machines and doing other work, said contract to become effective upon the execution and delivery of the Bond required by said specifications."

(20) That in awarding said contract to the Automatic Company, the said Voting Machine Board acted in the exercise of a discretion vested in it by the said Voting Machine Act. That the specifications in question contemplated that certain technical defects might arise and for that reason the said Voting Machine Board under Section 14 thereof "reserves to itself the right * * * to waive technical defects, as it may deem best for the public interests, and to award the contract on that type, size and make of voting machine which appears in the judgment of said Board, to be best for the public interests;" that said specifications further provide under Section 23 thereof that "The Voting Machine Board shall in all cases determine the amount or quantity, quality and acceptability of the work and materials which are to be paid for under this contract; shall decide all questions in relation to said work and the performance thereof; shall, in call cases, decide questions which may arise relative to the fulfillment of the contract or to the obligations of the Contractor thereunder; that the said specifications further provide under Section 24 "Should any misunderstanding arise as to the meaning and construction of anything contained in the specifications, the

decision of the Voting Machine Board shall be final and binding* * *. In all cases of doubt as to the true meaning of the specifications, plans and/or drawing, the decision of the Voting Machine Board shall be final and conclusive." That said specifications further provide under Section 41 thereof that "The Contractor shall and does hereby guarantee for a period of five (5) years after delivery and acceptance of all of the voting machines, to make at his sole cost and expense, and and all repairs to and renewals of and replacements of said voting machines,equipment and/or accessories that may be necessary for their proper operation and use in strict accordance with any and all laws and the contract documents * * * "

That said specifications further provide in Section 43 thereof "The Contractor shall furnish and deliver all of the said voting machines to be purchased under this contract to the Voting Machine Board in strict accordance with and to meet the requirements of all of thd terms, conditions, and provisions of Chapter 94 of the Laws of Maryland, Regular Session of 1937, and all other laws and the contract documents."

That said specifications further provide in Section 47 thereof that the sample machines which said section requires the bid to set up "May be subjected to such tests as thesaid Supervisors of Election and/or the Voting Machine Board deem advisable, and no machine which, in the judgment of the Voting Machine Board, fails to meet any of the requirements of law and of these specifications will be considered." Said secttion also provides "The sample voting machine, equipment, and accessories, thus set up by the successful bidder and upon which his bid is accepted, shall be taken by all parties concerned to be representatiye in all respects of the voting machines, equipment, and accessories to be furnished and delivered by the successful bidder, subject to all thd provisions of the contract documents."

(21) That at the first session of the hearing held by the Voting Machine Board on August 24, 1937, a Mr. Weiss, the President of the Shoup Company, testified as follows:

> "The point I want to make is this, as far as we are concdrned, we have put a fair price on the machine and

> think we have proven that conclusion. We are on redord, two years ago, with that price* * * But we put our legitimate standard price on our machine, and we certainly hope this Board favors us with the business."

That in view of this statement by the Shoup Corporation it was plainly apparent to the Voting Machine Board that neither the Shoup Corporation, nor any taxpayer could contend that the waiver by the Board of the defects in the arrangement of the ballot on the sample Voting Machine Board of the Automatic Corporation, if indeed, such sample ballot should be held defective, was in any way unfair to either the Shoup Company, or the taxpayers of Baltimore City. The Voting Machine Board under its broad power contained in the Voting Machine Act could if it had see fit to do so, have rejected both bids and then made a cotract with the Automatic Company for the purchase of a machine re-arranged in accordance with Plan B. To have done so would have foreclosed any determination by the Court of the question of the validity of the sample machine as arranged by the Automatic Company in submitting its bid. Under the specifications, particularly sections 41 and 43 quoted above, the contractor guarantees to furnish a machine that complies in all respects with the Voting Machine Act and other elections, and all other laws upon the subject. If the Courts should agree with the Attorney General that the ballot set up upon the sample machine does not comply with the election laws, then the Voting Machine Board, can, and will require the furnishing of a machine so arranged as to permit a ballot to be set up in accordance with Plan B, which is conceded to meet all the requirement sof our election laws.

And having fully answered, these defendants pray to be hence dismissed.

AND as in duty bound, etc.

Special Counsel to Voting Machine Board.

December 14, 1937.

Mr. James A. Young, Clerk,
Court of Appeals of Maryland,
Annapolis, Maryland.

Dear Sir:

Please find enclosed voucher of the Mayor and City Council of Baltimore for $15.00 in payment of certified copy of the Opinion of the Court in the Voting Machine cases.

Very truly yours,

City Solicitor.

H.
Encl.

9-24-37

WILLIAM S. MORRIS, Plaintiff	:	
	:	
Vs.		
HOWARD W. JACKSON, GEORGE SELLMAYER, R. WALTER GRAHAM, R. E. LEE MARSHALL, and BERNARD L. CROZIER, Constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94 of the Laws of Maryland, regular session of 1937, and	: : : : : :	IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY
J. GEORGE EIERMAN, WALTER A. McCLEAN, and DANIEL B. CHAMBERS, Constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and MAYOR AND CITY COUNCIL OF BALTIMORE, THE AUTOMATIC VOTING MACHINE CORPORATION, Defendants.	: : : : :	(1937) Docket 46A, Page 545. Case No. 22628-A.

TO THE HONORABLE, THE JUDGE OF SAID COURT:

The Answer of Automatic Voting Machine Corporation, a body corporate of the State of Delaware, with its principal office at Jamestown, New York, to the Bill of Complaint filed herein on September 9th, 1937, against this Respondent and others, and to the show cause order passed by this Honorable Court on September 9th, 1937, respectfully shows unto your Honor:

1. This Respondent admits the allegations of the first paragraph of the Bill of Complaint.

2. This Respondent admits the allegations of the second paragraph of the Bill of Complaint.

3. This Respondent admits the allegations of the third paragraph of the Bill of Complaint.

4. This Respondent admits the allegations of the fourth paragraph of the Bill of Complaint.

5. This Respondent admits the allegations of the fifth paragraph of the Bill of Complaint.

6. This Respondent admits the allegations of the sixth paragraph of the Bill of Complaint.

7. This Respondent admits the allegations of the seventh paragraph of the Bill of Complaint, except that the Shoup bid was $952,770. instead of $952,970., and this Respondent further says that its bid for furnishing 910 voting machines of said type A, size 1, was $200,245.50 less than the competing bid of the Shoup Corporation.

8. This Respondent admits the allegations of the eighth paragraph of the Bill of Complaint.

9. Answering the ninth paragraph of the Bill of Complaint, this Respondent says that a competing Company, the Shoup Corporation, expressed doubt that the said sample Automatic machine complied with the specifications and the election laws of the State of Maryland. The remaining portion of said paragraph is admitted. This Respondent has duly furnished bond which has been accepted by the Voting Machine Board.

10. Answering the tenth paragraph of the Bill of Complaint, this Respondent denies that its said sample 40 candidate machine fails to comply with the election laws as enumerated in said paragraph 10(A), and on the contrary says that said sample machine fully complies with all provisions of law applicable thereto.

This Respondent admits the allegations of paragraph 10(B), and says that the method of form of first and second choice

voting in a state-wide primary as shown on "Plaintiff's Exhibit No. 2," (which is hereinafter referred to as Plan A), is proper and legal in every respect. Plan A constitutes a substantial compliance with Sec. 203, as required in Sec. 224-F (d) of Ch. 94 of the Acts of the regular session of 1937, and in fact constitutes a literal compliance therewith. Plan A definitely and accurately registers first and second choice votes in such a primary election. It is the simplest and the most expeditious method of setting up this type of a primary ballot on the machine. A primary voter may vote a single first choice. He cannot vote a separate second choice alone, for to do so would violate Sec. 203, because with a paper ballot a single second choice vote is counted as a first choice vote, and on a machine it would be mechanically impossible to determine which second choice votes should count as first choice votes. The voter may vote by one operation for his first choice and for his second choice for an office, and these votes are definitely and accurately registered on the counter. Thus the first choice votes and the corresponding alternative second choice votes are registered together to comply with Sec. 203. The total first choice votes for each candidate for nomination is definite on each machine by adding the three counters (or more as the case may be) registered under the name of such candidate for nomination. Thus the vote in each precinct is definitely recorded, and the returns are made as shown in the example forms of tabulation in Sec. 203. The Board of Supervisors of Election of Baltimore City then consolidate the returns for a legislative district, pursuant to Sec. 203, and determine the respective first choice and second choice of the party candidate for an office of the Legislative District, which result is binding upon the delegates to the State convention of the particular political party.

This Respondent denies the allegation of paragraph 10(C) that the form of Plan A violates Sec. 224F (i). The voting devices for separate candidates on the Automatic machine are arranged in separate parallel rows, so that in a primary election adjacent rows are assigned to the candidates of a party with parallel office columns transverse thereto, and this arrangement is uniform on the face of the Automatic Machine. This Respondent alleges that no other machine considered by the Voting Machine Board observed this requirement of uniformity in having parallel office columns or rows transverse to the adjacent rows or columns assigned to a party. The Complainant has erroneously characterized first and second choice voting on Plan A as group voting. The Complainant has confused this with straight party voting or group voting which is permitted in some states in general elections, whereby one cross mark on a paper ballot or the pulling of one party lever on a machine counts for all of the candidates of one political party in a general election. Plan A has voting devices for separate candidates. There are three candidates. Each person is a candidate for the nomination to a single office. No person is a candidate for a second choice. The law permitting second choice voting permits alternative votes for a single nomination. In voting first choice and second choice, the voter does not vote twice, nor does he vote for two nominations. The voter votes but once. If a second choice vote comes into operation at all, his first choice vote must first be wholly ineffective. This is alternative voting, not group voting. This is not voting for two nominations; it is voting for but one nomination. It is merely a form for alternative voting. This is altogether different from voting for two separate men for two separate offices by the operation of a single lever. Under Sec.

203 this alternative voting must be tabulated together; every alternative second choice must be linked with the individual voter's first choice; Plan A both substantially and literally complies with this provision.

This Respondent denies the allegations of paragraph 10(D) that Plan A is confusing and illegal, and on the contrary says that the plan is perfectly clear and legal. This arrangement suits the construction of the Automatic machine within the terms of Sec. 224-A. Plan A would not suit the construction of any other type of machine considered by the Voting Machine Board. This Respondent believes Plan A to be, and recommends it as, the best form of setup available for a primary election requiring first and second choice alternative voting. This recommendation comes from a Voting Machine Company whose machines in the last Presidential election voted over 20% of all the ballots of every kind and description cast by all the voters in the United States. The Legislature in 1937 contemplated the necessity of deviation, where necessary, in the discretion of the Supervisors of Election, from the strict letter of the paper ballot law, in order to accommodate the style and mechanism of voting machines. Sec. 224F (d) of the Voting Machine Act requires a substantial compliance with Sec. 203 which comes within the Primary election section of the paper-ballot law. Sec. 224G (g) provides that "the form and arrangement of ballot labels, to be used at any election, shall be determined by the Board of Supervisors of Election as nearly as may be in accordance with this sub-title." This Respondent alleges that the Voting Machine Board, composed of the five members of the Board of Estimates of Baltimore City and the three members of the Board of Supervisors of Election of Baltimore City, acted properly within its sound discretion in purchasing machines from this Respondent, which

machines your Respondent alleges are the best that are made, and the purchase of which saves Baltimore City over $200,000.00.

Answering paragraph 10(E) of the Bill of Complaint, this Respondent denies that the sample Automatic machine fails to comply with paragraph 44 of the specifications, and denies that the award of the contract to this Respondent is invalid and void. The machine has nine horizontal party rows of 40 candidates each, making a total of 360 spaces for names of candidates. The sample has set up thereon the Democratic and Republican primary ballots of 1934. When set up for a general election, the party designations appear in a column to the left of and opposite the horizontal party rows, and the designations of offices appear above the top horizontal row, and the names of the different party candidates for each respective office appear in vertical columns immediately under the designation of the office for which the candidates respectively aspire. Thus there are nine political party rows and 40 voting devices in each of the nine rows. The Supervisors of Election asked this Respondent to set up the two 1934 primary ballots on the sample machine merely to illustrate a form. These ballots did not require the use of all nine rows. Merely for convenience one row was used to contain the designation of offices for the ballot of one political party. If occasion should require the full use of all nine rows in a primary election, (which is extremely unlikely on the Automatic machine), the flexibility of the machine permits the arrangement of the names and office designations in a variety of forms, so as to make all nine rows available for the use of names of candidates for nomination. The machine is so constructed and equipped, for example, as to permit the insertion of the designation of offices between any two horizontal rows of names. This permits this machine to use all nine rows for names only, and each machine can accommodate, one, two, three or more primary ballots at the same time. The flexibility

of this machine as to the various forms of its use is such that it will accommodate any ballot or ballots that may be required.

11. This Respondent admits the allegations of the eleventh paragraph of the Bill of Complaint and says in conjunction with the various dates for the delivery of the 910 machines that the contract provides "Time is of the essence of this contract."

12. This Respondent admits the allegations of the twelfth paragraph of the Bill of Complaint and says that the delivery dates are necessary so that the Supervisors of Election may have sufficient machines to instruct the Judges of Election and the voting public throughout Baltimore City. Delay in the delivery of machines may cause serious trouble and confusion in Baltimore City in the elections of 1938, and such delay might also jeopardize the position of the Respondent and of the sureties on its bond. This Respondent has already proceeded with its performance of the contract and has made purchases of large quantities of materials for said machines and has already started to fabricate said materials into the making of said machines at its factory at Jamestown, New York. This Respondent already has been hampered by the dilatory tactics of its competitor, notwithstanding the fact that the voting machine law of 1937 and the specifications of the Voting Machine Board were both drawn, after open and impartial hearings attended by representatives of both Companies, so that both the Automatic machine and the Shoup machine would conform thereto so as to permit competitive bidding by the two Companies. The bids were opened by the Voting Machine Board on August 11th, 1937, and the contract was signed on September 8th, 1937, almost one month later. In the interim the Voting Machine Board accorded both Voting Machine Companies impartial and uniform courtesy and consideration, and afforded them equal opportunities for full

and complete hearings. This Respondent on August 26th, 1937, sent the following telegram to the Members of the Voting Machine Board:

"The telegram sent you yesterday by counsel for the Shoup Company asking for opinions from the Attorney General as to the legality of the bid submitted by us is intended for delay and to confuse the issues and possibly to deprive the City of the prices submitted by us stop. These are precisely the same tactics employed by this company in other places where they found it impossible to compete on prices stop. The city will save more than two hundred thousand dollars on our bid on the forty candidate machine and more than two hundred and six thousand dollars on the fifty candidate machine stop. We submitted lowest possible prices based on expected prompt action but we shall not be able to await decision indefinitely stop. These bids were opened on August eleventh stop. Your Board met again August thirteenth stop. Action was delayed at the request of the Shoup Company because of the absence on vacation of City Solicitor Marshall stop. It was understood that he would pass on the Shoup Company's legal contentions stop. The Board met again on August twenty-fourth with City Solicitor Marshall present stop. It gave the bidders full opportunity to be heard and adjourned to meet again today when it is hoped by us that action will be takenstop. The Shoup Company now asks that Attorney General O'Conor be asked to make rulings although the sole reason for the delay beginning on August thirteenth was to await City Solicitor Marshall stop. The main objection made by the Shoup Company is to the arrangement proposed by us for voting first and second choice stop. We believe the arrangement suggested by us is entirely legal and is the most simple and easily understood of any plan yet suggested stop. We call your attention to the provisions of paragraph forty-three of the specifications under which the successful bidder is required to furnish voting machines in strict accordance with the laws of Maryland stop. The successful bidder is required to post a heavy bond to meet this and the other requirements stop. Any arrangement for voting at any election must be in accordance with law and the bond of the successful bidder is the guarantee that the law must be observed stop. This effort to get legal opinions at this time accomplishes no substantial purpose whatever except to create difficulties and delays at the instance of a company which bid an inordinately high price stop. Our Company has made more than ninety percent of the voting machines now in use in the United States stop.

We are the oldest, largest and most successful voting machine company in the country stop. We own our own factory and are not exclusively a selling agency stop. The Shoup people have threatened Court action here as in other places stop. They even threatened Court action before the bids were opened stop. The continued requests for opinions is only part of a plan to prevent an award stop. We respectfully request that your Board act without further delay and we wish also to express our appreciation of the unfailing patience and courtesy which the Board has shown to both bidders. Automatic Voting Machine Corp. by Russell F. Griffen, Vice-President."

Further answering said paragraph, this Respondent says that it has sufficient time to complete the manufacture of 910 machines, provided it is not hampered in the building of said machines, and will deliver them to Baltimore City in the quantities and at the times specified.

13. Answering the thirteenth paragraph of the Bill of Complaint, this Respondent says that it is now constructing the 910 machines in conformity with the Election Laws, and admits that protracted delay by litigation might seriously handicap the Board of Supervisors of Election. However, this Respondent has no desire to handicap the Board and will cooperate to the end that the legislative mandate of 1937 to use voting machines in Baltimore City in the elections of 1938 will be complied with. Machines of the type made by this Respondent are installed in over 3,500 cities, towns and villages of the United States, and this Respondent is proud of its record of cooperation with the various election boards in the expeditious handling of elections with its voting machines. This Respondent will not be the cause of any confusion at or before the primary and general elections in Baltimore City in 1938, as this Respondent is proceeding with the manufacture of the machines and will make deliveries thereof in due course in accordance with its contract.

14. Answering the fourteenth paragraph of the Bill of Complaint, this Respondent denies that the contract is

illegal and void, and denies that the City will lose $752,524.50 or any part thereof, and denies that the City may be put to the expense of holding another election, and denies that the votes to be cast on the machines to be furnished by this Respondent may be declared wholly void, and denies that the Plaintiff or other taxpayers of the City of Baltimore will suffer irreparable damage, and on the contrary says that the contract is legal, that Baltimore City has contracted to purchase the best voting machine made for the least amount of money and that the votes to be cast thereon will be entirely legal. Further answering said paragraph, this Respondent says that it and its predecessors have manufactured ninety percent of all voting machines used in the United States, having been in business since 1899; its factory, self-owned and operated, is the most complete, best organized and best conducted factory of its kind in existence; it is engaged solely in the business of manufacturing and selling voting machines; it is not exclusively a selling agency; its work is highly specialized and it has in its employ the most skilled voting machine experts in the United States, some of its technical advisors, engineers and employees having been in the business for over twenty-five years; that their expert knowledge and experience has been and is being used in cooperation with many election boards in many states, cities and counties of the United States, and this Respondent will give similar aid and cooperation to the Board of Supervisors of Election of Baltimore City. And besides the purchase by the City of 910 machines from this Respondent has saved the City over $200,000.00.

15. Further answering the Bill of Complaint, this Respondent says that Plan A (Plaintiff's Exhibit No. 2) conforms to all legal requirements and to the specifications of the Voting Machine Board and that said Plan A is the simplest, most flexible, and easiest to adjust, and which plan is strongly

recommended by this Respondent. The Automatic machine, however, is flexible and is susceptible of being set up and arranged in different forms and methods. Another form of setup in a primary election involving first and second choice voting, is to provide for the operation of one lever for first choice and a separate lever for second choice, a diagram or plan thereof being filed herewith and marked "Automatic Exhibit Plan B." This Respondent, in demonstrating the flexibility of its machine, offered in open meetings of the full membership of the Voting Machine Board to rearrange the form of the primary ballot on the sample machine from Plan A to Plan B, but the Board, in the proper exercise of its sound discretion, was satisfied and did not deem it necessary for this Respondent to demonstrate any other plan or form.

This Respondent has been and is now ready, able and willing to furnish machines which may use any form of first and second choice voting which the Board desires or the law requires. If this Honorable Court decrees that both Plan A and Plan B are valid methods of voting first and second choice, thus leaving the method of procedure in the sound discretion of the Supervisors of Election, then this Respondent would recommend the use of Plan A rather than Plan B. The Voting Machine Board has purchased a machine capable of flexibility of adjustment in any number of forms and methods. The easiest and most flexible method of arranging a primary ballot for first and second choice voting is the form of Plan A. The Board of Supervisors of Election, in the short time between the withdrawal date and the date of the primary, can easily and quickly set up its 50 Automatic machines, purchased by Baltimore City in 1928, and its 910 new Automatic machines, a total of 960 uniform machines, without hindrance, worry or delay. Sec. 203, providing for first and second choice voting

in primaries, was adopted in 1912, and since then for a quarter of a century has been used only three times in Maryland.

Under the provisions of paragraph 43 of the specifications, made part of the contract entered into by this Respondent, it is agreed that all of the voting machines to be purchased from this Respondent shall be in strict accordance with the provisions of Chapter 94 of the Laws of Maryland, Regular Session of 1937, and any other laws and contract documents. This Respondent, therefore, is obligated, and is under bond, to furnish machines, and will do so, which can be used in accordance with the election laws of Maryland. All machines must be adjusted and readjusted to meet the circumstances incident to each election, primary and general. Each election, primary and general, requires a different number of operating voting devices, depending upon the number of candidates for each nomination and the number of parties, in the case of primaries, and the number of nominees for each office to be filled in general elections. All provisions for first and second choice voting, if and when needed for a statewide primary, must be eliminated before the general election following such a primary. In some primaries no first and second choice voting will occur. However, this Respondent is obligated to and will, whenever such voting is necessary, under the existing election laws, see to it that the voting machines may be adjusted for first and second choice voting under "Plan A" or "Plan B" or any other plan which the Board of Supervisors may adopt in accordance with the provisions of the existing election laws.

16. Further answering the Bill of Complaint, this Respondent says that Baltimore City purchased 50 Automatic Voting Machines from this Respondent in 1928 and that said 50 machines have been used in some of the precincts of Baltimore City in general elections since that time. The Legislature by Sec.224A

of the 1937 Act has directed the Board of Supervisors of Election for Baltimore City in all future elections to use those 50 machines which are of the same type as the 910 machines now contracted for.

It has never been contended, although they have been in use for nine years, that the fifty voting machines already owned by Baltimore City, are in any sense illegal or unlawful. These machines have been used by the Board of Supervisors with the express approval of all of the Attorneys General of Maryland from the date of purchase. They have not yet been used in state-wide primaries, where first and second choice voting was required, but when they are, under the provisions of the mandate of the Legislature of 1937, this Respondent will see to it that they may be adjusted if the need for first and second choice voting occurs, in accordance with "Plan A" or "Plan B," or any other plan for first and second choice voting which the Board of Supervisors may adopt in accordance with the existing election laws of Maryland. These 50 machines have not been used heretofore in primaries for the reason that, until the passage of the 1937 voting machine act, it was necessary under Sec. 86 of Article 33 to preserve the ballot for four months, which would run beyond the date of the following general election.

17. Further answering the Bill of Complaint, this Respondent says that Sec. 224A directs the Voting Machine Board to purchase machines for use throughout Baltimore City, and vests in the said Board discretionary power to determine the type and make of the machine. The Board properly exercised that discretionary power in purchasing 910 machines from this Respondent.

Paragraph 14 of the specifications of the Voting Machine Board is as follows:

> "The Voting Machine Board reserves to itself the right to reject any or all bids or proposals and/or to waive technical defects,

as it may deem best for the public interests, and to award the contract on that type, size and make of voting machine which appears, in the judgment of said Board, to be best for the public interests."

The Board, therefore, entered into the contract with this Respondent in the proper exercise of its judgment that the Automatic machine is for the best public interest.

18. Further answering the Bill of Complaint, this Respondent says that the Bill of Complaint alleges no facts which would entitle the Complainant to any of the relief for which he prays; that the Bill of Complaint and each paragraph thereof is bad in substance and insufficient in law; that the Bill of Complaint merely raises questions of form and procedure in the use of the machine, which matters of form and procedure are in the sound discretion of the Voting Machine Board and the Supervisors of Election of Baltimore City; that this Respondent has by contract agreed to, and is under bond to, furnish 910 voting machines which shall comply with the law and the specifications; and that this Respondent is now proceeding with the manufacture of the machines so as to deliver the same in Baltimore City in the quantities and at the times specified in the contract.

And having fully answered, this Respondent prays to be hence dismissed.

AND AS IN DUTY BOUND, ETC.

AUTOMATIC VOTING MACHINE CORPORATION

By (s) Samuel C. Hamilton
Agent.

(s) Armstrong, Machen & Allen
Solicitors for Automatic Voting Machine Corporation.

STATE OF MARYLAND, BALTIMORE CITY, to wit:

I HEREBY CERTIFY that on this 24th day of September, 1937, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared SAMUEL C. HAMILTON, Agent of the Automatic Voting Machine Corporation, the Respondent in the aforegoing Answer, and he made oath in due form of law that the matters and facts set forth in the aforegoing Answer are true as therein stated, to the best of his knowledge, information and belief, and that he is the agent of said body corporate, duly authorized to make this affidavit.

WITNESS my hand and Notarial Seal.

Notary Public.

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WILLIAM S. NORRIS, Plaintiff,	:	
-vs-	:	IN THE
HOWARD W. JACKSON, GEORGE SELLMAYER, R. WALTER GRAHAM, R. E. LEE MARSHALL, and BERNARD L. CROZIER, Constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94 of the Laws of Maryland, regular session of 1937, and	:	CIRCUIT COURT NO. 2 OF BALTIMORE CITY
	:	(1937) Docket 46A, page 545
J. GEORGE EIERMAN, WALTER R. McCLEAN, and DANIEL B. CHAMBERS, Constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and	:	Case No. 22628-A
MAYOR AND CITY COUNCIL OF BALTIMORE, THE AUTOMATIC VOTING MACHINE CORPORATION, Defendants.	:	

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TO THE HONORABLE, THE JUDGE OF SAID COURT:

The Answer of Automatic Voting Machine Corporation, a body corporate of the State of Delaware, with its principal office at Jamestown, New York, to the Bill of Complaint filed herein on September 9th, 1937, against this Respondent and others, and to the show cause order passed

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this Honorable Court on September 9th, 1937, respectfully shows unto your Honor:

1. This Respondent admits the allegations of the first paragraph of the Bill of Complaint.

2. This Respondent admits the allegations of the second paragraph of the Bill of Complaint.

3. This Respondent admits the allegations of the third paragraph of the Bill of Complaint.

4. This Respondent admits the allegations of the fourth paragraph of the Bill of Complaint.

5. This Respondent admits the allegations of the fifth paragraph of the Bill of Complaint.

6. This Respondent admits the allegations of the sixth paragraph of the Bill of Complaint.

7. This Respondent admits the allegations of the seventh paragraph of the Bill of Complaint, except that the Shoup bid was $952,770. instead of $952,970., and this Respondent further says that its bid for furnishing 910 voting machines of said type A, size 1, was $200,245.50 less than the competing bid of the Shoup Corporation.

8. This Respondent admits the allegations of the eighth paragraph of the Bill of Complaint.

9. Answering the ninth paragraph of the Bill of Complaint, this Respondent says that a competing Company, the Shoup Corporation, expressed doubt that the said sample Automatic machine complied with the specifications and the election laws of the State of Maryland. The remaining

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portion of said paragraph is admitted. This Respondent has duly furnished bond which has been accepted by the Voting Machine Board.

10. Answering the tenth paragraph of the Bill of Complaint, this Respondent denies that its said sample 40 candidate machine fails to comply with the election laws as enumerated in said paragraph 10(A), and on the contrary says that said sample machine fully complies with all provisions of law applicable thereto.

This Respondent admits the allegations of paragraph 10(B), and says that the method of form of first and second choice voting in a state-wide primary as shown on "Plaintiff's Exhibit No. 2," (which is hereinafter referred to as Plan A), is proper and legal in every respect. Plan A constitutes a substantial compliance with Sec. 203, as required in Sec. 224-F (d) of Ch. 94 of the Acts of the regular session of 1937, and in fact constitutes a literal compliance therewith. Plan A definitely and accurately registers first and second choice votes in such a primary election. It is the simplest and the most expeditious method of setting up this type of a primary ballot on the machine. A primary voter may vote a single first choice. He cannot vote a separate second choice alone, for to do so would violate Sec. 203, because with a paper ballot a single second choice vote is counted as a first choice vote, and on a machine it would be mechanically impossible to determine which second choice votes should count as first choice votes. The voter may vote by one operation for his first choice and for his second choice for an office, and these votes are definitely and accurately registered on the counter. Thus the first choice votes and the corresponding alternative second choice votes are registered together to comply with Sec. 203. The total first choice votes for each candidate for nomination is definite on each machine by adding the three counters (or more as the case may be) registered under the name of such candidate for nomination. Thus the vote in each precinct is definitely recorded, and the returns are made as shown in the example forms of tabulation in Sec. 203. The Board of

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Supervisors of Election of Baltimore City then consolidate the returns for a legislative district, pursuant to Sec. 203, and determine the respective first choice and second choice of the party candidate for an office of the Legislative District, which result is binding upon the delegates to the State convention of the particular political party.

This Respondent denies the allegation of paragraph 10(C) that the form of Plan A violates Sec. 224F (i). The voting devices for separate candidates on the Automatic machine are arranged in separate parallel rows, so that in a primary election adjacent rows are assigned to the candidates of a party with parallel office columns transverse thereto, and this arrangement is uniform on the face of the Automatic Machine. This Respondent alleges that no other machine considered by the Voting Machine Board observed this requirement of uniformity in having parallel office columns or rows transverse to the adjacent rows or columns assigned to a party. The Complainant has erroneously characterized first and second choice voting on Plan A as group voting. The Complainant has confused this with straight party voting or group voting which is permitted in some states in general elections, whereby one cross mark on a paper ballot or the pulling of one party lever on a machine counts for all of the candidates of one political party in a general election. Plan A has voting devices for separate candidates. There are three candidates. Each person is a candidate for the nomination to a single office. No person is a candidate for a second choice. The law permitting second choice voting permits alternative votes for a single nomination. In voting first choice and second choice, the voter does not vote twice, nor does he vote for two nominations. The voter votes but once. If a second choice vote comes into operation at all, his first choice vote must first be wholly ineffective. This is alternative voting, not group voting. This is not voting for two nominations; it is voting for but one nomination. It is merely a form for alternative voting. This is altogether different from voting for two separate men for two separate offices by the operation of a single lever. Under Sec. 203 this alternative

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voting must be tabulated together; every alternative second choice must be linked with the individual voter's first choice; Plan A both substantially and literally complies with this provision.

This Respondent denies the allegations of paragraph 10(D) that Plan A is confusing and illegal, and on the contrary says that the plan is perfectly clear and legal. This arrangement suits the construction of the Automatic machine within the terms of Sec. 224-A. Plan A would not suit the construction of any other type of machine considered by the Voting Machine Board. This Respondent believes Plan A to be, and recommends it as, the best form of setup available for a primary election requiring first and second choice alternative voting. This recommendation comes from a Voting Machine Company whose machines in the last Presidential election voted over 20% of all the ballots of every kind and description cast by all the voters in the United States. The Legislature in 1937 contemplated the necessity of deviation, where necessary, in the discretion of the Supervisors of Election, from the strict letter of the paper ballot law, in order to accommodate the style and mechanism of voting machines. Sec. 224F (D) of the Voting Machine Act requires a substantial compliance with Sec. 203 which comes within the Primary election section of the paper-ballot law. Sec. 224G (g) provides that "the form and arrangement of ballot labels, to be used at any election, shall be determined by the Board of Supervisors of Election as nearly as may be in accordance with this sub-title." This Respondent alleges that the Voting Machine Board, composed of the five members of the Board of Estimates of Baltimore City and the three members of the Board of Supervisors of Election of Baltimore City, acted properly within its sound discretion in purchasing machines from this Respondent, which machines your Respondent alleges are the best that are made, and the purchase of which saves Baltimore City over $200,000.00.

Answering paragraph 10(E) of the Bill of Complaint, this Respondent denies that the sample Automatic machine fails to comply with

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paragraph 44 of the specifications, and denies that the award of the contract to this Respondent is invalid and void. The machine has nine horizontal party rows of 40 candidates each, making a total of 360 spaces for names of candidates. The sample has set up thereon the Democratic and Republican primary ballots of 1934. Thus set up for a general election, the party designations appear in a column to the left of and opposite the horizontal party rows, and the designations of offices appear above the top horizontal rwo, and the names of the different party candidates for each respective office appear in vertical columns immediately under the designation of the office for which the candidates respectively aspire. Thus there are nine political party rows and 40 voting devices in each of the nine rows. The Supervisors of Election asked this Respondent to set up the two 1934 primary ballots on the sample machine merely to illustrate a form. These ballots did not require the use of all nine rows. Merely for convenience one row was used to contain the designation of offices for the ballot of one political party. If occasion should require the full use of all nine rows in a primary election, (which is extremely unlikely on the Automatic machine), the flexibility of the machine permits the arrangement of the names and office designations in a variety of forms, so as to make all nine rows available for the use of names of candidates for nomination. The machine is so constructed and equipped, for example, as to permit the insertion of the designation of offices between any two horizontal rows of names. This permits this machine to use all nine rows for names only, and each machine can accommodate, one, two, three or more primary ballots at the same time. The flexibility of this machine as to the various forms of its use is such that it will accommodate any ballot or ballots that may be required.

__11.__ This Respondent admits the allegations of the eleventh paragraph of the Bill of Complaint and says in conjumbtion with the various

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dates for the delivery of the 910 machines that the contract provides "Time is of the essence of this contract".

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business of manufacturing and selling voting machines; it is not exclusively a selling agency; its work is highly specialized and it has in its employ the most skilled voting machine experts in the United States, same of its technical advisors, engineers and employees having been in the business for over twenty-five years; that their expert knowledge and experience has been and is being used in cooperation with many election boards in many states, cities and counties of the United States, and this Respondent will give similar aid and cooperation to the Board of Supervisors of Election of Baltimore City. And besides the purchase by the City of 910 machines from this Respondent has saved the City over $200,000.00.

15. Further answering the Bill of Complaint, this Respondent says that Plan A (Plaintiff's Exhibit No. 2) conforms to all legal requirements and to the specifications of the Voting Machine Board and that said Plan A is the simplest, most flexible, and easiest to adjust, and which plan is strongly recommended by this Respondent. The Automatic machine, however, is flexible and is susceptible of being set up and arranged in different forms and methods. Another form of setup in a primary election involving first and second choice voting, is to provide for the operation of one lever for first choice and a separate lever for second choice, a diagram or plan thereof being filed herewith and marked "Automatic Exhibit Plan B". This Respondent, in demonstrating the flexibility of its machine, offered in open meetings of the full membership of the Voting Machine Board to rearrange the form of the primary ballot on the sample machine from Plan A to Plan B, but the Board, in the proper exercise of its sound discretion, was satisfied and did not deem it necessary for this Respondent to demonstrate any other plan or form.

This Respondent has been and is now ready, able and willing to furnish machines which may use any form of first and second choice voting which the Board desires or the law requires. If this Honorable Court decrees

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that both Plan A and Plan B are valid methods of voting first and second choice, thus leaving the method of procedure in the sound discretion of the Supervisors of Election, then this Respondent would recommend the use of Plan A rather than Plan B. The Voting Machine Board has purchased a machine capable of flexibility of adjustment in any number of forms and methods. The easiest and most flexible method of arranging a primary ballot for first and second choice voting is the form of Plan A. The Board of Supervisors of Election, in the short time between the withdrawal date and the date of the primary, can easily and quickly set up its 50 Automatic machines, purchased by Baltimore City in 1928, and its 910 new Automatic machines, a total of 960 uniform machines, without hindrance, worry or delay. Sec. 203, providing for first and second choice voting in primaries, was adopted in 1912, and since then for a quarter of a century has been used only three times in Maryland.

Under the provisions of Paragraph 43 of the Specifications, made part of the contract entered into by this Respondent, it is agreed that all of the voting machines to be purchased from this Respondent shall be in strict accordance with the provisions of Chapter 94 of the Laws of Maryland, Regular Session of 1937, and any other laws and contract documents. This Respondent, therefore, is obligated, and is under bond, to furnish machines, and will do so, which can be used in accordance with the election laws of Maryland. All machines must be adjusted and readjusted to meet the circumstances incident to each election, primary and general. Each election, primary and general, requires a different number of operating voting devices, depending upon the number of candidates for each nomination and the number of parties, in the case of primaries, and the number of nominees for each office to be filled in general elections. All provisions for first and second choice voting, if and when needed for a state-wide primary, must be eliminated before the general election following such a primary. In some primaries no first and second choice voting will occur.

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However, this Respondent is obligated to and will, whenever such voting is necessary, under the existing election laws, see to it that the voting machines may be adjusted for first and second choice voting under Plan "A" or "Plan B" or any other plan which the Board of Supervisors may adopt in accordance with the provisions of the existing election laws.

16. Further answering the Bill of Complaint, this Respondent says that Baltimore City purchased 50 Automatic Voting Machines from this Respondent in 1928 and that said 50 machines have been used in some of the precincts of Baltimore City in general elections since that time. The Legislature by Sec. 224A of the 1937 Act has directed the Board of Supervisors of Election for Baltimore City in all future elections to use those 50 machines which are of the same type as the 910 machines now contracted for.

It has never been contended, although they have been in use for nine years, that the fifty voting machines already owned by Baltimore City, are in any sense illegal or unlawful. These machines have been used by the Board of Supervisors with the express approval of all of the Attorneys General of Maryland from the date of purchase. They have not yet been used in state-wide primaries, where first and second choice voting was required, but when they are, under the provisions of the mandate of the Legislature of 1937, this Respondent will see to it that they may be adjusted if the need for first and second choice voting occurs, in accordance with "Plan A" or "Plan B", or any other plan for first and second choice voting which the Board of Supervisors may adopt in accordance with the existing election laws of Maryland. These 50 machines have not been used heretofore in primaries for the reason that, until the passage of the 1937 voting machine act, it was necessary under Sec. 86 of Article 33 to preserve the ballot for four months, which would run beyond the date of the following general election.

17. Further answering the Bill of Complaint, this Respondent says that Sec. 224A directs the Voting Machine Board to purchase machines

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for use throughout Baltimore City, and vests in the said Board discretionary power to determine the type and make of the machine. The Board properly exercised that discretionary power in purchasing 910 machines from this Respondent.

Paragraph 14 of the Specifications of the Voting Machine Board is as follows:

> "The Voting Machine Board reserves to itself the right to reject any or all bids or proposals and/or to waive technical defects, as it may deem best for the public interests, and to award the contract on that type, size and make of voting machine which appears, in the judgment of said Board, to be best for the public interests."

The Board, therefore, entered into the contract with this Respondent in the proper exercise of its judgment that the Automatic machine is for the best public interest.

18. Further answering the Bill of Complaint, this Respondent says that the Bill of Complaint alleges no facts which would entitle the Complainant to any of the relief for which he prays; that the Bill of Complaint and each paragraph thereof is bad in substance and insufficient in law; that the Bill of Complaint merely raises questions of form and procedure in the use of the machine, which matters of form and procedure are in the sound discretion of the Voting Machine Board and the Supervisors of Election of Baltimore City; that this Respondent has by contract agreed to, and is under bond to, furnish 910 voting machines which shall comply with the law and the specifications; and that this Respondent is now proceeding with the manufacture of the machines so as to deliver the same in Baltimore City in the quantities and at the times specified in the contract.

And having fully answered, this Respondent prays to be hence dismissed.

AND as in duty bound, etc.

AUTOMATIC VOTING MACHINE CORPORATION
By (signed) SAMUEL C. HAMILTON, Agent

(signed) ARMSTRONG, MACHEN & ALLEN
Solicitors for Automatic Voting Machine Corporation

COPY

STATE OF MARYLAND, BALTIMORE CITY, to wit:

I HEREBY CERTIFY that on this 24th day of September, 1937, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared SAMUEL C. HAMILTON, Agent of the Automatic Voting Machine Corporation, the Respondent in the aforegoing Answer, and he made oath in due form of law that the matters and facts set forth in the aforegoing Answer are true as therein stated, to the best of his knowledge, information and belief, and that he is the agent of said body corporate, duly authorized to make this affidavit.

WITNESS my hand and Notarial Seal.

Notary Public

WILLIAM S. NORRIS, Plaintiff, -vs-	:	
	:	IN THE
HOWARD W. JACKSON, GEORGE SELLMAYER, R. WALTER GRAHAM, R. E. LEE MARSHALL, and BERNARD L. CROZIER, constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and	:	CIRCUIT COURT NO. 2 OF BALTIMORE CITY
J. GEORGE EIERMAN, WALTER A. McCLEAN, and DANIEL B. CHAMBERS, constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and	:	
MAYOR AND CITY COUNCIL OF BALTIMORE, THE AUTOMATIC VOTING MACHINE CORPORATION, Defendants.	:	

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TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now come J. George Eierman, Walter A. McClean and Daniel B. Chambers, constituting the members of the Board of Supervisors of Election of Baltimore City by Herbert R. O'Conor, Attorney General of the State of Maryland, and Charles T. LeViness, 3rd, Assistant Attorney General, their attorneys, and for answer to the Bill of Complaint herein filed against them respectfully show:

1. That they, as members of the Board of Supervisors of Election of Baltimore City, are part of a voting machine board created by Chapter 94 of the Acts of 1937, which voting machine board is a party defendant in this suit and which is filing a separate answer.

2. That the only relief prayed against these respondents is that they be restrained from installing machines in the 1938 elections; and that the right to install such machines will be determined by the outcome of this suit.

3. That these respondents are not filing an answer as individuals or as members of the Board of Supervisors of Election of Baltimore City, since their rights are fully protected in the answer herein filed for them as members of the said Voting Machine Board; and these respondents submit themselves to the jurisdiction of this Court and will abide by the decree of this Court passed in the premises.

And now having fully answered said Bill of Complaint these respondents pray that they may be hence dismissed with their proper costs.

And as in duty bound, etc.

(signed) HERBERT R. O'CONOR
Attorney General

(signed) CHAS. T. LeVINESS, 3rd
Asst. Attorney General, attorneys for J. George Eierman, Walter A. McClean and Daniel B. Chambers, constituting the members of the Board of Supervisors of Election of Baltimore City.

PLAN A

GOVERNOR

REPUBLICAN

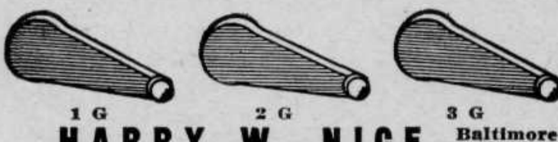
Turn down any one Pointer

1st Choice Only	1st & 2nd Choice	1st & 2nd Choice

1 F | 2 F | 3 F

PHILLIPS LEE GOLDSBOROUGH Baltimore City

1st Choice Only	1st Choice with Harry W. NICE 2nd Choice	1st Choice with H. Webster SMITH 2nd Choice



1 G | 2 G | 3 G

HARRY W. NICE Baltimore City

1st Choice Only	1st Choice with H. Webster SMITH 2nd Choice	1st Choice with Phillips Lee GOLDSBOROUGH 2nd Choice

1 H | 2 H | 3 H

H. WEBSTER SMITH Baltimore City

1st Choice Only	1st Choice with Phillips Lee GOLDSBOROUGH 2nd Choice	1st Choice with Harry W. NICE 2nd Choice

Two Methods of Arranging Candidates Names for First and Second Choice Voting at Primaries

PLAN "A"

1 2 3

GOVERNOR

TURN DOWN ONE POINTER ONLY

1 F 2 F 3 F

REPUBLICAN

PHILLIPS LEE GOLDSBOROUGH Baltimore City

Phillips Lee Goldsborough 1st Choice only	with Harry W. NICE 2nd Choice	with H. Webster SMITH 2nd Choice

1 G 2 G 3 G

REPUBLICAN

HARRY W. NICE Baltimore City

Harry W. NICE 1st Choice only	with H. Webster SMITH 2nd Choice	with Phillips Lee Goldsborough 2nd Choice

1 H 2 H 3 H

REPUBLICAN

H. WEBSTER SMITH Baltimore City

H. Webster SMITH 1st Choice only	with Phillips Lee Goldsborough 2nd Choice	with Harry W. NICE 2nd Choice

PLAN "B"

PLAZA 6272

CHARLES G. PAGE
Attorney-at-Law
CENTRAL SAVINGS BANK BUILDING
3 EAST LEXINGTON STREET
BALTIMORE, MD.

October 1, 1937

R. E. Lee Marshall, Esq.
217 Court House
Baltimore, Maryland

Dear Mr. Marshall:

I attach a copy of an amendment to my bill of complaint which will be filed on Monday.

I attach a copy of a stipulation with regard to the joint hearing.

I attach a copy of a proposed stipulation of fact.

I shall expect both of the latter stipulations to be executed on Monday.

Very truly yours,

Charles G. Page

CGP:RB
Encs.

Filed Sept. 24, 1937

COPY

WILLIAM S. NORRIS, Plaintiff,	:	
-vs-	:	
HOWARD W. JACKSON, GEORGE SELLMAYER, R. WALTER GRAHAM, R. E. LEE MARSHALL, and BERNARD L. CROZIER, Constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and	:	IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY
J. GEORGE EIERMAN, WALTER A. McCLEAN, and DANIEL B. CHAMBERS, Constituting themembers of the Board of Supervisors of election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and	:	
MAYOR AND CITY COUNCIL OF BALTIMORE, THE AUTOMATIC VOTING MACHINE CORPORATION, Defendants.	:	

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TO THE HONORABLE, THE JUDGE OF SAID COURT:

The answer of the Mayor and City Council of Baltimore, defendant in the above entitled cause, respectfully represents:

1. This Defendant admits the allegations contained in the first six paragraphs of said Bill of Complaint.

2. This Defendant admits the allegations contained in the seventh paragraph of said Bill of Complaint with the exception of the fact that

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the total bid of the Shoup Voting Machine Corporation for furnishing the voting machines mentioned therein was $952,770.00 instead of $952,980.00, as alleged.

3. This Defendant admits the allegations contained in the eighth and ninth paragraphs of said Bill of Complaint.

4. Answering the tenth paragraph of said Bill of Complaint, this Defendant denies that the type of Automatic forty-candidate machine to be furnished by the Automatic Voting Machine Corporation under its contract with the Voting Machine Board, as demonstrated by the sample machine in the office of the Supervisors of Election of Baltimore City, fails to comply with the General Election Laws and with the Specifications, as alleged in said paragraph.

5. This defendant admits the allegations contained in the eleventh, twelfth, thirteenth and fourteenth paragraphs of said Bill of Complaint.

6. Further, in affirmative defense to said Bill, your Respondent respectfully alleges:

As required by Section 47 of the Specifications, The Automatic Voting Machine Corporation, one of the Defendants herein, on or before the day that it submitted its bid, set up in the office of the Supervisors of Election, located in the Court House, Baltimore City, Maryland, a sample voting machine of the forty-candidate, type "A", size 1 machine. Upon such sample there was arranged a sample ballot as specified by the Supervisors of Election of Baltimore City. The said voting machine as furnished and set up by The Automatic Voting Machine Corporation is so constructed as to permit the setting up thereon, insofar as first and second choice voting is concerned, a ballot of the type and character shown on the exhibit attached hereto and marked "Exhibit 1 of the Mayor and City Council of Baltimore". The said sample voting machine is also so constructed as to permit compliance in all respects with the Election Laws of Maryland and to permit the setting up of

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ballots thereon in all forms and varieties permitted and authorized by law. The Automatic Voting Machine Corporation is obligated under the contract between it and the Voting Machine Board to furnish voting machines which comply with and meet the requirements of all the terms, conditions and provisions of Chapter 94 of the Laws of Maryland, Regular Session of 1937, any and all other laws and the contract documents. And your Respondent further alleges that the contract between The Automatic Voting Machine Corporation and the Voting Machine Board is legal and valid in all respects.

Having fully answered, this Defendant prays to be hence dismissed.

AND as in duty bound, etc.

(signed) CHARLES C. G. EVANS
Deputy City Solicitor

STATE OF MARYLAND, CITY OF BALTIMORE, to wit:

I HEREBY CERTIFY That on this ______________ day of ______________, nineteen hundred and thirty-seven, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City aforesaid, personally appeared HOWARD W. JACKSON, Mayor of the Mayor and City Council of Baltimore, and he made oath in due form of law that the matters and facts set forth in the foregoing answer are true as therein stated to the best of his knowledge, information and belief.

WITNESS my hand and Notarial Seal.

____
Notary Public

WILLIAM S. NORRIS,
Plaintiff,

vs.

HOWARD W. JACKSON,
GEORGE SELLMAYER,
R. WALTER GRAHAM,
R. E. LEE MARSHALL, and
BERNARD L. CROZIER,
Constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and
J. GEORGE EIERMAN,
WALTER A. McCLEAN, and
DANIEL B. CHAMBERS,
Constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and
MAYOR and CITY COUNCIL OF BALTIMORE,
THE AUTOMATIC VOTING MACHINE CORPORATION,
Defendants.

IN THE

CIRCUIT COURT NO. 2

OF

BALTIMORE CITY

- - - - - -

TO THE HONORABLE, THE JUDGE OF SAID COURT:

The bill of complaint of William S. Norris, plaintiff, respectfully represents:

(1) That plaintiff is a citizen and voter resident in the City of Baltimore, State of Maryland, and a taxpayer in said City and State, and brings this suit on behalf of himself and of all other taxpayers of the said City who may become parties to this proceeding and contribute to the expenses of this suit.

That defendants, Howard W. Jackson, George Sellmayer, R. Walter Graham, R. E. Lee Marshall, and Bernard L. Crozier are and were during all times hereinafter mentioned the members for the time being of the Board of Estimates of Baltimore City, and the defendants

J. George Eierman, Walter A. McClean and Daniel B. Chambers are and at all times hereinafter mentioned were the members for the time being of the Board of Supervisors of Election of Baltimore City; and the said defendants together constitute the board, hereinafter referred to as the Voting Machine Board, created by Section 224A of Article 33 of the Code as hereinafter set forth; that the defendant, Automatic Voting Machine Corporation, is a foreign corporation engaged in the manufacture and sale of voting machines.

(2) That the General Assembly of Maryland at its January session, in the year 1937, duly enacted an Act, hereinafter sometimes referred to as the Voting Machine Act, being Chapter 94 of the Acts of 1937, approved March 24, 1937, under which amongst other things it altered and amended Article 33 of the Annotated Code of Maryland by repealing and re-enacting Section 224 and Section 224A of the said article and adding nineteen new sections to the said article known as 224E to 224W inclusive.

(3) That Section 224A of Article 33 of the Code, as so altered and amended, reads in part as follows:

> "A Board composed of the members for the time being of the Board of Estimates of Baltimore City and the members for the time being of the Board of Supervisors of Election of Baltimore City is hereby constituted, and is authorized, empowered and directed to purchase a sufficient number of voting machines for use in all polling places throughout the City of Baltimore at all primary, general, special and other elections, held or to be held in said City after the 1st day of January, 1938. The expenses incurred by said Board and the cost of such voting machines shall, upon the requisition of said Board, be audited by the Comptroller of Baltimore City, who shall pay the same by warrant drawn upon the proper officers of said City. Said Board is authorized and empowered to determine by majority vote such specifications supplementary to the specifications hereinafter set forth as it may deem proper for voting machines acquired, or to be acquired, by it, and to select in its discretion the type and make of such voting machines, and, in its discretion, to employ engineers or other skilled persons to advise and aid said Board in the exercise of the powers and duties hereby conferred upon it."

(4) That thereafter the said Voting Machine Board issued its notice of letting specifications, forms of proposal for contracts and bond for the construction and installation of 910 voting machines, a copy of which is attached hereto, marked "Plaintiff's Exhibit No. 1",

and made part hereof.

(5) That thereafter, on or about August 11, 1937, the said bids were publicly opened and read.

(6) That at the time for opening and reading said bids, two sets of alternative bids were opened and read by the said Voting Machine Board, one by the Shoup Voting Machine Corporation (hereinafter referred to as the Shoup Corporation), and one by the Automatic Voting Machine Corporation (hereinafter referred to as the Automatic Corporation).

(7) That the Automatic Corporation, as one of two alternative bids offered to furnish and deliver 910 voting machines known as forty (40) candidate machines of the type and size described in the specifications as Type A Size 1 at $826.95; or a total of $752,524.50; and the Shoup Corporation as one of its four alternative bids offered to furnish and deliver 910 of the said Type A Size 1 machines at $1,047.00 each, or a total of $952,970.00.

(8) That paragraph 47 of the Specifications requires that samples of machines to be bid on be set up in the office of the Supervisors of Election in the Court House, in Baltimore; and prior to submission of said bids Automatic Corporation and Shoup Corporation each installed samples of said forty (40) candidate Type A Size 1 machine in the said office.

(9) That thereafter doubt was expressed before the Voting Machine Board as to whether the Automatic machines tendered by the Automatic Corporation as samples of the machines to be furnished by it under its said bid, complied with the Specifications or with the Election Laws of the State of Maryland; but the defendant Voting Machine Board, despite said objections, passed a resolution in accordance with which it was resolved

> "That the voting machines tendered by the Automatic Voting Machine Corporation are eligible and in all respects qualified for purchase by this Board under the provisions of Chapter 94 of the Laws of Maryland, regular session of 1937, and that the bids of said Automatic Voting Machine Corporation are entitled to be received by this Board as in all respects legal and valid."

and immediately thereafter the said bid of the Automatic Corporation to furnish 910 voting machines "Type A Size 1" at and for the sum of $826.95 each, was accepted, and Howard W. Jackson, Chairman of the said Board, was authorized and directed to execute in behalf of the Board a contract with the Automatic Corporation in the form attached to the Specifications, "said contract to become effective upon the execution and delivery of the bond required by said Specifications"; all as set forth in a resolution of said Board; and on or about the 8th day of September, 1937, the said Voting Machine Board executed a contract with the Automatic Corporation for said machines in accordance with said resolution.

(10) That the type of Automatic forty (40) candidate machine to be furnished by the said Automatic Corporation under the said contract, as demonstrated by the sample machine in the office of the Board of Supervisors of Election of Baltimore City, fails to comply with the general election laws in the following respects, that is to say:

(A) Article 33, Section 224-F (d) of the Code provides that voting machines must

> "(d) Permit each voter to vote, at any election, for any person and for any office for whom and for which he is lawfully entitled to vote, and to vote for as many persons for an office as he is entitled to vote for, including a substantial compliance with the provisions of Section 203 of this Article, and to vote for or against any question which appears upon a ballot-label;"

Section 224-F (i) requires that every voting machine acquired shall

> "(i) Have voting devices for separate candidates and questions, which shall be arranged in separate parallel rows or columns, so that, at any primary election, one or more adjacent rows or columns may be assigned to the candidates of a party, and shall have parallel office columns or rows transverse thereto;"

Section 203 of Article 33 provides in part as follows:

> "203. Every candidate for the nomination for a State office; that is to say, an office filled by the vote of all the registered voters of the State of Maryland, shall be nominated by conventions, the delegates to which shall be elected in accordance with the provisions of this article by the direct vote of the registered voters belonging to the political party of which the candidate is a member, and whose nomination for such office he is seeking; the ballots in such cases shall contain the names of the candidates for public office, delegates to party conventions and managing bodies, executives or executive committee to be voted for as provided

in the aforegoing sections, and in addition thereto and in the same manner the names of all candidates for state offices, who have duly qualified to have their names placed upon such ballot in the manner provided by this article. . . . . .

"In case there are more than two candidates for any State office, there shall be provided on the ballot two squares opposite the name of each of said candidates, which shall be designated from left to right as 'First Choice' and 'Second Choice', respectively, so that each voter may indicate his first and second choice or preference by placing a cross-mark in the appropriate squares as aforesaid. Such cross-marks to be made in the same manner as other cross-marks for voting at primary elections under this article for Baltimore City and the several counties of this State, respectively."

(B) That the said sample voting machine furnished by the Automatic Corporation provides as an example for operation of the machine in a primary election for Governor, a case where there are three candidates of a particular party and the voting arrangement is made in accordance with a diagram, a copy of which is attached hereto and made part hereof, marked "Plaintiff's Exhibit No. 2"; that three vote indicators are located immediately above each candidates name and on each ballot label under the other indicators to the extreme left is the statement "First choice only"; that immediately below the second vote indicator appears the name of one of the other candidates with the notation "Second choice" and immediately below the third vote indicator appears the name of the remaining candidate also with the notation "Second choice"; that the machine permits a voter to vote first choice by manipulating the first choice vote indicator only, but if on the other hand the voter desires to vote both a first and second choice, he can only do so by manipulating the second or third choice indicator depending upon which name he desires for second choice; that by manipulating either second or third choice indicator appearing above the parallel column in which a particular candidate's name is inserted such a manipulation will automatically indicate the voters choice for that candidate for first choice and for one of the other candidates for second choice, depending upon which of the other candidates name appears immediately beneath such vote indicator;

(C) That the said method of voting fails to provide

a legal method of voting in that it permits and requires group voting and does not provide a separate vote indicator for each choice made by the voter in violation of Article 33, Section 224-F (i) above quoted.

(D) That the said voting device is also confusing to the voter and illegal in that it contains the name of each candidate in several different ballot labels on the face of said board and under several different vote indicators; in violation of the above quoted provision of Article 33, Section 203 which provides that the name of the candidate shall appear only once and that two separate squares be provided opposite his name for the designation of a first or second choice.

(E) That not only does the said voting machine offered by the Automatic Corporation under its said bid, as demonstrated by its sample machine, fail to comply with the Election Laws as hereinbefore set forth, but also said machine fails to comply with the Specifications in that by paragraph 44 thereof said machine is required to have nine rows of levers or devices containing forty voting devices in each row for voting nine different political parties, or a total of three hundred and sixty voting levers or devices; whereas the sample submitted has only eight rows of voting levers or devices containing forty in each row or three hundred and twenty voting levers or devices in all; and the said award of the contract to the Automatic Corporation is therefore invalid and void.

(11) That under the provisions of Section 224A of the Code heretofore quoted, the Voting Machine Board is required to purchase voting machines for use in all polling places throughout the City of Baltimore at all primary, general and all other special elections held or to be held in said City after January, 1938; that the next general election to be held in Baltimore will be the general election on the 7th day of November, 1938, and if primary elections are necessary they must be held between the 8th and the 15th day of September, 1938; that under paragraph 39 of the Specifications the contractor is required to

deliver said machines as follows:

> "Two hundred (200) on or before March 1, 1938; two hundred (200) more on or before April 1, 1938; two hundred (200) more on or before May 1, 1938; and the balance of three hundred and ten (310) on or before July 1, 1938."

(12) That plaintiff is informed and believes and alleges that the manufacturer of the machines will require substantially the said amount of time to manufacture and install said machines; and plaintiff is informed and alleges that prior to any election using said machines it will be necessary for the Board of Supervisors of Election to instruct the various clerks and judges of election and the voting public with regard to their operation, and that this will be impossible until delivery of a large number of said machines.

(13) That if the Automatic forty (40) candidate machines which the Voting Machine Board proposes to purchase are not constructed in conformity with the election laws, or if further delay should be caused by litigation concerning the legality of the machines at a later time, the Board of Supervisors of Election will be seriously handicapped and possibly prevented from making installation of said machines within the time required by the law for use in the primary and general elections in 1938 and serious confusion in the said elections will result.

(14) That if the said machines do not conform to the election laws and if the contract for the said machines is illegal or void, the City will incur large expense, to wit, $752,524.50 which will be wholly lost to it; and the City may either be put to the expense of holding another election or the votes cast in said City be declared wholly void; and the plaintiff says that the plaintiff and other taxpayers of the City of Baltimore will suffer irreparable damage unless this Honorable Court shall grant the relief herein prayed.

TO THE END THEREFORE:

(1) That this Honorable Court declare that the said voting machines to be furnished by the said Automatic Voting Machine Corporation are not in compliance with the election laws, and that use

thereof for elections in this State will be illegal.

(2) That this Honorable Court declare the said contract entered into between the said Automatic Voting Machine Corporation and the Voting Machine Board illegal and void, and order cancellation thereof.

(3) That the defendant Voting Machine Board be restrained from proceeding with the performance of said contract, and from issuing warrants drawn upon the officers of the defendant Mayor and City Council of Baltimore for payment for said machines.

(4) That the Board of Supervisors of Election of Baltimore City be restrained from installing the said machines for use in the 1938 elections; primary and general elections.

(5) That the defendant, the Mayor and City Council of Baltimore be restrained from making payment on warrants drawn in payment of said machines under said aforementioned contract.

May it please your Honor to grant unto your Orator the writ of subpoena, directed to the said Howard W. Jackson, George Sellmayer, R. Walter Graham, R. E. Lee Marshall, and Bernard L. Crozier, constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and J. George Eierman, Walter A. McClean, and Daniel B. Chambers, constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and Mayor and City Council of Baltimore, and the Automatic Voting Machine Corporation, all residing in said Baltimore City, commanding them to be and appear in this Court at some certain day, to be named therein, and answer the premises and abide by and perform such decree as may be passed therein.

AND as in duty bound, etc.

CHARLES G. PAGE
Solicitor

WILLIAM S. NORRIS

STATE OF MARYLAND,)
) SS:
CITY OF BALTIMORE,)

I hereby certify, that on this 9th day of September, 1937, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared William S. Norris, the plaintiff in the foregoing bill of complaint, and he made oath in due form of law that the matters and facts set forth therein are true to the best of his knowledge, information and belief.

As witness my hand and Notarial Seal.

M. CAROL FLEAGLE
Notary Public

(Notarial Seal)

ORDER

On the foregoing bill of complaint, it is, this 9th day of September 1937, by the CIRCUIT COURT NO. 2 OF BALTIMORE CITY, ORDERED that the defendants and each of them show cause if any they have why relief should not be granted as prayed therein on or before the 24th day of September, 1937; provided a copy of the said bill of complaint and this order be served upon the said defendants or their counsel on or before the 14th day of September, 1937.

Edwin T. Dickerson
Judge

TRUE COPY TEST.
John Pleasants
CLERK.

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WILLIAM S. NORRIS, Plaintiff, -vs- HOWARD W. JACKSON, GEORGE SELLMAYER, R. WALTER GRAHAM, R. E. LEE MARSHALL, and BERNARD L. CROZIER, Constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and J. GEORGE EIERMAN, WALTER A. McCLEAN, and DANIEL B. CHAMBERS, Constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and MAYOR AND CITY COUNCIL OF BALTIMORE, THE AUTOMATIC VOTING MACHINE CORPORATION, Defendants.	: : : : : : : : : : :	IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

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TO THE HONORABLE, THE JUDGE OF SAID COURT:

The bill of complaint of William S. Norris, plaintiff, respectfully represents:

(1) That plaintiff is a citizen and voter resident in the City of Baltimore, State of Maryland, and a taxpayer in said City and State, and brings this suit on behalf of himself and of all other taxpayers of the said City who may become parties to this proceeding and contribute to the

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expenses of this suit.

That defendants, Howard W. Jackson, George Sellmayer, R. Walter Graham, R. E. Lee Marshall, and Bernard L. Crozier are and were during all times hereinafter mentioned the members for the time being of the Board of Estimates of Baltimore City, and the defendants J. George Eierman, Walter A. McClean and Daniel B. Chambers are and at all times hereinafter mentioned were the members for the time being of the Board of Supervisors of Election of Baltimore City; and the said defendants together constitute the board, hereinafter referred to as the Voting Machine Board, created by Section 224A of Article 33 of the Code as hereinafter set forth; that the defendant, Automatic Voting Machine Corporation, is a foreign corporation engaged in the manufacture and sale of voting machines.

(2) That the General Assembly of Maryland at its January session, in the year 1937, duly enacted an Act, hereinafter sometimes referred to as the Voting Machine Act, being Chapter 94 of the Acts of 1937, approved March 24, 1937, under which amongst other things it altered and amended Article 33 of the Annotated Code of Maryland by repealing and re-enacting Section 224 and Section 224A of the said article and adding nineteen new sections to the said article known as 224E to 224W inclusive.

(3) That Section 224A of Article 33 of the Code, as so altered and amended, reads in part as follows:

"A Board composed of the members for the time being of the Board of Estimates of Baltimore City and the members for the time being of the Board of Supervisors of Election of Baltimore City is hereby constituted, and is authorized, empowered and directed to purchase a sufficient number of voting machines for use in all polling places throughout the City of Baltimore at all primary, general, special and other elections, held or to be held in said City after the 1st day of January, 1938. The expenses incurred by said Board and the cost of such voting machines shall, upon the requisition of said Board, be audited by the Comptroller of Baltimore City, who shall pay the same by warrant drawn upon the proper officers of said City. Said Board is authorized and empowered to determine by majority vote such specifications supplementary to the specifications hereinafter set forth as it may deem proper for voting machines acquired, or to be

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> acquired, by it, and to select in its discretion the type and make of such voting machines, and, in its discretion, to employ engineers or other skilled persons to advise and aid said Board in the exercise of the powers and duties hereby conferred upon it."

(4) That thereafter the said Voting Machine Board issued its notice of letting specifications, forms of proposal for contracts and bond for the construction and installation of 910 voting machines, a copy of which is attached hereto, marked "Plaintiff's Exhibit No. 1", and made part hereof.

(5) That thereafter, on or about August 11, 1937, the said bids were publicly opened and read.

(6) That at the time for opening and reading said bids, two sets of alternative bids were opened and read by the said Voting Machine Board, one by the Shoup Voting Machine Corporation (hereinafter referred to as the Shoup Corporation), and one by the Automatic Voting Machine Corporation (hereinafter referred to as the Automatic Corporation).

(7) That the Automatic Corporation, as one of two alternative bids offered to furnish and deliver 910 voting machines known as forty (40) candidate machines of the type and size described in the specifications as Type A, Size 1 at $826.95; or a total of $752,524.50; and the Shoup Corporation as one of its four alternative bids offered to furnish and deliver 910 of the said Type A Size 1 machines at $1,047.00 each, or a total of $952,770.00.

(8) That paragraph 47 of the Specifications requires that samples of machines to be bid on be set up in the office of the Supervisors of Election in the Court House, in Baltimore; and prior to submission of said bids Automatic Corporation and Shoup Corporation each installed samples of said forty (40) candidate Type A Size 1 machine in the said office.

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(9) That thereafter doubt was expressed before the Voting Machine Board as to whether the Automatic machines tendered by the Automatic Corporation as samples of the machines to be furnished by it under its said bid, complied with the Specifications or with the Election Laws of the State of Maryland; but the defendant Voting Machine Board, despite said objections, passed a resolution in accordance with which it was resolved -

> "That the voting machines tendered by the Automatic Voting Machine Corporation are eligible and in all respects qualified for purchase by this Board under the provisions of Chapter 94 of the Laws of Maryland, regular session of 1937, and that the bids of said Automatic Voting Machine Corporation are entitled to be received by this Board as in all respects legal and valid."

and immediately thereafter the said bid of the Automatic Corporation to furnish 910 voting machines "Type A Size 1" at and for the sum of $826.95 each, was accepted, and Howard W. Jackson, Chairman of the said Board, was authorized and directed to execute in behalf of the Board a contract with the Automatic Corporation in the form attached to the Specifications, "said contract to become effective upon the execution and delivery of the bond required by said Specifications"; all as set forth in a resolution of said Board; and on or about the 8th day of September, 1937, the said Voting Machine Board executed a contract with the Automatic Corporation for said machines in accordance with said resolution.

(10) That the type of Automatic forty (40) candidate machine to be furnished by the said Automatic Corporation under the said contract, as demonstrated by the sample machine in the office of the Board of Supervisors of Election of Baltimore City, fails to comply with the general election laws in the following respects, that is to say:

(A) Article 33, Section 224-F (d) of the Code provides that voting machines must -

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"(d) Permit each voter to vote, at any election, for any person and for any office for whom and for which he is lawfully entitled to vote, and to vote for as many persons for an office as he is entitled to vote for, including a substantial compliance with the provisions of Section 203 of this Article, and to vote for or against any question which appears upon a ballot-label;"

Section 224-F (i) requires that every voting machine acquired shall -

"(i) Have voting devices for separate candidates and questions, which shall be arranged in separate parallel rows or columns, so that, at any primary election, one or more adjacent rows or columns may be assigned to the candidates of a party, and shall have parallel office columns or rows transverse thereto;"

Section 203 of Article 33 provides in part as follows:

"203. Every candidate for the nomination for a State office; that is to say, an office filled by the vote of all the registered voters of the State of Maryland, shall be nominated by conventions, the delegates to which shall be elected in accordance with the provisions of this article by the direct vote of the registered voters belonging to the political party of which the candidate is a member, and whose nomination for such office he is seeking; the ballots in such cases shall contain the names of the candidates for public office, delegates to party conventions and managing bodies, executives or executive committee to be voted for as provided in the aforegoing sections, and in addition thereto and in the same manner the names of all candidates for state offices, who have duly qualified to have their names placed upon such ballot in the manner provided by this article * * * *

"In case there are more than two candidates for any State office, there shall be provided on the ballot two squares opposite the name of each of said candidates, which shall be designated from left to right as 'First Choice' and 'Second Choice', respectively, so that each voter may indicate his first and second choice or preference by placing a cross-mark in the appropriate squares as aforesaid. Such cross-marks to be made in the same manner as other cross-marks for voting at primary elections under this article for Baltimore City and the several counties of this State, respectively."

(B)That the said sample voting machine furnished by the Automatic Corporation provides as an example for operation of the machine in a primary election for Governor, a case where there are three candidates of a particular party and the voting arrangement is made in accordance with a diagram, a copy of which is attached hereto and made part hereof,

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marked "Plaintiff's Exhibit No. 2"; that three vote indicators are located immediately above each candidate's name and on each ballot label under the other indicators to the extreme left is the statement "First Choice Only"; that immediately below the second vote indicator appears the name of one of the other candidates with the notation "Second Choice" and immediately below the third vote indicator appears the name of the remaining candidate also with the notation "Second Choice"; that the machine permits a voter to vote first choice by manipulating the first choice vote indicator only, but if on the other hand the voter desires to vote both a first and second choice, he can only do so my manipulating the second or third choice indicator depending upon which name he desires for second choice; that by manipulating either second or third choice indicator appearing above the parallel column in which a particular candidate's name is inserted such a manipulation will automatically indicate the voter's choice for that candidate for first choice and for one of the other candidates for second choice, depending upon which of the other candidate's name appears immediately beneath such vote indicator;

(C) That the said method of voting fails to provide a legal method of voting in that it permits and requires group voting and does not provide a separate vote indicator for each choice made by the voter in violation of Article 33, Section 224-F (i) above quoted.

(D) That the said voting device is also confusing to the voter and illegal in that it contains the name of each candidate in several different ballot labels on the face of said board and under several different vote indicators; in violation of the above quoted provision of Article 33, Section 203 which provides that the name of the candidate shall appear only once and that two separate squares be provided opposite his name for the designation of a first or second choice.

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(E) That not only does the said voting machine offered by the Automatic Corporation under its said bid, as demonstrated by its sample machine, fail to comply with the Election Laws as hereinbefore set forth, but also said machine fails to comply with the Specifications in that by paragraph 44 thereof said machine is required to have nine rows of levers or devices containing forty voting devices in each row for voting nine different political parties, or a total of three hundred and sixty voting levers or devices; whereas the sample submitted has only eight rows of voting levers or devices containing forty in each row or three hundred and twenty voting levers or devices in all; and the said award of the contract to the Automatic Corporation is therefore invalid and void.

(11) That under the provisions of Section 224A of the Code heretofore quoted, the Voting Machine Board is required to purchase voting machines for use in all polling places throughout the City of Baltimore at all primary, general and all other special elections held or to be held in said City after January, 1938; that the next general election to be held in Baltimore will be the general election on the 7th day of November, 1938, and if primary elections are necessary they must be held between the 8th and the 15th day of September, 1938; that under paragraph 39 of the Specifications the contractor is required to deliver said machines as follows:

> "Two hundred (200) on or before March 1, 1938; two hundred (200) more on or before April 1, 1938; two hundred (200) more on or before May 1, 1938; and the balance of three hundred and ten (310) on or before July1, 1938."

(12) That plaintiff is informed and believes and alleges that the manufacturer of the machines will require substantially the said amount of time to manufacture and install said machines; and plaintiff is informed and alleges that prior to any election using said machines it will be

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necessary for the Board of Supervisors of Election to instruct the various clerks and judges of election and the voting public with regard to their operation, and that this will be impossible until delivery of a large number of said machines.

(13) That if the Automatic forty (40) candidate machines which the Voting Machine Board proposes to purchase are not constructed in conformity with the election laws, or if further delay should be caused by litigation concerning the legality of the machines at a later time, the Board of Supervisors of Election will be seriously handicapped and possibly prevented from making installation of said machines within the time required by the law for use in the primary and general elections in 1938 and serious confusion in the said elections will result.

(14) That if the said machines do not conform to the election laws and if the contract for the said machines is illegal or void, the City will incur large expense, to wit, $752,524.50 which will be wholly lost to it; and the City may either be put to the expense of holding another election or the votes cast in said City be declared wholly void; and the plaintiff says that the plaintiff and other taxpayers of the City of Baltimore will suffer irreparable damage unless this Honorable Court shall grant the relief herein prayed.

TO THE END THEREFORE:

(1) That this Honorable Court declare that the said voting machines to be furnished by the said Automatic Voting Machine Corporation are not in compliance with the election laws, and that use thereof for elections in this State will be illegal.

(2) That this Honorable Court declare the said contract entered into between the said Automatic Voting Machine Corporation and the Voting Machine Board illegal and void, and order cancellation thereof.

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(3) That the defendant Voting Machine Board be restrained from proceeding with the performance of said contract, and from issuing warrants drawn upon the officers of the defendant Mayor and City Council of Baltimore for payment for said machines.

(4) That the Board of Supervisors of Election of Baltimore City be restrained from installing the said machines for use in the 1938 elections; primary and general elections.

(5) That the defendant, the Mayor and City Council of Baltimore be restrained from making payment on warrants drawn in payment of said machines under said aforementioned contract.

May it please your Honor to grant unto your Orator the writ of subpoena, directed to the said Howard W. Jackson, George Sellmayer, R. Walter Graham, R. E. Lee Marshall, and Bernard L. Crozier, constituting the members of the Board of Estimates of Baltimore City; and constituting with the Board of Supervisors of Election of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and J. George Eierman, Walter A. McClean, and Daniel B. Chambers, constituting the members of the Board of Supervisors of Election of Baltimore City; and constituting with the Board of Estimates of Baltimore City the Voting Machine Board created by Chapter 94, of the Laws of Maryland, regular session of 1937, and Mayor and City Council of Baltimore, and the Automatic Voting Machine Corporation, all residing in said Baltimore City, commanding them to be and appear in this Court at some certain day, to be named therein, and answer the premises and abide by and perform such decree as may be passed therein.

AND as in duty bound, etc.

(signed) CHARLES G. PAGE
Solicitor

(signed) WILLIAM S. NORRIS

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STATE OF MARYLAND,)
(SS:
CITY OF BALTIMORE,)

I HEREBY CERTIFY, That on this 9th day of September, 1937, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared William S. Norris, the plaintiff in the foregoing bill of complaint, and he made oath in due form of law that the matters and facts set forth therein are true to the best of his knowledge, information and belief.

AS WITNESS my hand and Notarial Seal.

(signed) M. CAROL FLEAGLE
Notary Public

(Notarial Seal)

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<u>O R D E R</u>

On the foregoing bill of complaint, it is this 9th day of September, 1937, by the CIRCUIT COURT NO. 2 OF BALTIMORE CITY, O R D E R E D That the defendants and each of them show cause if any they have why relief should not be granted as prayed therein on or before the 24th day of September, 1937; provided a copy of the said bill of complaint and this order be served upon the said defendants or their counsel on or before the 14th day of September, 1937.

(signed) EDWIN T. DICKERSON,
Judge

(TRUE COPY TEST.

(signed) JOHN PLEASANTS
Clerk

VOTING MACHINE CASES

BUREAU OF CONTROL AND ACCOUNTS

BALTIMORE

October 29, 1937

Mr. Thomas G. Young
City Collector
Municipal Building
City

Dear Sir:

Enclosed please find cash in the amouht of $4.80, covering a refund on bills paid for court costs to John Pleasants, Clerk, Circuit Court #2.

This represents attorney's appearance fees which should have been deducted when bill was paid.

Please deposit and credit to Appropriation Account 1.88.

Yours very truly,

H. Fallin

BUREAU OF DISBURSEMENTS

Meez

WCS:SL

Encl.

CC: Mr. R. E. Lee Marshall ✓ voucher 33046