RECORDS

& BRIEFS

JANUARY TERM

1938

1-4

Record - Nos. 3 and 4

HOWARD W. JACKSON, ETC., ET AL.,
VS.
WILLIAM S. NORRIS.

CHARLES C. G. EVANS,
Solicitor for Mayor & City Council of Baltimore,

PAUL F. DUE,
Solicitor for Voting Machine Board,

ARTHUR W. MACHEN,
WENDELL D. ALLEN,
ARMSTRONG, MACHEN & ALLEN,
Solicitors for the Automatic Voting Machine Corporation,
For Appellants and Cross-Appellees.

CHARLES G. PAGE,
For Appellee and Cross-Appellant.

HOWARD W. JACKSON, ETC., ET AL.,
VS.
HATTIE B. DALY.

CHARLES C. G. EVANS,
Solicitor for Mayor & City Council of Baltimore and R. Walter Graham,

PAUL F. DUE,
Solicitor for Voting Machine Board,

ARTHUR W. MACHEN,
WENDELL D. ALLEN,
ARMSTRONG, MACHEN & ALLEN,
Solicitors for the Automatic Voting Machine Corporation,
For Appellants and Cross-Appellees.

ISAAC LOBE STRAUS,
WILLIS R. JONES,
For Appellee and Cross-Appellant.

IN THE

Court of Appeals

OF MARYLAND

APPEALS AND CROSS-APPEALS IN TWO CASES
IN ONE RECORD
FROM THE
CIRCUIT COURT NO. 2
OF
BALTIMORE CITY

APPEAL TO THE
JANUARY TERM, 1938,
OF THE
COURT OF APPEALS
OF MARYLAND

Filed October 16, 1937.

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TRANSCRIPT OF RECORD

FROM THE
CIRCUIT COURT NO. 2 OF BALTIMORE CITY

IN THE CASES OF
HOWARD W. JACKSON, ETC., ET AL.,

VS.

WILLIAM S. NORRIS

AND

HOWARD W. JACKSON, ETC., ET AL.,

VS.

HATTIE B. DALY

APPEALS OF DEFENDANTS AND CROSS APPEALS OF PLAINTIFF IN EACH CASE

(APPEALS AND CROSS-APPEALS IN TWO CASES IN ONE RECORD)

TO THE
COURT OF APPEALS OF MARYLAND

CHARLES C. G. EVANS,
Solicitor for Mayor and City Council of Baltimore and R. Walter Graham,

PAUL F. DUE,
Solicitor for Voting Machine Board,

ARTHUR W. MACHEN,
WENDELL D. ALLEN,
ARMSTRONG, MACHEN & ALLEN,
Solicitors for Automatic Voting Machine Corporation,
For Appellants and Cross-Appellees.

CHARLES G. PAGE,
For Appellee and Cross-Appellant Norris,

ISAAC LOBE STRAUS,
WILLIS R. JONES,
For Appellee and Cross-Appellant Daly.

DOCKET ENTRIES IN WILLIAM S. NORRIS V. HOWARD W. JACKSON, ET AL.

Charles G. Page	*William S. Norris*
	No. 22628 A
Charles C. G. Evans R. E. Lee Marshall Paul F. Due	*Howard W. Jackson* *George Sellmayer* *R. W. Graham* *R. E. Lee Marshall* *Bernard T. 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*
Charles T. Le Viness III Herbert R. O'Conor Paul F. Due	*J. George Eierman* *Walter A. McClean* *and Daniel B. Chambers constituting 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*
R. E. Lee Marshall	*Mayor and City Council of Baltimore*
Arthur W. Machen Wendell D. Allen Armstrong, Machen & Allen	*The Automatic Voting Machine Corporation.*

9 September 1937—Bill of Complaint to have voting machines declared illegal, to have contract declared illegal and void and for an Injunction etc (1) and plaintiffs Exhibits No. 1 & 2 fd.

9 September 1937—Subpoena issued (3) (Summoned as marked).

9 September 1937—Subpoena issued (Summoned as marked).

9 September 1937—Order of Court thereon directing defendants show cause on or before the 24th day of September 1937 (5) fd.

Copy issued Served on defendants.

24 September 1937—Appearance of the Mayor and City Council of Baltimore by Charles C. G. Evans Esq. and its answer to the Bill of Complaint and Exhibits No. 1 annexed (6) fd.

24 September 1937—Appearance of J. George Eierman, Walter A. McClean and Daniel B. Chambers constituting the Board of Supervisors of Election by Herbert R. O'Conor and Charles T. Le Viness III, and their answer to the Bill of Complaint (7) fd.

24 September 1937—Appearance of the Automatic Voting Machine Corporation a body corporate of the State of Delaware by Armstrong Machen & Allen and its answer to the Bill of Complaint (8) and Automatic Exhibit Plan B (9) fd.

24 September 1937—Appearance 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, constituting the Voting Machine Board by Paul F. Due, Esq. and their answer to the Bill of Complaint (10) fd. and Voting Machine Board's Exhibit No. 1 (11) fd. 2 (12) 3 (13) 4 (14) fd.

* * * * * *

2 October 1937—Petition of Plaintiff for leave to amend his Bill of Complaint and Order of Court thereon granting the same and Plaintiffs Exhibit No. 1 A annexed (16) fd.

4 October 1937—Answer of the Automatic Voting Machine Corporation to the amendments of the Bill of Complaint (17) fd.

4 October 1937—Answer of the Mayor and City Council of Baltimore to the amendments to the Bill of Complaint (18) fd.

4 October 1937—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 constituting the Voting Machine Board to amendments to the Bill of Complaint (19) fd.

11 October 1937—Stipulation (20) fd.

11 October 1937—Opinion (21) fd.

11 October 1937—Testimony taken in open Court (22) fd.

14 October 1937—Decree (23) fd.

15 October 1937—Appeal of the Automatic Voting Machine Corporation to the Court of Appeals of Maryland from decree of this Court dated October 14, 1937 (24) fd.

15 October 1937 — Appeal 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, constituting the Voting Machine Board to the Court of Appeals of Maryland from decree of this Court dated October 14, 1937 (25) fd.

15 October 1937—Cross Appeal of William S. Norris, to the Court of Appeals of Maryland from Decree of this Court dated October 14, 1937 (26) fd.

16 October 1937—Appeal of the Mayor and Council of Baltimore to the Court of Appeals of Maryland from decree of this Court dated October 14, 1937 (27) fd.

BILL OF COMPLAINT AND ORDER.

(Filed 9th September, 1937.)

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 $952,770.00.

(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 machines 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 candiates 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 and in several rows and columns; 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. See Sec. 63 (made applicable by 224 (a).)

(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 devises 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 devises 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 8th 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.

(S) WILLIAM S. NORRIS,
CHARLES G. PAGE,
Solicitor.

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.

Plaintiffs' Exhibit No. 1, being proposal specifications, etc., attached to Bill of Complaint, omitted. These exhibits are similar to Stipulation Exhibit No. 6, Record, page 147.

Plaintiffs' Exhibit No. 2 being Plan A, omitted as similar to Stipulation Exhibit No. 3A, Record, page 165.

AMENDMENTS TO BILL OF WILLIAM S. NORRIS.

(Filed 2nd October, 1937.)

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:

* * * * *

(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.

* * * * * *

(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.

* * * * * *

AND, as in duty bound, etc.

CHARLES G. PAGE,
Solicitor for Plaintiff.

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

SAMUEL K. DENNIS,
Judge.

October 2-37.

Plaintiff's Exhibit No. 1 A, being Rules and Regulations of Central Purchasing Bureau, omitted (see Record page 222).

ANSWER.

(Filed 24th September, 1937.)

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 Dan-

iel 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, to the Bill of Complaint filed herein against these Defendants and others and to the show cause order passed by this Honorable Court on September 9, 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 that 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 Voting Machine 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 election 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, these defendants respectfully refer the Court to paragraph 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 paragraphs 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 further and affirmative defense to said Bill of Complaint, these defendants 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 Corporation, one of the defendants herein, which had been in use in general elections since 1928. That said 50 voting machines have not been used heretofore in primary elections for the reason that prior to the passage of the Voting Machine Act in 1937, it was necessary under the provisions of Section 86 of Article 33 to preserve the ballot for four months after election, which would run beyond the date of the following general election. So satisfactory had those machines proven to be, however, 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 Election 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." Section 244A, 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 Corporation, 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 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 interest.

Section 224A of Chapter 94, creating the board and investing this authority in them, 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. * * * 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. * * *

(11) That although there was no provision in said Chapter 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 Corporation, the defendant herein, and the Shoup Voting Machine Corporation. Of these two companies the Automatic Corporation is the older and is a pioneer in the business, having manufactured voting machines for many years, which are in use in over 3,500 towns and cities in the United States. The Shoup Corporation is of comparatively recent origin and does not itself manufacture the voting machines it sells. The Shoup Corporation has voting machines in operation in only three places, namely, the State of Rhode Island, and the City of Philadelphia, in which city there are used voting machines of both Corporations, the majority of which are those of the Automatic Corporation, and the town of Teaneck, New Jersey.

(12) That upon opening bids, it was found that the prices bid by the Automatic Corporation for both types of the manually operated machines were more than 20% lower than the bids of the Shoup Corporation on similar machines. The bid of the Automatic Corporation 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 Corporation for a similar machine was $1,047.00 each, or a total of $952,770.00. The purchase of the Automatic Corporation's machine therefore, represents a saving of $200,245.50 as against the purchase of the Shoup Corporation's machine.

(13) That after the opening of the bids and the disclosure of the Automatic Corporation as the low bidder, the Shoup Corporation asked the Voting Machine Board for a hearing, claiming certain defects or irregularities in the Automatic Corporation's machine which it was con-

tended invalidated the same. A hearing was granted the Shoup Corporation 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 Corporation's objections were as follows:

(A) That the sample voting machine, as set up by the Automatic Corporation 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 machines 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 Corporation 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 Corporation, the representatives of the Automatic Corporation 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 12 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 upon the sample machine of the Automatic Corporation 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 Corporation offered to make a re-arrangement would comply with the election laws; that the Voting Machine Board accordingly passed a resolution on August 26, 1937, requesting an opinion of the Attorney General on this subject, copy of which is filed herewith, marked "Voting Machine Board's 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 Board's 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 Corporation proposed to re-arrange upon its machine, if desired by the Voting Machine Board, is filed herewith, marked "Voting Machine Board's 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 Corporation 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 Board's Exhibit No. 4", is filed herewith 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 Corporation for 910 of its voting machines of the nine-party forty (40) candidate type, said Voting Machine Board having concluded that even if it be assumed that the ballot set up upon the sample machine of the Automatic Corporation be invalid, that nevertheless, the re-arrangement of the bal-

lot as tendered by the Automatic Corporation, designated "Plan B", 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 Corporation 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 Corporation, said resolution, reading as follows:

"RESOLVED, that 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 Corporation, 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 all 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, any and all repairs to and renewals of and replacement 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 the 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 bidder to set up ''May be subjected to such

tests as the said 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 section 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 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."

(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 concerned, we have put a fair price on the machine and think we have proven that conclusion. We are on record, 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 form or arrangement of the ballot on the face of the sample Voting Machine of the Automatic Corporation, if indeed, such sample ballot should be held defective, was in any way unfair to either the Shoup Corporation, or the taxpayers of Baltimore City. The Voting Machine Board, under its broad powers contained in the Voting Machine Act, could, if it had seen fit to do so, have rejected both bids and then made a contract with the Automatic Corporation 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 Corporation 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 re-

spects with the Voting Machine Act and other election laws, 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 requirements of our election laws.

(22) That while it might not be necessary for this Court to pass upon the validity of a machine arranged and equipped to vote a ballot under "Plan A", in view of the fact that "Plan B" is conceded to be lawful and the further fact that the Voting Machine Board has ample authority and discretion to make a selection, in view of the well established principle that Courts will not assume that a Board or administrative body will act unlawfully if it is possible for it to proceed in a lawful manner, nevertheless this Board welcomes this suit and the prospect of a determination by the Courts of the validity of "Plan A". The said Voting Machine Act requires the use of voting machines throughout Baltimore City at all elections held after January 1, 1938, which no doubt means that said machines must be ready for a primary election in September, 1938. For this reason, Section 39 of the specifications, provides that the machines shall be delivered in installments, the first installment of two hundred to be delivered on or before March 1, 1938, and the last before July 1, 1938. That this Board must therefore elect as soon as possible whether to require said machines to be so arranged and equipped as to vote "Plan A" or "Plan B". In this connection, the Board feels that "Plan A" presents a simple and satisfactory ballot, which it is informed has been used successfully in other jurisdictions in primary elections where first and second choice voting prevails; and ballots can be set up more quickly under "Plan A" than "Plan B". That so far as the validity of "Plan A" is concerned, while the Attorney General has ruled it is invalid, it is clear from his opinion that he regards the question to be a close one. That for full argument of the other view this Board respectfully refers this Court to the answer of the Automatic Voting Machine Corporation filed or to be filed in

this case. That while this Board has the greatest respect for the opinion of the Attorney General it does not concede the invalidity of "Plan A", recognizing that the only body having authority to settle the question is the Courts; and for such reason, as stated above this Board is most anxious to secure a judicial determination of the question whether it can elect to require the Automatic Voting Machine Corporation to furnish machines arranged and equipped to vote "Plan A" or those so arranged and equipped to vote "Plan B," or whether it can only order machines arranged and equipped to vote "Plan B".

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

And as in duty bound, etc.

PAUL F. DUE,

Special Counsel to Voting Machine Board.

HOWARD W. JACKSON,

Chairman, Voting Machine Board.

(Affidavit Annexed.)

Voting Machine Board's Exhibit Nos. 1, 2, 3, and 4 Omitted.

No. 1—Letter Board of Supervisors of Elections of Baltimore City to Attorney General omitted as similar to Stipulation Exhibit No. 2—Record page 152.

No. 2—Resolution omitted, as similar to Stipulation Exhibit No. 2 Record page 156.

No. 3—Copy of Plan B omitted, as similar to Stipulation Exhibit No. 3A Record page 166.

No. 4.—Attorney General's opinion omitted as similar to Stipulation Exhibit No. 3, Record page 157.

(19)

ANSWER.

(Filed 4th October, 1937.)

ANSWER OF THE VOTING MACHINE BOARD TO THE AMENDMENTS OF THE BILL OF COMPLAINT.

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, to the amendments to the Bill of Complaint filed herein by leave of Court on October 4th, 1937, respectfully shows:

(9a). Answering paragraph (9a) of said amended Bill of Complaint, this Board denies that the contract between it and the Automatic Corporation was improperly awarded, and says that said contract was properly awarded and is legal in all respect. This Board denies that said Article 78 of the Code has any relation or application whatever to the contract for the purchase of said voting machines. This Board alleges that by Section 224A of the Voting Machine Act, it is "authorized, empowered and directed to purchase a sufficient number of voting machines" for use in Baltimore City, and that said Section further authorizes and empowers this Board to determine "such specifications supplementary to the specifications hereinafter set forth as it may deem proper for voting machines acquired * * * and to select in its discretion the type and make of such voting machines * * * ". That Section 3 of said Voting Machine Act provides "that all sections of this Article" (Article 33) "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". That this Board is not a state board, within the meaning of said Article 78, nor are voting machines "materials, supplies,

merchandise or articles" as referred to therein, but if they were, the provisions of said Article 78 are wholly inconsistent with those of said Voting Machine Act, and that said Article 78 is repealed to the extent of such inconsistency.

(10) (F). Answering paragraph (10) (F) of said amended bill of complaint, this Board admits the existence of the provisions of the Declaration of Rights, Constitution of Maryland and Voting Machine Act referred to therein, but denies that they entitle voters in the election of public officers to vote for persons selected by him whose names do not appear on the official ballot or ballot label, as alleged therein. This Board admits that the sample voting machine of the Automatic Corporation fails to provide a voting device whereby a voter can exercise such alleged privilege.

Further answering said paragraph of said amended bill of complaint, this Board alleges that the Legislature in 1924 (Acts of 1924, Ch. 581, Sec. 54, Code Art. 33, Sec. 62) revoked the privilege referred to, of personal choice voting, as it had existed under Chapter 2, Sec. 49 of the Extra Session of 1901, and as it had existed under the Acts of 1896, which read as follows:

"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."

That the Legislature, in 1924, neglected, however, to amend Sec. 80 of Article 33, which referred to Section 62 of said Article, as authorizing personal choice voting. That the question of the effect of this change was submitted to Attorney General Robinson, and on May 29, 1926, the Attorney General ruled upon this question, as follows:

"May 29, 1926.

"H. Fillmore Lankford, Esq.,

Attorney at Law,

Princess Anne, Md.

"Dear Mr. Lankford:

The Attorney General has requested me to answer your letter of May 17th, in which you ask for an opinion as to whether or not the voters may now write on the ballot the names of persons for whom they desire to vote, since the passage of Chapter 581 of the Acts of 1924, the general purpose of which was to shorten the ballot by eliminating blank spaces thereon.

This inquiry has been very carefully considered by the Attorney General, and he is of the opinion that it is not now permissible for a voter to write on the ballot the name of any person for whom he may desire to vote. Inasmuch as Section 62 of the Code of 1924, does not authorize the writing of additional names on the ballot by a voter, the provision contained in Section 80 and reading "or other than the name or names of any other candidate written by a voter on the ballot as provided by Section 62" becomes nugatory.

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 space would seem to deprive the voters of none of their constitutional rights.

Very truly yours,

WILLIS R. JONES, Asst. Attorney General."

That said opinion of the Attorney General has been followed from that time to this, and when the question arose, in October, 1936, of whether the names of the candidates of the Union Party could be written in on the ballot at the general election in November, 1936, Attorney General O'Conor ruled that they could not. (Opinions of the At-

torney General, Volume 21, Pp. 354-356). That when specifications were being prepared by this Board, representatives of the Shoup Corporation raised the question of whether the voting machines to be purchased should provide for personal choice voting, and this Board, through the Board of Supervisors of Election of Baltimore City, submitted said queston to the Attorney General, and were advised that the election laws of Maryland did not permit personal choice voting. That in view of the several rulings of the Attorney General, and the long continued acquiesence therein, this Board was of the opinion that to provide for personal choice voting upon the voting machines to be purchased might render the machine invalid. That as a consequence the specifications contained no provision for personal choice voting; and this Board believes that the Automatic Corporation's machine conforms to the specifications in making no provision for personal choice voting. That Section 43 of the specifications, however, provides that "The contractor shall furnish and deliver all of the said voting machines * * * in strict accordance with and to meet the requirements 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 the contract documents. That if, therefore, the Constitution of Maryland, Declaration of Rights, Voting Machine Act, or any of them, guarantee or require personal choice voting, then the said Automatic Corporation is bound by the provisions of said Section 43 of the Specifications to furnish voting machines which will permit personal choice voting.

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

And as in duty bound, etc.

PAUL F. DUE,

Special Counsel to Voting Machine Board.

HOWARD W. JACKSON,

Chairman, Voting Machine Board.

(Affidavit Annexed.)

(8)

ANSWER.

(Filed 24th September, 1937.)

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 specifica-

tions 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 choicé 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, pur-

suant 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 (E) 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 taken stop. 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 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. 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 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 Complant 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.

ARMSTRONG, MACHEN & ALLEN,

Solicitors for Automatic Voting Machine Corporation.

AUTOMATIC VOTING MACHINE CORPORATION.

By SAMUEL C. HAMILTON,

Agent.

(Affidavit Annexed.)

Automatic Voting Machine Exhibit Plan B omitted, as similar to that in Stipulation Exhibit No. 3A, Record page 166.

ANSWER.

(Filed 4th October, 1937.)

ANSWER OF AUTOMATIC VOTING MACHINE CORPORATION TO THE AMENDMENTS OF THE BILL OF COMPLAINT

To the Honorable, the Judge of said Court:

The Answer of Automatic Voting Machine Corporation

to the amendments to the Bill of Complaint filed herein by leave of Court on October 2nd, 1937, respectfully shows:

9a. Answering paragraph 9a of the Amended Bill of Complaint, this Respondent denies that said contract was improperly awarded, and says that said contract was properly awarded and is legal in all respects. This Respondent denies that Art. 78, Sec. 3 of the Code is applicable to this contract for voting machines and says that the Central Purchasing Bureau has no jurisdiction whatever in regard to the awarding of this contract, and that the approval of the Central Purchasing Bureau was and is unnecessary; that the general rules and regulations promulgated by the Central Purchasing Bureau do not control in any way the awarding of this contract; that it was unnecessary to consult the Central Purchasing Bureau in regard to the standards of the voting machines or in any other matter. This Respondent denies that the bond omitted the State of Maryland as one of the obligees, and on the contrary says that the bond of this Respondent, with the Fidelity & Deposit Company of Maryland and the New Amsterdam Casualty Company as sureties thereon, runs in favor of the following obligees: the Board constituted by Ch. 94 of the laws of Maryland, Regular Session of 1937, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election of Baltimore City, and the State of Maryland. This Respondent says that it was unnecessary to have the penalty of the bond determined by the Central Purchasing Bureau, and further

says that said bond is legal and sufficient in every particular.

10 F. Answering paragraph 10 F of the Amended Bill of Complaint, this Respondent says that the Complainant has correctly quoted portions of the Declaration of Rights and of the Constitution of Maryland. This Respondent denies that a voter in Maryland has the privilege of writing-in the name of any person he desires on a ballot which does not appear on the official ballot. This Respondent admits that the sample machine offered by this Respondent does not have thereon the equipment for personal choice voting, better known as "write-in" voting. This Respondent denies that the sample machine is illegal and void, and denies that the use of the 910 machines, being built as per the sample, would be illegal, and on the contrary says that the sample machine and the 910 machines being built under the contract are legal in every particular. Further answering said paragraph, this Respondent says that the Legislature in 1924, (Acts of 1924, Ch. 351, Sec. 54, new Code Art. 33, Sec. 62), revoked the privilege of personal choice voting, or "write-in" voting as it had existed under Ch. 2, Sec. 49 of the Extra Session of 1901, and as it had existed under the Acts of 1896, Ch. 202, Sec. 49, and which read as follows:—

"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."

However, in 1924, the Legislature, while striking out this provision from Sec. 62, neglected to amend Sec. 80 of Art. 33, which also apparently recognized personal choice voting or write-in voting as provided in Sec. 62. In 1927, by Ch. 370, the Legislature repealed and re-enacted said Sec. 80 with amendments and still apparently recognized the right of the voter to exercise personal choice voting as provided in Sec. 62. However, in 1931, by Ch. 120, the Legislature eliminated the provision in said Sec.

80 by striking out the privilege of personal choice voting. This question was passed on by the Attorney General of Maryland in 1926, as follows:

"May 29, 1926.

"H. Fillmore Lankford, Esq.,

Attorney at Law,

Princess Anne, Md.

"Dear Mr. Lankford: The Attorney General has requested me to answer your letter of May 17th, in which you ask for an opinion as to whether or not the voters may now write on the ballot the names of persons for whom they desire to vote, since the passage of Chapter 581 of the Acts of 1924, the general purpose of which was to shorten the ballot by eliminating blank spaces thereon.

"This inquiry has been very carefully considered by the Attorney General, and he is of the opinion that it is not now permissible for a voter to write on the ballot the name of any person for whom he may desire to vote. Inasmuch as Section 62 of the Code of 1924, does not authorize the writing of additional names on the ballot by a voter, the provisions contained in Section 80 and reading 'or other than the name or names of any other candidate written by a voter on the ballot as provided by Section 62' become nugatory.

"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.

Very truly yours,

WILLIS R. JONES, Asst. Attorney General."

The Attorney General of Maryland also definitely ruled in the years 1936 and 1937 that personal choice voting is not permissible in Maryland. The subject mat-

ter of personal choice voting was discussed by the Voting Machine Board and representatives of the Shoup Corporation and the Automatic Corporation prior to the bids, and it was definitely understood that the sample machines should not be equipped for personal choice voting. The sample Automatic machine under the contract, and the 910 machines being built under the contract, therefore, are not equipped for personal choice voting. The contract was made in the light of existing statutes forbidding personal choice voting and in the light of continued opinions by the Attorney General since 1926 that personal choice voting is prohibited, and also in the light of the fact that the Act of 1924, prohibiting personal choice voting, has been accepted in practice throughout the State since that time. For twenty-eight years, from 1896 to 1924, the law had provided for write-in voting, but this experience had demonstrated that it was without any practical effect whatever and was a useless expense and a useless enlargement of the ballot. The Voting Machine Board had an absolute legal right to make a valid and binding contract for machines without write-in voting equipment. The contract price per machine for the 910 machines, of course, would have been higher if write-in voting equipment had been required.

This Respondent, however, is prepared to furnish, and will furnish, at the option of the Voting Machine Board, 910 machines at the said contract price of $826.95 for each machine, with sufficient space to contain the mechanism and equipment for personal choice or write-in voting. This Respondent gave this option to the Voting Machine Board by submitting two types of sample machines, one with space for the write-in equipment and mechanism, and one without such space. The difference between the two types of sample machines is very slight, the one with the said space merely having a slightly higher top. The Voting Machine Board, at its option, may have such slight additional space in the top of the machine if it so desires, or may have the machines without such slight additional space, either of which, under the contract, are to be furnished, and will be furnished, at the said unit contract price of $826.95 per machine. This Respondent, however, desires that the Voting Machine Board promply choose which of the sample types

submitted it desires to have, so as to accommodate this Respondent's factory in the building of said machines, so that they may be delivered within the delivery dates mentioned in the contract.

If this Honorable Court should decree that write-in equipment and mechanism actually must be installed at this time in said machines, then this Respondent will furnish and install such additional write-in equipment and mechanism at this time, charging therefor the sum of $82.00 for such additional equipment and mechanism installed in each machine. The installation of such write-in equipment and mechanism in the said 910 machines at this time would increase the cost of the price per machine from $826.95 to $908.95. If, however, such additional write-in equipment and mechanism should not be ordered at this time, but should be ordered at some future time after the said 910 machines are delivered, then at such future time the cost to the Voting Machine Board for furnishing and installing said write-in equipment and mechanism will be a reasonable amount commensurate with the cost of material and labor at such future time.

And as in duty bound, etc.

ARMSTRONG, MACHEN & ALLEN,
Solicitors for Automatic Voting
Machine Corporation.

RUSSELL F. GRIFFEN,
Vice President of Automatic Voting
Machine Corporation.

(Affidavit Annexed.)

ANSWER.

(Filed 24th September, 1937.)

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 the total bid of the Shoup Voting Machine Corporation for furnishing the voting machines mentioned therein was $952,770.00 instead of $952,970.00, 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 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.

(Affidavit Annexed.)

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(18)

ANSWER.

(Filed 4th October, 1937.)

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 en-

titled 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.

CHARLES G. EVANS,
Deputy City Solicitor of Baltimore City.

ANSWER.

(Filed 24th September, 1937.)

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.

HERBERT R. O'CONOR,
Attorney General.

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.

DOCKET ENTRIES.

In Hattie B. Daly vs. Howard W. Jackson, et al.

Isaac Lobe Straus
Willis R. Jones

Hattie B. Daly, a taxpayer of Baltimore City

No. 22652-A.

Paul F. Due

Howard W. Jackson, Mayor of Baltimore City

George Sellmayer, President of the City Council of Baltimore City

R. Walter Graham, Comptroller of Baltimore City

R. E. Lee Marshall, City Solicitor of Baltimore City and Bernard L. Crozier, City Engineer of Balti-

more City, each and all of said parties being members of and constituting the Board of Estimates of Baltimore City and

Herbert R. O'Conor	*J. George Eierman*
Charles T. LeViness, III.	*Walter A. McClean and Daniel B. Chambers, each and all of said last named three parties being members of and consisting the Board of Supervisors of Elections of Balto. City all of the said members of said Board of Estimates of Balto. City together with all of said members of said Board of Supervisors of Election of Baltimore City being and constituting the Voting Machine Board created by Chapter* 94 *of the Acts of the General Assembly of Maryland of* 1937 *and the*
Charles C. G. Evans	*Mayor and City Council of Baltimore City a municipal corporation of the State of Maryland*
	R. Walter Graham, Comptroller of Balto. City and the
Armstrong, Machen & Allen	*Automatic Voting Machine Corporation, a body corporate*

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18 September, 1937—Bill of Complaint to have award of Contract declared unconstitutional, illegal and void and for an injunction etc. (1) and plaintiff's Exhibits No. 1 (2), 2 (3), 3 (4), 4 (5) and 5 (6).

18 September, 1937—Supoena issued (7 Summoned as marked).

18 September, 1937—Supoena issued (8 Summoned as marked).

18 September, 1937—Order of Court thereon directing defendants show cause on or before the 4th day of October, 1937 (9) fd. Copy issued (Served on defendants as marked).

30 September, 1937—Appearance 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, constituting the Voting Machine Board by Paul F. Due, Esq. and their answer to the Bill of Complaint (10) and Voting Machine Board's Exhibit No. 1 (11), 2 (12) and 3 (13).

1 October, 1937—Appearance of the Mayor and City Council of Baltimore, a municipal corporation of the State of Maryland and R. Walter Graham by Charles C. G. Evans Esq. and their answer to the Bill of Complaint and Exhibit No 1 annexed (14) fd.

1 October, 1937—Appearance of J. George Eierman, Walter A. McClean and Daniel B. Chambers, constituting the Board of Supervisors of Election of Baltimore City by Herbert R. O'Conor and Charles T. LeViness, III. and their Answer to the Bill of Complaint (15) fd.

4 October, 1937—Appearance of the Automatic Voting Machine Corporation a body corporate of the State of Delaware by Armstrong, Machen & Allen and its answer to the Bill of Complaint (16) and Automatic Exhibit Plan A (17) and Plan B (18) fd.

11 October, 1937—Stipulation, opinion and testimony taken in open Court filed in case of Norris vs. Jackson, et al., Docket 46-A 545/1936, No. 22628-A.

14 October, 1937—Decree (19) fd.

15 October, 1937—Appeal on the Automatic Voting Machine Corporation to the Court of Appeals of Maryland from decree of this Court dated October 14, 1937 (20) fd.

15 October, 1937—Appeal 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, constituting the Voting Machine Board to the Court of Appeals of Maryland from decree of this Court dated October 14, 1937 (21) fd.

16 October, 1937—Appeal of the Mayor and City Council of Baltimore and R. Walter Graham, Comptroller of Baltimore City to the Court of Appeals of Maryland from decree of this Court dated October 14, 1937 (22) fd.

16 October, 1937—Cross-Appeal of Hattie B. Daly to the Court of Appeals of Maryland from decree of this Court dated October 14, 1937 (23) fd.

(1-9)

BILL OF COMPLAINT AND ORDER.

(Filed 18th September, 1937.)

In the Circuit Court No. 2 of Baltimore City.

BILL OF COMPLAINT.

To the Honorable Edwin T. Dickerson,

Judge of said Court:

The Bill of Complaint of Hattie B. Daly, a property owner, taxpayer, citizen and resident of the City of Baltimore, filed on her own behalf, and on behalf of all other property-owners and taxpayers of Baltimore City who may care to come into and avail themselves of this suit, respectfully shows:

1. That she, said Hattie B. Daly, the Plaintiff in the above-entitled cause, is a property owner, taxpayer, resident and citizen of the City of Baltimore, in the State of Maryland, and that said Plaintiff, as property owner and

taxpayer, as aforesaid, has paid to the City of Baltimore on her property, No. 1404 Cold Spring Lane in Baltimore City, which is specifically designated in the tax bill of the Plaintiff, filed herewith marked "Plaintiff's Exhibit No. 1" and prayed to be taken as part hereof, the taxes annually levied on said property by said City; that she has paid her taxes in past years as they have been levied on her said property, and she will be required to pay and shall pay again the tax or taxes levied thereon for the municipal purposes of said Baltimore City for the current year; that she has an interest as taxpayer, as aforesaid, in the awarding of municipal contracts and in the expenditure of the monies and funds of said City of Baltimore for supplies, materials, work, etc., purchased and acquired for its use.

To the end that the procedure prescribed by the Charter of the City of Baltimore and the Laws of the General Assembly of Maryland appertaining and relating to said City of Baltimore, may be compiled with, and that said City, in the purchase and acquirement of supplies, materials, work, etc., for its use, shall not be unlawfully subjected to or involved in expenditures which will increase the burden and rate of taxation on the body of property-owners and taxpayers of said Baltimore City, who have to sustain such burden, she, the Plaintiff, has a right to require that the money contributed and paid by her, or which she may contribute and pay in the future, as municipal taxes, for the public use and benefit of said City, shall be spent only for the purpose and in the manner authorized by law so that the tax levy upon the property-owners and taxpayers of said City shall not be improperly or illegally increased by unauthorized or unlawful expenditures for the use or in behalf of said City of Baltimore and that every requirement of law, enacted to protect the expenditures of the public money of said City and to secure the lawfulness of such expenditures, shall be observed and maintained.

2. That the Defendant, the Mayor and City Council of Baltimore, is a public municipal corporation of the State of Maryland empowered by and under Section 14 of its Charter, being Chapter 123 of the Acts of the General Assembly of Maryland of 1898, and supplements and amendments thereto, to contract for any public work

or supplies exceeding in value the sum of five hundred dollars ($500.00), provided, however, that proposals for the same shall be advertised for in two or more daily newspapers in and of the City of Baltimore for not less than ten nor more than twenty days, and that the contract for doing the said work or furnishing said supplies shall be awarded as prescribed and required by said City Charter and the Acts of the General Assembly of Maryland applicable to the work or supplies in question; and that said City Charter and the Act of the General Assembly of Maryland, hereinabove and hereinafter referred to, namely Chapter 94 of the Acts of the General Assembly of Maryland of 1937, require the voting machines, therein referred to, to be purchased and acquired for said City of Baltimore and to be used by it in all elections therein, to be paid for by said City of Baltimore out of its municipal funds under and in accordance with a contract therefor to be awarded upon competitive bidding to the lowest responsible bidder.

3. That the Defendants, Howard W. Jackson, the Mayor of Baltimore City, George Sellmayer, the President of the City Council of Baltimore City, R. Walter Graham, the Comptroller of Baltimore City, R. E. Lee Marshall, the City Solicitor of Baltimore City, and Bernard L. Crozier, the City Engineer of Baltimore City, are and were at all times hereinafter mentioned and referred to, 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 were at all times hereinafter mentioned and referred to, the Members, for the time being, of the Board of Supervisors of Elections of Baltimore City, and that all of said Members of said Board of Estimates and all of said Members of said Supervisors of Elections, together are and constitute the Board herein and hereinafter referred to as the Voting Machine Board, created by Section 224-A of Article 33 of the Code of Public General Laws of Maryland as said Section 224-A was enacted by Chapter 94 of the Acts of the General Assembly of Maryland of 1937, as hereinafter more particularly set forth.

The Defendant, R. Walter Graham, is the Comptroller of the City of Baltimore, and is herein sued as a party

Defendant, as said Comptroller, referred to in said Section 224-A of Article 33 of the Code of Public General Laws of Maryland.

The Defendant, the Automatic Voting Machine Corporation, is a corporation engaged in the manufacture and sale of voting machines and engaged in and carrying on its said business of selling voting machines in the City of Baltimore, State of Maryland.

4. That the General Assembly of Maryland at its January Session in the year 1937, enacted said Chapter 94 of the Acts of the General Assembly of 1937, repealing and re-enacting Sections 224 and 224-A of Article 33, title, Elections, of the Annotated Code of the Public General Laws of Maryland and adding nineteen new sections, to be known as Sections 224-E to 224-W, inclusive to said Article 33.

Section 224-A of said Article 33, as enacted by said Chapter 94 of the Acts of 1937, 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 first 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. Such voting machines, when purchased, shall be delivered to the

Supervisors of Election of Baltimore City, who shall have custody and control of the same for all the uses and purposes of this Act. The form and arrangement of ballot labels shall be in accordance with the provisions as to ballots contained in Section 63 of Article 33 of Bagby's Annotated Code, Edition of 1924, (or as may herein and hereinafter be prescribed by law), except that the titles of offices shall be arranged horizontally or vertically, and the names of the candidates of each party or principle shall be arranged, under or opposite the proper title, in a horizontal or vertical row or rows for each party or principle; and except that said 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 . . . The titles of the offices on the ballot labels shall be printed in type as large as the space for such office will reasonably permit; there shall be printed below the office title the words 'Vote for One', 'Vote for Two', in accordance with the provisions of Section 63 of Article 33 of Bagby's Annotated Code, Edition of 1924, or such number as the voter is lawfully entitled to vote for out of the whole number of candidates nominated for such office. . . .

No voter, in the use of a voting machine, shall be permitted to occupy more than two minutes while other voters are waiting to use the same. . . .

Wherever possible, the provisions hereof shall be construed in harmony with existing laws."

Section 224-E of said Chapter 94 of the Acts of 1937, defines certain terms used in said Act, including the following:

"(1) The word 'ballot-labels' shall mean the cards, paper, or other material, containing the names of offices and candidates and statements of questions to be voted on;

"(2) The word 'diagram' shall mean an illustration of the official ballot, when placed upon the machine, showing the names of the parties, offices, and candidates, and statements of the questions, in their proper places, together with the voting devices therefor, and shall be considered a specimen ballot;

"(4) The words 'vote indicator' shall mean the levers, knobs or handles attached to the face of the machine by means of which the voter indicates the choice of candidates or decision of question;

"(9) The word 'model' shall mean a mechanically operating model of a portion of the face of the machine, illustrating the manner of voting;

"(11) The words 'election' and 'elections', whenever used in this act, shall be held to include and mean all general, municipal, primary and special elections."

Section 224-F of said Chapter 94, aforesaid, provides and requires:

"Every voting machine acquired or used under the provisions of this sub-title shall:

(a) Provide facilities for voting for such candidates as may be nominated, and upon such questions as may be submitted;

(b) Permit each voter, in one operation, to vote for all the candidates of one party for presidential electors;

(c) Permit each voter, at other than primary elections, to vote a ticket selected from the nominees of any and all parties and from independent nominations;

(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;

(g) Permit each voter to change his vote for any candidate, or upon any question appearing upon the ballot-labels, up to the time he begins the final operation to reg-

ister his vote, or indicates or expresses his intention to register his vote;

(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;

(l) Be provided with a lock or locks, by means of which, immediately after the polls are closed, or the operation of the machine for an election is completed, all movement of the registering mechanism is absolutely prevented;

(p) Be so constructed that a voter may readily learn the method of operating it.''

Section 224-G of said Chapter 94, aforesaid, provides:

''(a) The papers, cards or strips, enclosed within the ballot-frame or frames of any voting machine, and containing the names of a candidate or candidates, and his, her or their political party, or the statement of a question to be voted upon, hereinafter referred to as ballot-labels, shall be printed in black ink, upon clear white material, of such size as will fit the ballot frame, and in plain clear type so as to be clearly readable by persons with normal vision.

(d) The titles of offices may be arranged horizontally or vertically, with the names of candidates for an office arranged transversely under or opposite the title of the office.

(e) The names of all candidates, nominated or seeking nomination by a political party, shall appear in adjacent rows or columns containing generally the names of candidates nominated or seeking nomination by such party.

(g) 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.''

Section 224-H of said Chapter 94, aforesaid, provides:

"(a) The Board of Supervisors of Election shall cause the proper ballot-labels to be placed on each voting machine which is to be used in any precinct of Baltimore City, and shall cause each machine to be placed in proper order for voting; and said Board or its duly authorized agent shall examine each machine before it is sent out to a polling place; shall see that the proper ballot-labels are properly arranged on each machine.

(f) The Board of Supervisors of Election shall furnish, at the expense of the City, all ballot-labels, forms of certificates, returns, and other papers and supplies, required under the provisions of this sub-title."

Section 63 of Article 33 of the Annotated Code of Public General Laws of Maryland has for many years provided and, as re-enacted by Chapter 232 of the Acts of 1937, still provides:

"Ballots shall be so printed as to give each voter a clear opportunity to designate, by a cross (X) in a square at the right of the name of each candidate and at the right of each question, his choice of candidate and his answer to such question."

Said Section 63 of Article 33 further provides:

"To the right of the name of each candidate upon the official ballot and properly separated from said name, and immediately to the left of the square opposite the name of the candidate and in line therewith, shall be added the designation of the party or principle which the candidate represents, etc. The name of each candidate for state office or candidate for congress shall be added the name of the county or city in which the candidate resides."

Section 80 of Article 33 provides:
"If there shall be any mark on the ballot other than the cross-mark in a square opposite the name of a candidate, such ballot shall not be counted."

Section 198 of said Article 33, referring to Primary Elections, provides:

"Official ballots shall be prepared and printed for such primary elections in Baltimore City and in the several

counties, respectively, by the said separate Boards of Supervisors of Election for said City and said several Counties, respectively, as is now provided by this Article for general elections, except as otherwise provided for in this sub-title."

Section 203 of said Article 33, relating to the nomination of candidates for state offices, provides:

"If 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 (John Smith, for instance), indicated their 'Second Choice' or preference from among the remaining candidates (for instance, James Robinson and Peter Brown) in the following form: "(Note the form set forth in the Statute showing that each candidacy for "First Choice" and "Second Choice" is, of itself, a separate candidacy.)

The said Section 203 of said Article 33 further provides:

"And the returns made by the judges of elections shall set forth on blank forms, to be furnished by the Supervisors of Elections, the number of 'First Choice' votes cast for each candidate, followed horizontally by a statement of the number of 'Second Choice' votes cast by his supporters for each of the other candidates.

"If any candidate shall receive a majority of all the

votes cast and counted for his office in any county or legislative district for 'First Choice', he shall be considered the 'First Choice' Candidate of such county or legislative district.

"And in such case the 'Second Choice' Candidate of said county shall be determined by the Supervisors of Election, as follows:" * * * etc. * * * And said Section goes on repeatedly describing and designating the candidate so voted for as "First Choice" Candidates and "Second Choice" Candidates, referring repeatedly to candidates for "First Choice" and candidates for "Second Choice" and to the "Lowest" Candidate and the distribution of his ballots as marked for "Second Choice" among "the remaining candidates", reference being here respectfully made to the literal text of said Section 203 as the same appears in Volume I of the Annotated Code of Public General Laws of Maryland, Article 33, title "Elections", on pages 1335 and 1338, inclusive.

And finally and generally, the Plaintiff respectfully shows that no group voting in any form or manner is allowed by or under the Election Laws of Maryland, with reference to either general or primary elections. The said Election Laws, for the important purpose of securing to every voter simplicity, intelligibility, ease, certainty, and freedom from confusion or delay in exercising his suffrage, and of making the count of the ballots as simple, easy, certain expeditious and accurate as possible, invariably and consistently provides that the voter shall cast his ballot for each candidate and choice of candidate, and with respect to each question, presented for his vote in each election, by a single act applied specifically to each candidate or choice of candidate and question presented.

5. During the Month of July, 1937, the said Voting Machine Board, appointed by said Chapter 94 of the Acts of the General Assembly of Maryland of 1937, advertised for separate sealed proposals for furnishing and delivering voting machines to be used in elections in Baltimore City as provided by said Chapter 94 of the Acts of 1937, the said advertisement appearing under the caption "Notice of Letting" included in Plaintiff's Exhibit No. 2 hereinafter filed as part hereof.

That in the manner hereinafter more particularly referred to, and acting principally through the members of the Board of Supervisors of Elections, a constituent part of said Voting Machine Board, certain specifications were caused to be prepared for the particular description of the voting machines so required and intended to be bought for use in the elections to be held in and throughout said Baltimore City and to be paid for by the funds and monies of said City, as provided and prescribed by said Chapter 94 of said Acts of 1937 and the Election Laws of Maryland, being Article 33 of the Code aforesaid, and that the bids or proposals invited, as aforesaid, in said advertisement were to be based upon and in accordance with said specifications, to be furnished for intending bidders upon their applications as stated in said advertisement.

Said specifications so advertised and actually furnished to the bidders who submitted proposals pursuant to said invitation and advertisement, provided and required among other things, as follows:

Paragraph 43, Page 15, of the Specifications referred to in said advertisement inviting proposals for furnishing and delivering voting machines and furnished by said Voting Machine Board to those parties who, pursuant to said advertisement and invitation, submitted bids or proposals, provides:

"43. The Contractor shall furnish and deliver all 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 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 Paragraph 47, Page 17, of said Specifications provides:

"47. On or before the day that a bidder submits his bid, he shall set up, at his sole cost, expense and risk, in the office of the Supervisors of Election, located in the Court House, Baltimore City, Maryland, the following samples of the voting machines, equipment and accesso-

ries, such as he proposes to furnish and deliver if awarded the contract:

"A sample of each size of the 'Type A' machines, if the bidder is bidding on 'Type A' only;

"If the bidder is bidding on both 'Type A' and 'Type B' machines it will be sufficient for him to so set up samples of each size of 'Type B' only, provided that at any time after the bids have been opened, every bidder who has submitted samples of 'Type B' only, shall at his own expense and risk, and promptly upon written notice from the Voting Machine Board, remove from his said 'Type B' samples all equipment pertaining to the electrical operation of his said samples, and thereafter said sample machines, without said electrical equipment, shall be held and taken to be said bidder's samples of manually operated (Type A) machines which he proposes to furnish and deliver if awarded this contract.

"All 'Type B' sample machines, as originally set up by the bidder, shall be equipped with D. C. motors.

"Upon each sample machine so set up, there shall be arranged such sample ballots as may be specified by the Supervisors of Election. Such ballots shall provide space for a contest for officials on said ballots in the case of every office to be filled. Such sample machines may be subjected to such tests as the said 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. Such sample machines, equipment and accessories, shall remain in place until the contract is awarded to the successful bidder or until all bids are rejected, and the sample machine so set up by the successful bidder and upon which his bid is accepted (together with all equipment and accessories) shall thereafter remain in place until all of the machines, equipment and accessories, to be furnished by him shall have been delivered and accepted, and such sample machine, equipment and accessories, may, in the discretion of the Voting Machine Board, be accepted as one of the machines, equipment and accessories, to be delivered under the contract.

"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 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."

A copy of said advertisement inviting sealed bids or proposals as aforesaid, and of said Specifications, to which are attached the form of the proposal invited and the form of the contract intended to be awarded and the bond, in the matter aforesaid of the furnishing and delivering of voting machines provided for by said Chapter 94 of the Acts of the General Assembly of 1937, all embraced in one pamphlet, is filed with this Bill of Complaint, as part of the same, marked "Plaintiff's Exhibit No. 2."

In connection with the said Specifications embraced in said pamphlet, aforesaid, the Board of Supervisors of Elections of Baltimore City on July 22, 1937, forwarded and delivered to the Shoup Voting Machine Corporation and to the Automatic Machine Corporation the directions and requirements of said Board of Supervisors with respect to the ballots to be arranged by said Shoup Voting Machine Corporation upon the sample machines to be set up by it in the office of said Supervisors of Elections on or before the day of said opening of bids as provided in Section 47 of the Specifications adopted by the said Voting Machine Board created by Chapter 94 of the Acts of the General Assembly of 1937, said directions and requirements of said Board forwarding and delivering them, as aforesaid, on July 22, 1937, being filed herewith as part hereof, marked "Plaintiff's Exhibit No. 3."

6. That as directed and provided by Paragraph 47, hereinabove recited, of said Specifications, each of said bidders, the said Shoup Voting Machine Corporation and the said Automatic Voting Machine Corporation, respectively, set up, exhibited and tendered as part of their said respective bids or proposals, in the office of the Board of Supervisors of Elections of Baltimore City, samples of the said "40 Candidate, Type A, Size 1 Voting Machine", respectively tendered by each of said bidders with and as part of their said respective bids or

proposals and as samples of the voting machine, equipment and accessories which each of said bidders proposed to furnish and deliver if awarded said contract or, as stated in said Specifications, as "representative in all respects of the voting machines, equipment and accessories to be furnished and delivered by the successful bidder."

7. That thereafter, on the 11th day of August, 1937, the bids or proposals, submitted pursuant and in response to said advertisement inviting bids to said Voting Machine Board, were publicly opened and read at the office of said Board, in Room 231, being the Board Room of the Board of Estimates and the Board of Awards of Baltimore City, in the City Hall of said City. Upon said opening of said bids or proposals submitted, as aforesaid, it appeared that there were two sets of alternative bids submitted, which were then and there opened by said Voting Machine Board, one set of said bids having been submitted by the Shoup Voting Machine Corporation and the other set of said bids having been submitted by the Automatic Voting Machine Corporation. The said bid of said Shoup Voting Machine Corporation was to furnish and deliver 910 voting machines, known as "40 Candidate Machines" and described in said Specifications as "type A", Size 1"; for the sum of ten hundred forty-seven dollars ($1047.00) each, or nine hundred fifty-two thousand, nine hundred seventy dollars ($952,970.00) for said 910 voting machines. The Automatic Voting Machine Corporation, by its said bid, offered to furnish and deliver said 910 voting machines of the type last aforesaid at eight hundred twenty-six dollars and ninety-five cents ($826.95) each, or a total of seven hundred fifty-two thousand, five hundred twenty-four dollars and fifty cents ($752,524.50) for said 910 machines. As appears hereinafter, the kind of voting machine which said Automatic Voting Machine Corporation offered to furnish and set up as the accompanying sample of the machine referred to and covered by its said bid or proposal, was so deficient, incompetent and inadequate in size, device, mechanism, equipment and operation that, by reason of its deficiencies, omissions and defaults, it failed to comply with and violated the Election Laws and the Voting Machine Law (Chapter

94 of the Acts of 1937, aforesaid) in various material and grave respects, as hereinafter more particularly set forth; whereas the voting machine set up and tendered by said Shoup Voting Machine Corporation as an accompaniment and part of its said bid and as the required sample of the machine to be furnished and delivered by it, if awarded said contract, fully complied in all respects with all the requirements of the Election Laws of the State of Maryland, including said Voting Machine Law, for the proper and lawful holding and conduct of elections, general, primary and special in and throughout the City of Baltimore, as hereinafter more particularly set forth.

8. Subsequently, meetings of said Voting Machine Board were held at the office of the Board of Supervisors of Elections of Baltimore City for the purpose of considering the award of said contract. Representatives, including counsel of both the bidders, were present at said meetings. Counsel for the Shoup Voting Machine Corporation charged and demonstrated that the voting machine tendered by said Automatic Voting Machine Corporation failed to comply with and defeated snd violated the Election Laws of Maryland and was in essential respects seriously illegal, and would extensively imperil a free, proper and lawful exercise of the elective franchise by the people of Baltimore City in elections to be held in said City, the grounds of said illegality and of said jeopardy to the said elective franchise of the people of said City being hereinafter more particularly specified. Inasmuch as the Attorney General of Maryland would have to pass officially upon the legality of the ballots set up and to be voted upon by the voting machines to be purchased, as aforesaid, for the elections to be held in Baltimore City, and to determine whether, under the Elections Laws of the State, the machines so purchased might be legally used in elections in Baltimore City, and in view of the importance that such questions, so thereafter to be determined by the Attorney General, be settled before any machines were purchased, counsel for one of said bidders, said Shoup Voting Machine Corporation, requested that said questions of law be submitted at least by the Board of Supervisors of Elections of Baltimore City, a constituent of said Voting Machine Board, to the

Honorable, the Attorney General of Maryland, for an official opinion thereupon.

That thereupon the Board of Supervisors of Elections of Baltimore City on August 26, 1937, passed the Resolution which it forwarded to the Honorable Herbert R. O'Conor, the Attorney General of Maryland, together with a communication, asking for an official opinion of the Attorney General in the premises, of which said Resolution and Communication and the Brief referred to therein, true and exact copies are filed herewith as part hereof, marked "Plaintiff's Exhibit No. 4."

9. That in response to said Resolution and Communication of August 26, 1937, of said Board of Supervisors of Elections, the Honorable Herbert R. O'Conor, Attorney General of Maryland, and the Honorable Hilary W. Gans, Deputy Attorney General of Maryland, rendered their official Opinion to said Board of Supervisors of Elections of Baltimore City, advising said Board, as its official legal advisor, that the voting machine submitted and tendered by said Automatic Voting Machine Corporation with its said bid, was illegal as not complying with the Election Laws of Maryland; and, further, in their said legal Opinion declaring and advising said Board of Supervisors of Elections, in manifest substance and effect, that the machine tendered by said Shoup Voting Machine Corporation with its said bid did comply with said Election Laws of Maryland and was legally valid and operable in accordance with said Election Laws, as will more fully appear to this Honorable Court by reference to said Opinion so, as aforesaid, rendered by the Attorney General and the Deputy Attorney General of Maryland to said Board of Supervisors of Elections of Baltimore City, filed herewith as part hereof, marked "Plaintiff's Exhibit No. 5."

10. That said Opinion of the Attorney General and Deputy Attorney General of Maryland was delivered to the Board of Supervisors of Elections of Baltimore City on September 8, 1937, at about twelve-forty o'clock P. M.; that the Chairman of said Board of Supervisors delivered said Opinion with copies to his Honor, the Mayor of Baltimore, Chairman of said Voting Machine Purchasing Board, who had called a meeting of said Voting

Machine Board to be held at two-thirty o'clock P. M. on the same day, September 8, 1937. Counsel for the Shoup Voting Machine Corporation was informed of the intended meeting, and a request, upon the part of said counsel, that he be allowed ample time before said meeting to read and consider the Opinion of the Attorney General, was denied. Immediately upon the convening of said meeting of said Voting Machine Board, including the members of said Board of Supervisors of Elections of Baltimore City, all of whom were present at said meeting, in said Board Room, aforesaid, a motion was made and carried that said Board go into executive session for the consideration of the Attorney General's Opinion; whereupon said Board retired into executive session, and at the conclusion of such Executive Session, counsel for the said two Bidders were called into the room where said Executive Session was held and thereupon His Honor, the Mayor of Baltimore City, announced that said contract for the purchase of said 910 voting machines had been awarded to the Automatic Voting Machine Corporation. With the exception of said determination of said Award, no proceeding of or upon the part of said Board was disclosed or revealed upon or after its said Executive Session. And as no information was given out or obtainable with respect to the discussions or proceedings of said Voting Machine Board in its said Executive Session on the afternoon of September 8, 1937, as aforesaid, counsel for the Shoup Voting Machine Corporation on Friday, September 10, 1937, delivered to the office of his Honor, the Mayor of Baltimore City, as Chairman of said Voting Machine Board, a letter asking for said information in the form of a copy of the Stenographer's Record of said discussions and proceedings of said Executive Session. On the night of September 14, the stenographer's typewritten notes were delivered to one of the counsel for said Shoup Corporation.

From the stenographer's said notes so delivered as aforesaid, it was learned that the Award of said Contract was made by the following proceedings and resolutions of said Voting Machine Board in said Executive Session, to wit:

"(Mr. Marshall:) I propose this resolution then, just to bring the matter before the Board; it's merely to clear

the decks before we take any vote on selection of the machine.

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 Machine 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 Corporation 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 Elections 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.''

''(Mr. McClean) I make this motion: Resolved, that 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,'' both of which said Resolutions aforesaid, then and there, were adopted and passed by said Voting Machine Board.

That following and pursuant to the adoption of said Resolutions, the bid of said Automatic Voting Machine Corporation for furnishing 910 voting machines as tendered by it, as aforesaid, was accepted and the said Contract awarded to said Corporation, and the Honorable, Howard W. Jackson, Chairman of the said Board, on the same day, September 8, 1937, executed for and on behalf of said Board a contract with said Automatic Voting Machine Corporation in the form attached to said Specifications, said Contract to become effective upon the execution and delivery of a bond in the form prescribed by said Specifications, which said bond was also executed by the said parties on the same day.

The Plaintiff respectively shows that the said Award of said Contract and the said Contract or bond pursuant thereto, entered into by said Voting Machine Board with said Automatic Voting Machine Corporation, as aforesaid, are all and singular in the possession of the said Voting Machine Board and of the said Mayor and

City Council of Baltimore, and the Plaintiff shows that the Plaintiff is not in possession of the same, or of any of the same or of any copies of any of the same; and accordingly the Plaintiff respectfully prays that the said Voting Machine Board and the said Defendant Municipal Corporation may each be required to bring into and produce in this Court, either at the hearing of this cause or otherwise, the said alleged Award, Contract and Bond entered into by it with the Defendant, the Automatic Voting Machine Corporation, as aforesaid.

11. The Plaintiff is advised and respectfully shows that said alleged or pretended Award of said Contract and said Contract entered into by said Voting Machine Board with said Automatic Voting Machine Corporation, are ultra vires, illegal and void, inasmuch as said alleged and pretended Award and Contract were and are in illegal violation of the Declaration of Rights, Article 7, and the Constitution of Maryland, Article 1, title ELECTIVE FRANCHISE, and Section 1 of said Chapter 94 of the Acts of the General Assembly of 1937 and of the Election Laws of Maryland, embraced in Article 33 of the Annotated Code of Maryland, public General Laws, and also of the Opinion, aforesaid, rendered by the Attorney General of Maryland upon the request of the Members of the Board of Supervisors of Elections of Baltimore City to said Members of said Board, and also in disregard and violation of the Specifications, aforesaid, with which said bids or proposals were required to conform, and also in violation of the provisions of the Charter of Baltimore City requiring competitive bidding in expenditures by the City for materials or supplies in excess of five hundred dollars ($500.00), and in a manner and under circumstances, which illegally prevented and excluded competition in the bidding for as well as in the awarding of said Contract, for all of which several and various reasons, the Plaintiff is advised and respectfully shows that said alleged or pretended Award and Contract were and are unlawful, unconstitutional, nugatory and void; and the Plaintiff is further advised and respectfully shows that inasmuch as said alleged and pretended Award and Contract are illegal null, and void, as aforesaid, the payment which the Mayor and City Council of Baltimore intends and is about to make out

of its municipal funds and monies of said sum of seven hundred, fifty-two thousand, five hundred twenty-four dollars and fifty cents ($752,524.50) as provided in said alleged Contract, to said Automatic Voting Machine Corporation, pursuant to or in pretended pursuit of said Contract, would be an unauthorized, ultra vires and illegal expenditure of the funds and monies of said City of Baltimore, which, if not prohibited and enjoined, as hereinafter prayed, will result in an unauthorized and illegal increase of the rate and burden of taxation upon said property-owners and taxpayers, including the Plaintiff, of Baltimore City and in remediless and irreparable loss and injury to them.

12. Specifying more particularly the several, various grounds stated in the last preceeding paragraph of this Bill of Complaint, of the unconstitutionality, illegality and invalidity of said Award and Contract for the purchase of said voting machines of said Automatic Voting Machine Corporation, the Plaintiff further respectfully shows unto your Honor:

A. 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 preceeding 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." The said "Type A—Size 1" voting machine of the Automatic Voting Machine Corporation, for the purchase of which said Award and said Contract provide, makes no provi-

sion for, and excludes and prevents the voters of Baltimore City, in each and every voting precinct thereof, from voting for any person of his choice, that is to say from voting his personal choice for such person as he may choose and elect to vote for any office to be filled at any election in said City. There is no space, device, ballot-label or any other provision whatsoever upon said voting machine of said Automatic Voting Machine Corporation whereby any voter may exercise the right to vote, to which, by said Declaration of Rights, Article 7, and by said Section 1 of Article I of the Constitution of Maryland, every voter is entitled, for any person of his choice for any office in the elections held in Baltimore City or elsewhere in the State of Maryland. The Plaintiff is advised and respectfully shows that the said Award and Contract for the purchase of said voting machines of said Automatic Voting Machine Corporation are denials and violations and will necessitate and entail denials and violations of the guarantee above recited of the Declaration of Rights and of the Constitution of Maryland, and that, therefore, said Award and said Contract are fundamentally and utterly unconstitutional, null and void.

The Plaintiff, furthermore, respectfully represents that the entire absence of equipment for personal choice voting from said Automatic Corporation voting machines, and the utter exclusion of personal choice voting by said Automatic Voting machines, not only violates the provisions of the Declaration of Rights and the Constitution of Maryland, above referred to, but also violates Section 224-F, Sub-section (d) of the Voting Machine Act of 1937, when considered in connection with Sub-section (c) of said Section 224-F.

Said Section 224-F of said Chapter 94 of the Acts of 1937 requires that "every voting machine acquired or used under the provisions of this sub-title shall:

"(c) Permit each voter, at other than primary elections, to vote a ticket selected from the nominees of any and all parties and from independent nominations;

"(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.''

Because the attempted use of said Automatic voting machine or machines, embraced in and provided and called for by said Award and Contract, would, in respects hereinabove in this Paragraph set forth, violate said provisions of the Declaration of Rights and the Constitution of Maryland, and of said Act of the General Assembly of 1937, Chapter 94, it is respectfully submitted that this Award and Contract are absolutely unconstitutional, illegal, null and void.

B. The said voting machines of the Automatic Voting Machine Corporation, embraced in and provided and called for by said Award and Contract, are so arranged with respect to candidates in primary elections for nomination for state-wide offices that one voting device or lever votes for two candidates, that is to say, a candidate for first choice and another candidate for second choice. There is but one voting device or lever for these two candidates so that group voting for them is the result, whereas such voting is not authorized but is excluded by the Law of Maryland. Moreover, there is no counter on said machine to show the total first choice votes of any candidate. And furthermore, many voters would be prevented from exercising and would be denied their lawful right to vote for a second choice; because after voting for a first choice, as the voter has a lawful right to do, the said Automatic voting machine is locked so that the voter may not vote for a second choice until he unvotes his first choice. This is in violation of Section 224-F, Sub-section (i) of said Voting Machine Act of 1937, which imperatively requires that the machines purchased shall ''have voting devices for separate candidates.''

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."

Furthermore, Section 224-A of the Voting Machine Act of 1937 provides that "the form and arrangement of the ballot-labels shall be in accordance with the provisions as to ballots contained in Section 63 of Article 33 of Bagby's Annotated Code (edition of 1924) or as may herein and hereinafter be prescribed by law", with certain exceptions specified in said Section 224-A, but there is no exception which authorizes voting for two candidates by the operation of one lever or voting device, as to which the said Voting Machine Act requires, as above recited, the voting machines to "have voting devices for separate candidates". And Section 63 of Article 33 of Bagby's Annotated Code, which said Section 63 was repealed and re-enacted by Chapter 232 of the Acts of 1937, provides: "Ballots shall be so printed as to give each voter a clear opportunity to designate by a cross (x) in a square at the right of the name of each candidate, and at the right of each question, his choice of candidates and his answer to such question.

Moreover, a vote for one candidate for first choice and another candidate for second choice are separate votes for separate opposing candidates. The "First Choice Candidate" and the "Second Choice Candidate" are separate and distinct and are repeatedly and consistently referred to as separate and distinct candidates in Section 203 of Article 33, hereinabove recited. The Law expressly prohibits a person from voting for the same candidate for both first and second choice. Therefore, the said Automatic Voting Machine, being so constructed that it requires the voter, in exercising his elective franchise, to vote for two candidates by the operation of one voting device, does not have or provide "voting devices for separate candidates", or provide for such form and ar-

rangement of the ballot-labels as required by the provisions of Section 63 of Article 33 and Section 224-A of said Article 33 as enacted by the Voting Machine Act of 1937, or afford the voter the right to express his choice for each candidate by one operation as prescribed by the provisions of Section 63 of Article 33.

C. The use of said voting machines of said Automatic Voting Machine Corporation in any primary election in the City of Baltimore wherein voters are entitled to vote for first and second choice candidates for state-wide office would deny the voters their elective franchise as secured to them by the Election Laws of the State of Maryland, because the very small and restricted space, provided on the ballot-label in and upon said Automatic Voting Machines for the names of two candidates under one voting device and the other descriptive matter with respect to such candidates specifically required by the said Voting Machine Act of 1937 and the other Election Laws of Maryland referred to in said Voting Machine Act, would be utterly inadequate to include and accomodate all of said descriptive matter together with the names of said candidates in "plain, clear type so as to be clearly readable by persons with normal vision", as required by Section 224-G of said Voting Machine Act of 1937. Section 224-A of said Act provides that "the designation of the party or principle which each candidate represents shall appear just above the name of each such candidate"; and the same Section declares that the form and arrangement of the ballot labels shall be in accordance with the provisions of Section 63 of Article 33, relating to elections, there being no exception eliminating or affecting the mandatory requirement of Section 63 of Article 33, which provides that "to the name of each candidate for state-wide office or congress shall be added the name of the County or City in which the candidate resides"—a principle and policy which have been immemorially included and preserved in the Election Laws of Maryland. The crowding of all such required printed matter in the small and restricted space provided upon said Automatic voting machines for such candidates for nominations for state-wide offices would inevitably result in depriving thousands of voters of Maryland of their elective franchise by reason of inability to read

such small type crowded within the ballot-labels limited and restricted as aforesaid. The policy of the Election Laws of Maryland has for many years been to prevent the disfranchisement of voters by the use of small type upon the ballots to be voted upon, and Section 65 of the General Election Laws of the State has ever since 1902 required that all ballots shall be printed—"in clear, plain bold and legible Roman capitals, etc., and that it shall be the duty of the Board of Supervisors of Elections for Baltimore City and for each County to cause all ballots to be used by the voters of said City, and the several Counties, to be printed in the manner and form as aforesaid." It was plainly in order to preserve and effectuate that important policy of the law for the protection and security of a free, fair and unobstructed elective franchise that Section 224-D of Chapter 94 of the Acts of 1937, requires the printing upon and in the ballot labels to be: "in black ink, upon clear white material of such size as will fit the ballot frame, and in plain, clear type so as to be clearly readable by persons with normal vision."

D. The said Automatic Voting Machine violates the letter and spirit of the further provision in Section 224-A of said Voting Machine Act of 1937, "that the said 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 ballots-labels shall be so arranged that exact uniformity (so far as practicable) will prevail as to the size and face of printing of all candidates' names and party designations."

E. In and upon the said Automatic Voting Machine "the designation of the party or principle which each candidate represents" does not "appear just above the name of each candidate"; as required by Section 224-A of the Voting Machine Act, and the place of residence does not follow the name of each candidate as required by the same section of the Voting Machine Act and Section 63 of Article 33. It is respectfully represented by the Plaintiff that the said Act and the Election Laws of Maryland do not permit the printing of the party desig-

nation or the place of residence with the name of a candidate in one place and elimination of the party designation and the place of residence from the name of the same candidate where it appears on the ballot in another place. The voter has a right under the law to have the party designation and the place of residence with the name of the candidate at each place the name of the candidate appears upon the ballot label, and the voter may not be required to look up the party designation or the place of residence of the particular candidate for whom he is then voting at other places on the ballot.

F. On the voting machine of said Automatic Voting Machine Corporation, there is no adequate direction to the voter as required by Section 224-A of the Voting Machine Act, and by which it is provided, "the titles of the offices on the ballot labels shall be printed in type as large as the space for such office will reasonably permit; there shall be printed below the office title the words 'Vote for One', 'Vote for Two', in accordance with the provisions of Section 63 of Article 33 of Bagby's Annotated Code (edition of 1924), or such number as the voter is lawfully entitled to vote for out of the whole number of candidates nominated for such office."

G. Section 224-G (g) of the Voting Machine Act provides:

"The form and arrangement of the ballot labels to be used at any election, shall be determined by the Board of Supervisors of Elections as nearly as may be in accordance with this Sub-title."

Obviously, the Legislature never intended by the use of the above language to permit the Board of Supervisors of Elections to over-ride or forego the express mandatory provisions of said Act or any of the other Election Laws of the State, and the Legislature could not constitutionally delegate to such a Board in Baltimore City the right to abrogate any of the mandatory or essential requirements of the state-wide primary or general Election Laws.

The expression "as nearly as may be" is a positive injunction upon the Board of Supervisors of Elections to follow and adhere to as fully and closely as may be

possible, the provisions of the Sub-title relating to the form and arrangement of ballot titles as against releasing or eliminating any of the essentials of the law. If it be possible to carry out the provisions of the law, the expression "as nearly as may be" affirmatively requires the provisions of law to be observed. It is only in the event of absolute and insuperable impossibility to carry out the law that such impossibility may prevent it. But the mandate "as nearly as may be" requires the law to be preserved to the very fullest possible extent. The Shoup Machine carries out the law and shows that it is possible to comply with it. The Automatic Machine fails to follow the law and violates its provisions, although the Shoup Machine shows that it is possible to observe every mandatory provision of the law.

H. Paragraph 44 of the Specifications requires that Type A—Size 1 machine shall have nine rows of levers or voting devices and forty voting levers or devices in each row, or a total of three hundred sixty (360) voting levers or devices, to be available for candidates. The voting machines of the Automatic Voting Machine Corporation embraced in and provided and called for by said Award and Contract, fail to comply with said Paragraph 44 of said Specifications, because said Automatic machine has only eight rows of voting levers or devices containing forty levers or devices in each row available for candidates, and, therefore, has but three hundred twenty (320) voting devices available for candidates, instead of three hundred sixty (360) as required upon specifications for said type of machine.

Said Specifications, Paragraph 47, Page 17, provides and requires that "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."

It is respectfully submitted that said Board could not properly and lawfully award said Contract to and enter into a Contract with said Automatic Voting Machine Corporation for its said voting machines, which said Automatic Voting machine do not conform to, but distinctly and materially violate the requirements of said Specifications.

1. Paragraph 3 of said Specifications provides, "The bidder is assumed to have made himself familiar with all Federal, State, Local and Municipal laws, ordinances, etc., which in any manner affect those engaged or employed in the work, or the materials or equipment to be furnished or used in or upon the work, or in any way affect the work, and no plea of misunderstanding will be considered on account of ignorance thereof".

Paragraph 11 of said Specifications provides; "Bids when filed, shall be irrevocable".

Paragraph 43 of said Specifications provides, "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 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".

Paragraph 47 of the Specifications provides;

"On or before the day that a bidder submits his bid, he shall set up, at his sole cost, expense and risk, in the office of the Supervisors of Election, located in the Court House, Baltimore City, Maryland, the following samples of the voting machines, equipment and accessories, such as he proposes to furnish and deliver if awarded the contract . . .

"Such sample machines may be subjected to such tests as the said 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. Such sample machines, equipment and accessories, shall remain in place until the contract is awarded to the successful bidder or until all bids are rejected, and the sample machine so set up by the successful bidder and upon which his bid is accepted (together with all equipment and accessories) shall thereafter remain in place until all of the machines, equipment and accessories, to be furnished by him shall have been delivered and accepted, and such sample machine,

equipment and accessories, may, in the discretion of the Voting Machine Board, be accepted as one of the machines, equipment and accessories, to be delivered under the contract.

"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 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 Award and Contract aforesaid for the voting machines of the Automatic Voting Machine Corporation do not comply with, but violate, said Specifications, hereinabove recited, because the sample machine set up and tendered by said Automatic Voting Machine Corporation as required by Paragraph 47 of said Specifications and which said machines the said Award and Contract provide and call for as the voting machines to be purchased from said Automatic Voting Machine Corporation, violate Sections 3 and 43 of said Specifications, in that said Automatic Voting Machines fail to comply with, and violate, as hereinabove particularly set forth the Declaration of Rights and the Constitution of Maryland and the Election Laws of Maryland included in said Chapter 94 of the Acts of the General Assembly of 1937.

And the Plaintiff is advised and furthermore respectfully represents that said Award and said Contract also violate Sections 14 and 15 of the Charter of said City of Baltimore, in that said Award and said Contract, being in disregard, contravention and violation of said Specifications, and of the Law of the State of Maryland in the respects aforesaid not only failed to permit and avail of competitive bidding for said Award and Contract but precluded and prevented competitive bidding, as required by said Sections of said City Charter.

13. The Plaintiff, furthermore, respectfully represents that whilst, as aforesaid, the Sample of the voting machine set up and tendered by said Automatic Voting Machine Corporation as required by Paragraph 47 of said Specifications, violates the Declaration of Rights,

Constitution and Election Laws, aforesaid, of Maryland, and also the said Specifications and Charter of Baltimore City, all as aforesaid, which Sample Automatic voting machine so set up and tendered by said Automatic Voting Machine Corporation as part of its bid pursuant to said Paragraph 47 of said Specifications, has never been changed in any respect with reference to said voting machine, equipment and accessories and moreover, has never at any time been before said Voting Machine Board in form, substance, essentials, equipment and accessories, in any respect, other than as said Automatic Voting Machine was set up in the office of the Supervisors of Elections of Baltimore City as the accompaniment and part of said bid or proposal of said Automatic Voting Machine Corporation, as provided and required by Section 47 of said Specifications and as "representative in all respects of the voting machines, equipment and accessories to be furnished and delivered by the successful bidder."

And the Plaintiff further shows that not only was said Automatic Sample machine, so set up as the Sample voting machine accompanying and part of the bid of said Automatic Voting Machine Corporation, never changed in any respect whatsoever so as to be before said Board in such form, essentials and equipment as to comply with the Law of Maryland in the respects aforesaid and with said Specifications and provisions of the Charter of Baltimore City, but the Plaintiff is advised and further shows that said Sample voting machine of said Automatic Voting Machine Corporation, so as aforesaid set up by it as the accompaniment and part of its said bid, cannot be so mechanically changed and equipped as to comply with the requirements of said Law of Maryland, in its several and various provisions aforesaid, or with said Specifications and provisions of the Charter of Baltimore City requiring competitive bidding upon and in compliance with Specifications furnished to contemplated or expected bidders. And the Plaintiff respectfully shows that although the Members of said Voting Machine Board were fully advised, on said eighth day of September, 1937, when said Award was made and said Contract entered into, that said Sample machine so, as aforesaid, set up and tendered with and as part of its

bid by said Automatic Voting Machine Corporation, did not comply with the laws of Maryland, but on the contrary violated said Laws, to which effect, the Honorable, the Attorney General of Maryland, has specifically and distinctly advised the Members of the Board of Supervisors of Elections of Baltimore City, who had laid said Opinion of the Attorney General before said Voting Machine Board, nevertheless said Voting Machine Board in abuse of its discretion and authority, and by wilful and arbitrary action upon its part in abuse of its discretion and authority, under said Voting Machine Act of 1937, made said alleged Award, aforesaid, of said Contract to said Automatic Voting Machine Corporation and entered into said Contract with said Corporation, which said arbitrary actions upon the part of said Voting Machine Board in abuse of its discretion and authority, as aforesaid, the Plaintiff is advised and respectfully represents, are illegal, null and void.

14. The Plaintiff, furthermore, respectfully represents, to this Honorable Court that the apparent or ostensible difference of approximately two hundred thousand dollars ($200,000.00) between the bid of the Automatic Voting Machine Corporation for furnishing its voting machines aforesaid, and the bid of the Shoup Voting Machine Corporation for furnishing its machines aforesaid, which said machines, set up and tendered and which would be furnished by said Shoup Voting Machine Corporation if the Contract for the purchase of the same had been awarded to and entered into with it, would comply in all respects and all provisions of all the Laws of Maryland of said Specifications and of said Charter of Baltimore City, is not substantial or real. And that the award of said Contract to said Automatic Voting Machine Corporation and said Contract with it will not save the City of Baltimore the amount of said ostensible difference, but, on the contrary, will not result in any saving to said City; in support of which said allegations, the Plaintiff more particularly shows:

A. The said machine of the Automatic Voting Machine Corporation furnishes only eight rows of spaces of forty rows each available for candidates in primary elections. The said Automatic Corporation machines use one

of its rows as an index for candidates in said primary elections, and said machines are so constructed as to make and leave only eight rows as aforesaid possible therein. The machine of said Shroup Voting Machine Corporation provides, as required by said Specifications, nine such rows of forty spaces each. In this connection, Section 224-A of said Voting Machine Act requires the machines purchased to be used "in all primary, general, special and other elections".

B. The said Automatic Voting Machine, as aforesiad is not equipped for personal choice voting, as required by the provisions of the Organic Law and the Election Laws of Maryland hereinabove recited.

If said Automatic machines of said Automatic Voting Machine Corporation are purchased without the personal choice equipment and it becomes necessary to install such equipment in its machines, that company may be expected to exact (without competition because no other company could install said equipment in the Automatic machines) a price far in excess of the present difference in bids. The provision and installation of mechanism and equipment for said personal choice voting is costly and expensive. In this connection, the Plaintiff avers that the same Automatic Voting Machine Corporation, without competition, charged the City of Baltimore $1239.00 per machine for the fifty machines heretofore purchased from said Automatic Company, or more than $400.00 per machine over its present bid, and that the machines so heretofore purchased by the City are equipped with personal choice voting, although they were purchased after the passage of the act of the Legislature in 1924 attempting to take away the right of personal choice voting.

C. The method of second choice voting for which the Shoup machine is equipped is very much more costly than that for which the Automatic Machine is equipped. Wholly apart from the Failure of the Automatic machine to meet the legal requirements in this respect, any attempt to crowd the names and descriptions of two candidates in the very small space available on the Automatic machine under one voting device will lead to confusion and disfranchisement of a large portion of the voters.

The equipment of said Shoup Voting Machine for first and second choice voting for candidates for state-wide offices in accordance and compliance with the Primary Election Laws of Maryland, embraces an item of cost and value which not only mechanically and structurally, but, estimated in the light of the importance, in securing the elective franchise in Maryland as provided by its laws, goes far to eliminate the said apparent or ostensible difference between said respective bids.

The Plaintiff, moreover, is advised and respectfully shows that there are upon the said Shoup voting machine various appliances affording securities and advantages in the use of said machines in elections which said Automatic Voting Machine does not provide.

15. In connection with the aforegoing allegations of this and of other paragraphs of this Bill of Complaint, the Plaintiff respectfully prays the Court to Order and require the Defendant, said Voting Machine Board, and the Defendant, the Automatic Voting Machine Corporation, not to make any change or alteration in the said Sample Automatic Voting Machine as the same was set up and tendered by said Automatic Voting Machine Corporation as accompanying and part of its bid in the office of the Board of Supervisors of Elections of Baltimore City, as hereinabove set forth, so that said Sample voting machine may be produced and exhibited to this Honorable Court in the same form and essentials and with the same equipment and mechanism in and with which said Sample machine was set up and tendered as aforesaid.

16. That inasmuch as the voting machines contracted to be purchased from said Automatic Voting Machine Corporation as aforesaid violate the Declaration of Rights and the Constitution, as well as the Election Laws, of this State, including said Chapter 94 of the Acts of the General Assembly of 1937, and also violate said Specifications, and also the provisions of Sections 14 and 15 of the Charter of Baltimore, as a result whereof said contract, so awarded as aforesaid for said machines, is unconstitutional, illegal and void, the City of Baltimore will, if said contract be carried out, incur a large expense, to wit, an expenditure of seven hundred fifty-two thousand, five hundred twenty-four dollars and fifty cents

($752,524.50), which said sum, the City of Baltimore will entirely waste and lose; whereby manifestly the Plaintiff and other taxpayers of the City of Baltimore will suffer irreparable injury, *dmmage* and loss, which said injury, damage and loss may be avoided and prevented only by the interposition of this Honorable Court in granting the relief hereinafter prayed.

To the end, therefore:

1. That this Honorable Court may declare the said Award of said Contract for the purchase of said voting machines to said Automatic Voting Machine Corporation, and also the said Contract, which, pursuant to said Award, was entered into by the Defendant, the said Voting Machine Board, and the Defendant, the said Automatic Voting Machine Corporation, unconstitutional, illegal and void;

2. That this Honorable Court may restrain and enjoin the said Defendant, the said Voting Machine Board, and the said Defendant, the said Automatic Voting Machine Corporation, from performing, executing or carrying out, and from proceeding in any manner in or with the performance, execution and carrying out of said Contract.

3. That the Defendant, the said Voting Machine Board, may be restrained and enjoined from issuing any requisition or warrant upon the Mayor and City Council of Baltimore, or upon any of the Officers of said Mayor and City Council of Baltimore, for payment for said machines referred to and provided for in said Contract or for any of said machines.

4. That the Defendant, R. Walter Graham, the Comptroller of Baltimore City, be restrained and enjoined from auditing or paying by any warrant or requisition upon any of the Officers of said City, the cost or price, or any part of the cost or price of said Voting Machines, or any part of the same, embraced in and provided or attempted to be purchased by said Contract.

5. That the Defendant, Municipal Corporation, the Mayor and City Council of Baltimore, and each and all of its officers or agents, be restrained and enjoined from issuing any warrant or warrants and from making any

payment or payments on warrants or otherwise in payment of or for said voting machines, or any of the same, under or by virtue of said Contract.

6. That the Members of the Board of Supervisors of Elections of Baltimore City, be restrained and enjoined from installing said machines for use in any elections, primary or general, to be held in the City of Baltimore or in any of the election precincts of said City.

7. That the Plaintiff may have such other and further relief as her case may require.

May it please Your Honor to grant unto the Plaintiff the Writ of Supoena, directed to the Defendants, the said Howard W. Jackson, George Sellmayer, R. Walter Graham and Bernard L. Crozier, being and constituting the Members of the Board of Estimates of Baltimore City, and to J. George Eierman, Walter A. McClean and Daniel B. Chambers, being and constituting the Members of the Board of Supervisors of Elections of Baltimore City; all the said Members of said Board of Estimates of Baltimore City, together with all of said Members of the Board of Supervisors of Elections of Baltimore City, constituting the Voting Machine Board created by Chapter 94 of the Acts of the General Assembly of Maryland of 1937, and also to the Mayor and City Council of Baltimore, by service upon His Honor, the Mayor of said City at his office in the City Hall in said City of Baltimore, and also directed to the Defendant R. Walter *Grahm*, Esquire, the Comptroller of Baltimore City and also directed to the Automatic Voting Machine Corporation by service upon its agent and representative, residing and doing business in said City of Baltimore, demanding them and each and all of them to be and appear in this Honorable Court upon some certain day, to be named therein, and answer the premises and abide by and perform such decree as may be passed herein.

And as in duty, etc.

ISAAC LOBE STRAUS,
WILLIS R. JONES,
Solicitors for Plaintiff.

HATTIE B. DALY,
Plaintiff.

Affidavit Annexed.)

ORDER OF COURT.

On the aforegoing Bill of Complaint, affidavit and Exhibits it is this 18th day of September, 1937, by the Circuit Court No. 2 of Baltimore City Ordered that the Defendants named in said Bill of Complaint, and each of them, show cause on or before the 4th day of October, 1937, why relief prayed for in said Bill of Complaint should not be granted; provided a copy of said Bill of Complaint and of this Order be served upon said Defendants or their counsel on or before the 23rd day of September, 1937.

EDWIN T. DICKERSON,
Judge.

PLAINTIFF DALY'S EXHIBITS.

Exhibit No. 1—Tax bill omitted.

Exhibit No. 2—Proposal, specifications, etc., omitted, as similar to Stipulation Exhibit No. 6. Record page 169.

Exhibit No. 3—Instructions of Board omitted, as similar to Stipulation Exhibit No. 1, Record page 147.

Exhibit No 4—Letter to Attorney General, August 26, 1937, with resolution omitted, as similar to Stipulation Exhibit No. 2, Record page 152.

Exhibit No. 5—Attorney General's opinion omitted, as similar to Stipulation Exhibit No. 3, Record page 157.

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(10)

ANSWER.

(Filed 30th September, 1937.)

To the Honorable 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, to the Bill of Complaint filed herein against these Defendants and others and to show cause order passed by this Honorable Court on September 18th, 1937, respectfully represents:

(1) Answering the first paragraph of said Bill of Complaint, these defendants, (hereinafter referred to for convenience as "this Board"), have no knowledge of whether the plaintiff is a taxpayer, as alleged therein, but believe the same to be true. Further answering said paragraph, this Board denies that the Charter of Baltimore City, or any section thereof, in any wise affects the purchase of the voting machines here involved, as more particularly set forth in Paragraph 2 of this answer. Further answering, this Board denies that the contract for the purchase of voting machines referred to in said bill of complaint violates any of the provisions of the laws of Maryland.

(2) Answering the second paragraph of said bill of complaint, this Board denies that Section 14 of the Charter of Baltimore City has any application whatsoever to the purchase of the voting machines in question. This Board alleges that the following provisions of Section 224-A of Chapter 94 of the Acts of 1937, (hereinafter referred to for convenience as the "Voting Machine Act"), show conclusively that the legislature vested in this Board complete and absolute 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, with or without competitve bidding, if the Board so elected:

"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 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 on it."

Further answering, this Board alleges that said Section 14 of the Baltimore City Charter affects only officials and boards of the Mayor and City Council of Baltimore; and this Board, consisting of members of both city and state boards, is not only not a board of the Mayor and City Council of Baltimore, but the function to be performed by it is strictly a state function, relating, as it does, to the elective franchise, a function which under our Constitution has not been and could not be delegated to the Mayor and City Council of Baltimore. That the fact that Section 14 of the Charter is not applicable here is further demonstrated by the provision thereof that a city board, known as the Board of Awards and created by Section 15 of the Charter, is authorized and directed to award the contracts referred to in said Section 14, which is utterly repugnant to the provisions of Section 224-A of the Voting Machine Act, quoted above.

(3) This Board admits the allegations contained in the third paragraph of said Bill of Complaint.

(4) This Board admits the existence of the provisions of law set forth in the fourth paragraph of said Bill of Complaint, and for a full and complete statement of the terms and provisions thereof, respectfully refers this Court to the Acts in question. Further answering, this Board denies any suggestion, that the voting machines purchased by it provide for "group voting" or that such machines do not permit the voter to cast his ballot as provided by law.

(5) This Board admits the allegations contained in the fifth paragraph of said bill of complaint and the existence of the provisions of the specifications referred to therein, but alleges, as pointed out hereafter, that the pro-

visions quoted, as in the case of the provisions of law quoted in the fourth paragraph of said bill of complaint, do not embrace all the provisions of the specifications that bear on the questions raised by said bill of complaint.

(6) This Board admits that the Shoup Voting Machine Corporation, (hereinafter referred to for convenience as the "Shoup Corporation"), and the Automatic Voting Machine Corporation, (hereinafter referred to for convenience as the "Automatic Corporation"), furnished samples of their respective voting machines, as required by paragraph 47 of the specifications, referred to in the sixth paragraph of said bill of complaint.

(7) This Board admits the allegations contained in the seventh paragraph of said bill of complaint, with the exception that it denies the allegations that the sample machine of the Automatic Corporation was "so deficient, incompetent and inadequate in size, device, mechanism, equipment and operation that, by reason of its deficiencies, omissions and defaults, it failed to comply with the provisions of the Election Laws and the Voting Machine Law", as alleged. Further answering, this Board alleges that the legality of the voting machine of the Shoup Corporation is not here in issue.

(8) Answering the eighth paragraph of said Bill of Complaint, this Board admits that it held certain meetings, as alleged and that counsel for the Shoup Corporation, the high bidder, attacked the validity of the Automatic Corporation's bid, but denies that said counsel demonstrated that the voting machine tendered by said Automatic Corporation failed to comply with the election laws of Maryland and was otherwise illegal, as alleged therein. This Board admits that the Board of Supervisors of Election requested advice of the Attorney General as alleged therein, but denies the other allegations contained in the eighth paragraph of said Bill of Complaint and demands strict proof thereof.

(9) Answering the ninth paragraph of said Bill of Complaint, this Board denies that the Attorney General advised the Board of Supervisors of Election that the voting machine submitted and tendered by said Auto-

matic Corporation with its said bid was illegal. This Board alleges that the Attorney General advised, in his opinion, that the "arrangement" of the ballot on said voting machine did not comply with the election laws, but that another plan of arrangement proposed and tendered by said Automatic Corporation, referred to hereafter as "Plan B", did conform to all legal requirements. Further answering, this Board denies that the Attorney General was requested to advise or did advise these defendants as to the validity of the Shoup machine.

(10) Answering the tenth paragraph of said Bill of Complaint, this Board admits the receipt of the Attorney General's opinion, and that this Board met and awarded the contract, as alleged. This Board denies any suggestion that it refused to hear counsel for the Shoup Corporation, but, having sat for two days prior thereto for that purpose, the Board felt there was no necessity for further argument. This Board further alleges that it will produce the contract and bond referred to in the tenth paragraph of said Bill of Complaint at the hearing of this cause, and that the Plaintiff, or her counsel, is at liberty to examine the said contract and bond at any time prior thereto.

(11) Answering the eleventh paragraph of said Bill of Complaint, this Board denies that the award of the contract to the Automatic Corporation violates any of the provisions of the Constitution, Declaration of Rights, Laws of Maryland, Charter Provisions or anything else referred to in said eleventh paragraph of said Bill of Complaint, and, on the contrary, alleges that the awarding of said contract was entirely lawful and, as shown hereinafter, for the best interests of the taxpayers of Baltimore City.

(12) Answering the twelfth paragraph of said Bill of Complaint, this Board alleges:

(a) That neither Article 7 of the Declaration of Rights nor Section I of Article I of the Constitution of Maryland give, or purport to give to the voters of this State the right to vote "his personal choice for such person as he may choose and elect to vote for any office to be filled at any election" which may be held, as alleged by

the complainant. That this Board further alleges that Attorney General O'Conor had occasion, prior to the general election of 1936, to advise the Board of Supervisors of Election of Baltimore City as to the validity of writing upon the ballot the personal choice of the individual voter. (Opinions of Attorney General, Vol. 21, pages 354-356). That from the following extract from said opinion it will be noted the Attorney General ruled definitely and positively that such personal choice voting was not lawful:

"Prior to 1931, it was permissible for a voter to write in the name of a candidate, under certain circumstances. The fact that such a course was possible is borne out by the provisions of the then existing law, Section 80 of Article 33 of the Code which provided inter alia that the judges of election should reject ballots marked in certain ways. In the section referred to, the Legislature had provided that ballots should not be rejected containing the name or names of any candidates written by the voter on the ballot as provided in Section 62.

As another indication that under the pre-existing situation voters could write in the name of a person of their choice, was the fact that the official ballots contained blank spaces to afford such opportunity to the voters.

However, the General Assembly of Maryland in 1931, by Chapter 120 of the Acts of that session, repealed and re-enacted the section regulating the actions of election judges. In the newly enacted statute the words above quoted were omitted, and the law as it now stands provides that the election judges must reject any ballots upon which "there shall be any mark on the ballot other than the cross-mark in a square opposite the name of a candidate."

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.

You are therefore, advised that a ballot upon which a

voter has written the name of a person for whom he desires to vote, must not be counted.''

That even though the said opinion of the Attorney General seemed conclusive of this question, the Board of Supervisors of Elections, at the request of the Shoup Corporation, at the time of preparing specifications again requested the Attorney General's advice on this subject, by letter dated July 22, 1937, copy of which is attached hereto marked ''Voting Machine Board's Exhibit No. 1''; and as a result received an opinion from the Attorney General confirming his earlier opinion on this subject, dated July 24, 1937, copy of which is attached hereto, marked ''Voting Machine Board's Exhibit No. 2'', and prayed to be taken as a part hereof. That in view of the Attorney General's rulings on the subject, this Board was of opinion that to provide for spaces for personal choice voting upon the voting machines to be purchased might and probably would render the machines to be purchased and the contract therefor invalid. That as a consequence the specifications contained no provisions for personal choice voting; and the Automatic Corporation's machine conforms to said specifications in making no provision for personal choice voting.

(b) Answering this sub-paragraph of paragraph 12 of this Bill of Complaint, this Board alleges that the ballot on the sample voting machine of the Automatic Corporation, in respect to candidates for state-wide offices, was arranged so that the voter could vote for first choice for a candidate by using one lever, or he could vote for first choice for the said candidate and for second choice for another candidate by the use of one lever. That, as alleged in the ninth paragraph of this answer, the Attorney General advised the Board of Supervisors of Election that said arrangement for first and second choice voting was illegal, as being in violation of Section 224-F, sub-section (i) of the Voting Machine Act. That as further alleged in said ninth paragraph of this answer, and as shown more particularly hereinafter, the Automatic Corporation proposed and tendered another plan or arrangement of its machine, referred to hereinafter as ''Plan B'', which the Attorney General in his opinion aforesaid ruled valid. That this Board, however, does

not concede the invalidity of the plan or arrangement of the ballot as it appeared on the sample voting machine of the Automatic Corporation, it appearing from the Attorney General's opinion that he considered the question a close one, and to concede the invalidity of the arrangement on such sample ballot would foreclose the right of this Board to select a voting machine equipped to vote in the manner that said sample ballot was arranged.

(c) Answering this sub-paragraph of paragraph 12 of this Bill of Complaint, this Board alleges that the ballot label upon the sample machine of the Automatic Corporation is sufficiently large to include all of the information required by law to be printed thereon. This Board further alleges, however, that if it should be found that the ballot label is insufficient in size to contain all of the information required by law, as said label is arranged on the sample voting machine of the Automatic Corporation, that the said machine, as more particularly set forth in the preceding sub-paragraph, and also as set forth hereinafter, is capable of a re-arrangement in a manner tendered by the Automatic Corporation so as to provide a ballot described hereafter as Plan B, which plan, it is conceded, complies with the law in all respects.

(d) Answering this sub-paragraph of paragraph 12 of this Bill of Complaint, this Board alleges that said sub-paragraph contains merely a general statement to the effect that the Automatic Voting Machine "violates the letter and spirit" of the provision of Sec. 224-A of the Voting Machine Act "that the said 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 the size and face of printing of all candidates' names and party designations." That from the fact the Plaintiff has underlined the words "exact uniformity" this Board assumes that it is in this respect that the Automatic machine is alleged to violate the provisions of

Section 224-A cited. That it is to be noted the statute only requires "exact uniformity" "so far as practicable", and in the judgment of this Board the Automatic Voting Machine complies with the section of the law in question. That it was because of the physical impossibility of confirning the name "Germershausen", for example, within the limits required for "Eby", that the Legislature provided for "exact uniformity" only "so far as practicable".

(e) Answering this sub-paragraph of paragraph 12 of said Bill of Complaint, this Board admits that the ballot labels as shown on the sample machine of the Automatic Corporation do not include the designation of the party or principle which each candidate represents, just above the name of the candidate, nor do they contain, in the case of candidates for state office or candidates for Congress, the name of the County or City in which the candidate resides. That the plaintiff does not allege that the ballot labels are not large enough or for any other reason the information in question cannot be printed on the label of the machine of the Automatic Corporation, the allegation being merely that this information does not appear on the sample ballot labels. That assuming, without conceding, that all of this information is necessary, there is sufficient space on the ballot labels of the machine of the Automatic Corporation to print the information in question, and said machine therefore complies with the specifications, this Board having reserved to itself in Paragraph 14 thereof the right to waive technical defects in any bids or proposals if it deemed it best for the public interests to do so. That there seems to be no necessity for printing the name of the party or principle which each candidate represents on the ballot label in a primary election, and this Board does not concede that the law requires this to be done. For legal authority for this view, this Board respectfully refers the Court to the answer of the Automatic Corporation filed in this case.

(f) Answering this sub-paragraph of Paragraph 12 of said Bill of Complaint, this Board admits that the Automatic Corporation, in setting up the sample ballot, did not print below the office title the words "Vote for One" as provided in Section 224-A of the Voting Machine Act,

but alleges that wherever there was a necessity for voting for more than one, the sample ballot contains the words "Vote for Two", "Vote for Three", "Vote for Six". That because the machine was so designed that it is impossible to vote for more than one the said Automatic Corporation did not include the words "Vote for One" on its sample ballot. That here again, however, the allegation is not that the ballot does not contain space enough for this information but simply that the information does not appear on the sample ballot. That said voting machine therefore complies with the specifications, this Board having reserved to itself in Paragraph 14 thereof the right to waive technical defects in any bids or proposals if it deemed it to be best for the public interests to do so.

(g) Answering this sub-paragraph of Paragraph 12 of this Bill of Complaint, this Board alleges that it does not contain the statement of any facts or any grounds of objection to the awarding of said contract to the Automatic Corporation, but consists merely of argument, attempting to limit to such an extent as to nullify the discretion vested in the Board of Supervisors of Election under 224-G of the Voting Machine Act, in determining the form and arrangement of ballot labels, to be used at any election.

(h) That the contention made in said sub-paragraph "H", to the effect that the sample machine of the Automatic Corporation does not contain nine rows of levers or voting devices can only be classed as frivolous, and is immediately dispelled upon examination of the sample voting machine. That said voting machine does in fact have nine rows of levers or voting devices, but because the ballot submitted by the Supervisors of Election required the use of only eight such rows, the Automatic Corporation simply repeated a second time the list of offices and questions that appeared at the top of the ballot. That it can and will be shown that said sample voting machine of the Automatic Corporation does comply with the said specifications cited in every respect.

(i) Answering this sub-paragraph of Paragraph 12 of this Bill of Complaint, this Board admits the existence of

certain provisions of the specifications therein set forth. This Board, however, denies that the specifications have been violated by the award of said contract, which, as hereafter shown, was done in the lawful exercise of the discretion vested in this Board by the Voting Machine Act. Further answering, this Board denies that sections 14 and 15 of the City Charter have any application to the awarding of this contract or that said Board is required to provide for competitive bidding for reasons set forth in paragraph 2 of this answer, and further denies that competitive bidding was precluded as alleged therein, as will be shown more particularly hereafter.

(13) Answering the thirteenth paragraph of said Bill of Complaint, this Board denies that the sample voting machine of the Automatic Corporation violates any of the provisions of law or of the specifications therein referred to that may be applicable to the contract for the purchase of said voting machines. For reasons stated in paragraph 17, et seq, this Board denies that it is essential to the validity of said contract that no change be made in said sample voting machine of the Automatic Corporation in order to set up Plan "B", this Board being satisfied that the said Automatic Corporation can and will, deliver said voting machines constructed and arranged to vote a ballot as shown on the sample machine or in accordance with Plan "B", at the option of this Board, depending upon whether this Court shall determine that the arrangement of the ballot on the sample machine is or is not valid. Further answering, this Board denies that there is any provision of law in any wise limiting its right to enter the contract as aforesaid, which it alleges is within the discretion conferred upon it by the Voting Machine Act, and as will be shown more particularly hereafter, for the benefit of the taxpayers of Baltimore City.

(14) Answering the fourteenth paragraph of said Bill of Complaint, this Board denies the allegation that the saving of approximately Two Hundred Thousand Dollars resulting from the awarding of said contract to the Automatic Corporation is only "apparent or ostensible" and alleges that the said saving is real. Further answering, this Board denies, for reasons already stated, any

necessity of changing said voting machine as alleged in sub-paragraphs A and B. Further answering, this Board alleges, as will be shown hereafter, that the price submitted by the Shoup Corporation, according to the testimony given by its President before this Board, is the lowest the said Company can bid upon said machine; and so far as the allegation that "the method of choice voting for which the Shoup Machine is equipped is very much more costly than that for which the Automatic Machine is equipped", is concerned, the change, if any, in the Automatic Machine to enable it to vote a method of choice voting identical to that of the Shoup machine is so slight that the said Automatic Corporation has offered so to equip its machines, at the option of this Board, without any change in the contract price.

Further answering, this Board denies that there are any securities or advantages in the use of Shoup voting machines which said Automatic voting machine does not provide.

(15) Answering the fifteenth paragraph of said Bill of Complaint, these defendants allege that the complainant well knows that no changes have been made, or will be made, in the sample voting machine of the Automatic Corporation by any of the defendants in this case.

(16) Answering the sixteenth paragraph of said Bill of Complaint, these defendants deny that the contract awarded the Automatic Voting Machine Corporation is in any respect unlawful as alleged therein, and alleges on the contrary that the said contract is lawful in all respects and is made pursuant to authority and discretion vested in these defendants by the Voting Machine Act.

For a further and affirmative defense to said Bill of Complaint, these defendants respectfully allege:

(17) That 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 Corporation, which had been in use in general elections since 1928. That said 50 voting machines have not been used heretofore in primary elections for the reason that prior to the passage of the Voting Machine Act in 1937, it was

necessary under the provisions of Section 86 of Article 33 to preserve the ballot for four months after election, which would run beyond the date of the following general election. So satisfactory had those machines proven to be, however, 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 Election 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". Section 224-A. 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 Corporation, 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 224-A 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.

(18) That it is assumed throughout the entire Bill of Complaint filed in this case that a limitation is placed upon the authority of the Board, under Sections 14 and 15 of the Baltimore City Charter, so as to limit the Board, in its selection of the voting machines, to a machine precisely in the form of the sample machine submitted with the bid. That this Board has shown, in Paragraph 2 of this answer, that the Voting Machine Act confers upon it complete and absolute authority and discretion in the selection of the type and make of voting machine to be purchased, and that the charter sections, relating to competitive bidding have no application to this contract. That the Board, as alleged in the Bill of Complaint did call for bids, which were received from only two companies, the Automatic Corporation and the Shoup Corporation. That of these two companies the

Automatic Corporation is the older and is a pioneer in the business, having manufactured voting machines for many years, which are in use in over 3,500 towns and cities in the United States. The Shoup Corporation is of comparatively recent origin and does not itself manufacture the voting machines it sells. The Shoup Corporation has voting machines in operation in only three places, namely, the State of Rhode Island, and the City of Philadelphia, in which City there are used voting machines of both Corporations, the majority of which are those of the Automatic Corporation, and the town of Teaneck, New Jersey.

(19) That in creating this Board, the Legislature vested in it 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.

(20) That after the opening of the bids and the disclosure of the Automatic Corporation as the low bidder, the Shoup Corporation asked this Board for a hearing, claiming certain defects or irregularities in the Automatic Corporation's machine, which, it was contended, invalidated the same. That a hearing was granted the Shoup Corporation by this Board, and two sessions were held, on August 24th and August 26th, 1937, at which it developed that the grounds of the Shoup Corporation's objection were substantially as alleged in the Bill of Complaint, particular stress being laid on the invalidity of the ballot set up on the Automatic sample machine, in so far as it related to first and second choice voting.

(21) That after the objection of the Shoup Corporation was made as aforesaid, the representatives of the Automatic Corporation offered to deliver, at the option of the Board, and at the price bid, machines arranged and equipped to vote the ballot in accordance with the sample machine, or in accordance with a plan designated "Plan B", copy of which is attached hereto, marked "Voting Machine Board's Exhibit No 3", and prayed to be taken as a part hereof.

(22) That as alleged in the Bill of Complaint, this

Board, through the Board of Supervisors of Election secured an opinion from the Attorney General in which it was held, in effect, that the ballot on the sample machine of the Automatic Corporation violated the provisions of the election laws, relating to first and second choice voting, but that the arrangement of said machine under "Plan B", conforms to all legal requirements.

(23) That upon receipt of said opinion, this Board met, and since it was conceded that regular elections of all kinds could be held upon the Automatic machine under "Plan B", determined that the bid submitted by the Automatic Corporation was in all respects, responsive to the specifications.

(24) That after further consideration and comparison of the merits of the respective machines, this Board determined to award the contract therefor to the Automatic Corporation.

(25) That it will be seen from the form of the contract, as it appears in the specifications filed by the complainant, the Automatic Corporation agrees to furnish and deliver 910 manually operated voting machines and to do other work, "subject to all the conditions, covenants, stipulations, terms and provisions contained in" the specifications and the bid, or proposal. That this Board could have awarded the contract for the purchase of a machine equipped and arranged to vote "Plan B"; but, in the opinion of the Board, the ballot as arranged on the sample machine is simple and satisfactory, and it can be set up more quickly, than the Ballot under "Plan B". That for this reason, this Board did not care to waive its right to demand the furnishing of machines arranged and equipped in accordance with the sample machine of the Automatic Corporation, until there had been a judicial determination of the legality of such arrangement, and for that reason the Board awarded the contract to the Automatic Corporation for the furnishing of 910 machines to comply with the "conditions, covenants, stipulations, terms and proposals contained in" the specifications, with the knowledge that it has, under Section 43 of the specifications the right to demand voting machines, which are "in strict accordance with and to meet the requirements 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 the contract documents''. That it is thoroughly understood by this Board and by the Automatic Corporation that this Board has the right to elect, and will elect after the determination of this case, whether the machines will be arranged and equipped in accordance with the sample machine, or in accordance with ''Plan B''.

(26) That an examination of the specifications shows the sample machine referred to in Section 47 is only ''representative'' of the machines, equipment and accessories *to be furnished and is ''subject to all the provisions of the* contract documents.'' That the fact this Board did not consider itself bound to purchase the identical sample machine tendered is apparent from the specifications which provide, in Section 14, that the Board may waive technical defects if deemed best for the public interests, and award the contract on ''that type, size and make of voting machine which appears, in the judgment of the Board, to be best for the public interests.'' That the authority of this Board, as set forth in Section 23 of the specifications, shows that it retains the right to determine the acceptability of the work and materials to be paid for, that it shall decide all questions in relation to the work and of the performance thereof, and that it shall, in all cases, decide any question which may arise relative to ''the fulfillment of the contract or to the obligations of the Contractor thereunder''. To make the hold upon the Contractor complete, the said section provides that a committee of three members of this Board shall be referee in any question touching the contract, and that the decision of a majority of said committee shall be final and conclusive upon the Contractor. That under Section 41 entitled, ''Guarantee, Maintenance and Repair Obligations'', the contractor guarantees for a period of five years, after delivery, to make any repairs, renewals 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.''

(27) That at the first session of the hearing held by this 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 concerned, we have put a fair price on the machine and think we have proven that conclusion. We are on record, 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."

(28) That in view of this statement by the President of the Shoup Corporation it was plainly apparent to this Board that neither the Shoup Corporation, nor any taxpayer could contend that the waiver by the Board of the defects in the form or arrangement of the ballot on the face of the sample Voting Machine of the Automatic Corporation, if indeed, such sample ballot should be held defective, was in any way unfair to either the Shoup Corporation, or the taxpayers of Baltimore City, since a rejection of the bids and securing new bids would only result in expense and delay, with the same final result.

(29) That while it might not be necessary for this Court to pass upon the validity of a machine arranged and equipped to vote a ballot as shown on the sample machine, in view of the fact that "Plan B" is conceded to be lawful and the further fact that this Board has ample authority and discretion to make a selection, because of the well established principle that Courts will not assume that a Board or administrative body will act unlawfully if it is possible for it to proceed in a lawful manner, nevertheless this Board welcomes this suit and the prospect of a determination by the Court of the validity of the ballot on the sample machine. The said Voting Machine Act requires the use of voting machines throughout Baltimore City at all elections held after January 1, 1938, which no doubt means that said machines must be ready for a primary election in September, 1938. For this reason, Section 39 of the specifications, provides that the machines shall be delivered in installments, the first installment of two hundred to be delivered on or before March 1, 1938, and the last before July 1, 1938. That this Board must therefore elect as soon as possible whether to require said machines to be so arranged and equipped as to vote the ballot as arranged on the sample machine, or "Plan B". That so far as the validity of the ballot on the sample machine is concerned, while the At-

torney General has ruled it is invalid, it is clear from his opinion that he regards the question to be a close one. That for full argument of the other view this Board respectfully refers this Court to the answer of the Automatic Corporation filed in this case. That while this Board has the greatest respect for the opinion of the Attorney General it does not concede the invalidity of the ballot on the sample machine, recognizing that the only body having authority to settle the question is the Courts; and for such reason, as stated above, this Board is most anxious to secure a judicial determination of the question whether it can elect to require the Automatic Voting Machine Corporation to furnish machines arranged and equipped to vote the ballot shown on the sample machine, or those so arranged and equipped to vote "Plan B", or whether it can only order machines arranged and equipped to vote "Plan B".

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

And as in duty bound, etc.

PAUL F. DUE,

Special Counsel to Voting Machine Board.

HOWARD W. JACKSON,

Chairman, Voting Machine Board.

(Affidavit Annexed.)

DEFENDANT VOTING MACHINE BOARD'S EXHIBITS.

Exhibit No. 1—Request for Opinion of Attorney General, July 22, 1937, omitted, as similar to Stipulation Exhibit No. 9, Record page 216.

Exhibit No. 2—Letter O'Conor, July 24, 1937, omitted, as similar to Stipulation Exhibit No. 11, Record page 220.

Exhibit No. 3—Plan B, omitted, as similar to Stipulation Exhibit No. 3A, Record page 166.

ANSWER.

(Filed 1st October, 1937.)

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 voting machines in future 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.

HERBERT R. O'CONOR,

Attorney General.

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.

ANSWER.

(Filed 1st October, 1937.)

To the Honorable, the Judge of said Court:

The answers of Mayor and City Council of Baltimore, a municipal corporation of the State of Maryland, and R. Walter Graham, Comptroller of Baltimore City, to the Bill of Complaint filed herein against these Defendants and others and to the show cause order passed by this Honorable Court on September 18, 1937, respectfully represents:

1. Answering the first paragraph of said Bill of Complaint, these Defendants admit the allegations contained in the first paragraph of said Paragraph 1.

Further answering the first paragraph of said Bill of Complaint, these Defendants deny that the Charter of Baltimore City or any section thereof in any wise affects the purchase of voting machines here involved, and also

deny that the contract for the purchase of voting machines referred to in said Bill of Complaint violates any of the provisions of the laws of Maryland.

2. Answering the second paragraph of said Bill of Complaint, these Defendants admit that the Mayor and City Council of Baltimore is a public municipal corporation of the State of Maryland but deny that Section 14 of the Charter of Baltimore City is applicable to the purchase of the aforementioned voting machines.

Answering said paragraph further, these Defendants deny that the contract for the purchase of the aforesaid voting machines was required to be awarded upon competitive bidding to the lowest responsible bidder.

3. These Defendants admit the allegations contained in the third paragraph of said Bill of Complaint.

4. Answering the fourth paragraph of said Bill of Complaint, these Defendants respectfully refer this Honorable Court to the laws referred to in said paragraph for a complete statement of the terms and provisions thereof.

Further answering said paragraph, these Defendants deny any inference or suggestion that the voting machines purchased and to be delivered under the terms and conditions of the contract of purchase provide for "group voting" or that such machines do not and will not permit a voter to cast his ballot in a legal manner.

5. These Defendants admit the allegations contained in the fifth paragraph of said Bill of Complaint and of the provisions of the Specifications referred to therein, but respectfully direct the attention of this Honorable Court to all of the provisions of said Specifications that are applicable in the premises.

6. Answering the sixth paragraph of said Bill of Complaint, these Defendants admit that the Shoup Voting Machine Corporation (hereinafter referred to as "Shoup Corporation") and The Automatic Voting Machine Corporation (hereinafter referred to as "Automatic Corporation") furnished samples of their respective voting machines as required by Paragraph 47 of the Specifica-

tions, mentioned in the sixth paragraph of the Bill of Complaint.

7. Answering the seventh paragraph of said Bill of Complaint, these Defendants admit the allegations contained therein except that they deny the allegation that the sample machine of the Automatic Corporation was "so deficient, incompetent and inadequate in size, device, mechanism, equipment and operation that, by reason of its deficiencies, omissions and defaults, it failed to comply with and violated the Election Laws and the Voting Machine Law (Chapter 94 of the Acts of 1937, aforesaid) in various material and grave respects."

Answering said paragraph further, these Defendants allege that the legality of the voting machine set up and tendered by the Shoup Corporation forms no part of the issues presented in this case.

8. Answering the eighth paragraph of said Bill of Complaint, these Defendants admit that the Voting Machine Board held certain meetings as alleged and that Counsel for the Shoup Corporation attacked the bid of the Automatic Corporation, but deny that Counsel for the Shoup Corporation demonstrated that the voting machine tendered by the Automatic Corporation failed to comply with the Election Laws of the State of Maryland and was otherwise illegal, as alleged in said paragraph.

Further answering said paragraph, these Defendants admit that advice from the Attorney General of Maryland was requested by the Board of Supervisors of Election of Baltimore City, as alleged therein. All other allegations contained in said paragraph are neither admitted nor denied by these Defendants but strict proof thereof is demanded.

9. Answering the ninth paragrph of said Bill of Complaint, these Defendants deny that the Attorney General of Maryland advised the Board of Supervisors of Election that the voting machine submitted and tendered by the Automatic Corporation with its said bid was illegal.

Further answering said paragraph, these Defendants respectfully refer this Honorable Court to the opinion of the Attorney General, mentioned in said Bill of Complaint, for the meaning and effect thereof.

10. Answering the tenth paragraph of said Bill of Complaint, these Defendants admit the allegations contained in said paragraph with the exception that these Defendants deny any inference or suggestion that all bidders were not given a full opportunity by the Voting Machine Board to appear before it and to be heard.

11. Answering the eleventh paragraph of said Bill of Complaint, these Defendants deny the allegations contained therein.

12. Answering the twelfth paragraph of said Bill of Complaint, these Defendants respectfully refer this Honorable Court to the provisions of law mentioned therein. These Defendants deny the allegation that the award and contract for the purchase of said voting machines of the Automatic Corporation are unconstitutional, illegal and invalid and the allegation that the use by the voters of the voting machines to be purchased from and furnished by the Automatic Corporation is unconstitutional and illegal.

As to any other allegations contained in said paragraph, these Defendants neither admit nor deny the same but require strict proof thereof.

13. Answering the thirteenth paragraph of said Bill of Complaint, these Defendants deny each and every material allegation contained therein.

14. Answering the fourteenth paragraph of said Bill of Complaint, these Defendants deny that the difference of approximately $200,000. between the bid of the Automatic Corporation and the bid of the Shoup Corporation is "apparent or ostensible" and allege that the saving to the Mayor and City Council of Baltimore is substantial and real.

Further answering said paragraph, these Defendants deny that the machines to be furnished by the Automatic Corporation violate any of the provisions of the Specifications.

Further answering said paragraph, these Defendants deny the materiality of the allegations contained in subparagraph "B" of said paragraph and require strict proof thereof.

Further answering said paragraph, these Defendants deny that there are any securities or advantages afforded by the Shoup Voting Machine which are not afforded by the Automatic Voting Machine, and deny that "any attempt to crowd the names and descriptions of two candidates in the very small space available on the Automatic machine under one voting device will lead to confusion and disfranchisement of a large proportion of the voters."

15. Answering the fifteenth paragraph of said Bill of Complaint, these Defendants allege that to the best of their information, knowledge and belief no changes have been made or will be made in the sample voting machine of the Automatic Corporation by any of the defendants in this case.

16. Answering the sixteenth paragraph of said Bill of Complaint, these Defendants deny that the contract awarded to the Automatic Corporation is in any respect unconstitutional, illegal or void, as alleged therein, but, on the contrary, allege that the said contract is lawful in all respects and is made pursuant to authority and discretion vested in and lawfully exercised by the Voting Machine Board.

17. Further, in affirmative defense to said Bill, this Defendant respectfully alleges:

As required by Section 47 of the Specifications, the Automatic 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 Corporation is so constructed as to permit the setting up thereon, insofar as first and second choice voting is concerned, of 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 ballots thereon in all forms and varieties permitted and authorized by law. The Automatic 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 this Defendant further alleges that the contract between the Automatic 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.

CHARLES C. G. EVANS,

Deputy City Solicitor of Baltimore City.

(Affidavit Annexed.)

MAYOR AND CITY COUNCIL.

Exhibit No. 1—Plan B omitted, as similar to Stipulation Exhibit No. 3A, Record page 166.

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(16)

ANSWER.

(Filed 4th October, 1937.)

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 18th, 1937, against this Respondent and others, and to the show cause order passed by this Honorable Court on September 18th, 1937, respectfully shows unto your Honor:

1. Answering the first paragraph of the Bill of Complaint, this Respondent has no knowledge as to whether or not Hattie B. Daly, the Complainant, is a property owner and taxpayer, but believes the same to be true. This Respondent denies that the procedure prescribed in the Charter of Baltimore City is applicable to this case.

2. Answering the second paragraph of the Bill of Complaint, this Respondent denies that Sec. 14 of the Charter of Baltimore City is applicable to the purchasing power of the Voting Machine Board created by Ch. 94 of the Acts of the General Assembly of Maryland at its regular session of 1937, and this Respondent says that the power of the Voting Machine Board is fixed exclusively by the terms of said Ch. 94 of the Acts of 1937.

3. Answering the third paragraph of the Bill of Complaint, this Respondent admits that the personnel of the Voting Machine Board under said Ch. 94 of the Acts of 1937 is 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 Supervisors of Election of Baltimore City. This Respondent admits that R. Walter Graham is the Comptroller of the City of Baltimore. This Respondent says that it is a corporation of the State of Delaware, with its factory and principal office at Jamestown, New York.

4. Answering the fourth paragraph of the Bill of Complaint, this Respondent admits the passage of Ch. 94 of the Acts of 1937, and says that the Complainant has quoted portions of the Laws of Maryland, and has quoted some provisions of law not applicable to the subject matter of this suit and has failed to quote other provisions of law applicable to this suit. This Respondent says that the Complainant has erroneously confused group voting with alternative voting for first and second choice in state-wide primary elections, which is hereinafter more fully answered.

5. Answering the fifth paragraph of the Bill of Complaint, this Respondent admits in substance the allegations thereof and says that the Voting Machine Board appointed some of its members as a Specifications' Committee to see to the preparation of specifications for vot-

ing machines. This Respondent alleges that the provisions quoted do not cover all of the provisions of the specifications.

6. Answering the sixth paragraph of the Bill of Complaint, this Respondent admits that the Shoup Corporation and the Automatic Corporation furnished samples of their respective voting machines, but says, however, that the legality of the voting machine of the Shoup Corporation is not a proper subject matter of this suit, although the said Shoup machine is inadequate and deficient in several particulars.

7. Answering the seventh paragraph of the Bill of Complaint, this Respondent admits that bids or proposals were publicly opened and read as alleged, and says that on the Type A, Size 1 machine, the bid of the Automatic Voting Machine Corporation for 910 such machines was $200,245.50 less than the competing bid of the Shoup Corporation. This Respondent denies that the Automatic machine was deficient, incompetent and inadequate in any particular and denies that the Automatic machine failed to comply with any provisions of law, and this Respondent on the contrary alleges that the Automatic machine is adequate and efficient in every particular and complies with all laws and legal requirements. This Respondent further alleges that the question of the fitness or legality of the Shoup machine is not an issue in this case, but that if it were an issue, that the said Shoup machine is inadequate and illegal in several respects.

8. Answering the eighth paragraph of the Bill of Complaint, this Respondent admits that meetings were held by the Voting Machine Board and admits that Counsel for the Shoup Corporation, which had made a greatly higher bid, endeavored to attack the validity of the Automatic machine, but this Respondent denies that Counsel for the Shoup Corporation demonstrated that the Automatic machine failed to comply with the election laws of Maryland, or that it was illegal in any respect. This Respondent admits that the Board of Supervisors of Election requested an opinion from the Attorney General of Maryland. This Respondent denies the other allegations of said eighth paragraph.

9. Answering the ninth paragraph of the Bill of Complaint, this Respondent denies that the Attorney General advised the Board of Supervisors of Election that the Automatic voting machine was illegal. On the contrary, the Attorney General advised that in his opinion the form or arrangement of the ballot on the Automatic machine, referred to as Plan A, pertaining to a Republican primary election where three persons were candidates for the same state-wide office and involving first and second choice, did not comply with the election law, but that another plan or form of first and second choice voting submitted by this Respondent, and styled "Plan B", did conform with the election law. This Respondent denies that the Attorney General passed upon the legality, sufficiency or validity of the Shoup machine. This Respondent alleges that Plan A is valid and legal in all respects.

10. Answering the tenth paragraph of the Bill of Complaint, this Respondent admits that the opinion of the Attorney General was sent to the Board, and admits that on September 8th, 1937, the Voting Machine Board awarded the contract to the Automatic Voting Machine Corporation. This Respondent says that Counsel for the Shoup Corporation, as well as Counsel for the Automatic Corporation, were at all times accorded full opportunity for full and complete argument before the full membership of the Voting Machine Board. This Respondent admits that the contract and bond were delivered to the Voting Machine Board.

11. Answering the eleventh paragraph of the Bill of Complaint, this Respondent denies that the award of said contract and the said contract are ultra vires, illegal and void, and denies that they are in violation of the Declaration of Rights, the Constitution of Maryland, the Laws of Maryland, the opinion of the Attorney General, the specifications, or the Charter of Baltimore City, and the Respondent alleges on the contrary that the awarding of said contract and the said contract are entirely legal in every respect.

12. Answering the twelfth paragraph of the Bill of Complaint, this Respondent denies that said award and contract are unconstitutional, illegal and invalid, and further answering said paragraph says:

A. This Respondent denies that Art. 7 of the Declaration of Rights of Maryland, or that Sec. 1 of Art. 1 of the Constitution of Maryland, or that any other provision of law gives to a voter of Maryland the right of personal choice voting, that is the privilege of writing in any name the voter desires for any office in any election. This Respondent admits that the sample Automatic machine does not have the equipment installed thereon to permit personal choice voting, and further says that personal choice voting in Maryland is illegal, and that the specifications and the contract do not call for personal choice voting. This Respondent says that the sample Automatic machine is legal in every respect and fully complies with the specifications, the contract and the existing laws of Maryland. The subject of personal choice voting also appears later in this Answer.

B. This Respondent denies that the method of first and second choice voting in state-wide party primaries, as shown on the sample Automatic machine, is illegal in any respect, and on the contrary says that said method of first and second choice voting fully complies with all provisions of law applicable thereto. This Respondent files herewith as part hereof a diagram of said method of first and second choice voting marked "Automatic Exhibit Plan A," which is hereinafter referred to as Plan A. Plan A constitutes a substantial compliance with Sec. 203 of Art. 33 as required by 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. Under the form or arrangement of Plan A the voter may vote by one operation for his first choice and for his second choice for a state-wide office in a party primary, 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 consolidates the returns from each legislative district, pursuant to Sec. 203, and determines the respective first choice and second choice of the legislative district for the nomination for the particular office, which result is binding upon the delegates from such legislative district to the State convention of the particular political party. This Respondent denies that the form of Plan A violates Sec. 224-F (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.

C. This Respondent denies that the size of the type or print on the Automatic ballot label is too small, and denies that the space on the face of the machine is inadequate to include and accommodate all of the descriptive matter required thereon, and on the contrary says that the size of the type or print is legal and adequate. The Complainant very facetiously contends that if the form of Plan A is legal, then it would be necessary in first and second choice voting to print the names of two candidates, as well as the other necessary descriptive matter, under each separate voting device. Under Plan A this Respondent denies that it is necessary to repeat the names of two candidates in first and second choice voting under each respective voting lever. The general form of the printing of the ballot label in first and second choice voting as shown on the sample Automatic machine is clear and adequate in every respect. This Respondent alleges that 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 of 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. 224-F (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. 224-G (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."

Under Plan A in first and second choice voting, the Complainant naively suggests that not only must the names of two candidates appear in one space, but also that the party designation and the name of the county or city in which the candidate resides shall likewise be printed in connection with each of the two names. This Respondent denies the necessity of the Complainant's suggestion. On a primary ballot it is necessary to print the designation of the political party only once with the group of candidates seeking the nomination. Sec. 224-G (c) is as follows:

"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."

As shown on Plan A the designation of the county or city where the candidate resides, appearing once in connection with each candidate's name in the group, is sufficient under the law.

This Respondent alleges that the practice has not been uniform in Baltimore City and the twenty-three counties in the printing of the party designation, that is "Democrat" or "Republican" after each name on a primary ballot. There is no necessity for repeating the party designation after each name. A primary paper ballot of the Democratic Party is separate and distinct from a Republican primary paper ballot, and vice versa. On the voting machine the two primary ballots are likewise separate and distinct. When a registered Democrat enters the curtains of the voting machine, he can vote only the democratic primary ballot, because the Republican primary ballot is then locked off, and vice versa. (Sec. 224-H (a).) The two primary party ballots on the face of the machine are respectively designated "Democratic" and "Republican."

Counsel for this Respondent has just recently made inquiry of the twenty-four Boards of Supervisors of Elections throughout Maryland as to the form of primary ballots in 1934.

Twenty jurisdictions have responded.

The following thirteen jurisdictions as shown by copies of the ballots or newspaper publications thereof, printed the party designation after each name on the primary ballot:

Baltimore City, Anne Arundel County, Baltimore County, Caroline County, Charles County, Dorchester County, Garrett County, Montgomery County, Talbot County, Washington County and Worcester County, Allegany County, and St. Mary's County.

The following seven jurisdictions, as shown by copies of the ballots or newspaper publications thereof, did not print the party designation after any name on the primary ballot:

Cecil County, Frederick County, Harford County, Kent County, Queen Anne's County, and Somerset County, and Howard County.

Up to the time of the filing of this Answer, Counsel of this Respondent has not heard from the remaining four Counties, except that Wicomico County sent a tally sheet, which may or may not be representative of the ballot, and which tally sheet does not print the party designations. It is unnecessary and mere surplusage to repeat the party designation after each name on a primary ballot. Thus, by administrative practice in many counties of Maryland the primary law has been interpreted not to require the unnecessary repetition of the party designation after each name on a primary ballot.

The general election law of Art. 33 ends with Sec. 189. The primary elections section of the Article commences with Sec. 190.

Sec. 193, covering primary elections, provides:

"All such primary elections shall be conducted under the control of the several boards of supervisors of elections in Baltimore City and the counties, respectively, by

the judges and clerks of elections appointed by them under the provisions of said article 33, for the conduct of elections held thereunder in Baltimore City and in the several counties of the State, and in the same manner as far as may be applicable as general elections are conducted under said article 33, except as may be hereinafter otherwise provided."

Sec. 198, covering primary elections, provides:

"Official ballots shall be prepared and printed for such primary elections in Baltimore City and in the several counties, respectively, by the said several Boards of Supervisors of Elections for said city and said several counties, respectively, as is now provided by this Article for general elections, except as otherwise provided for in this sub-title * * *."

Sec. 200, covering primary elections, provides:

"The names of candidates for nomination for each office or for each place or position aforesaid, respectively, shall be arranged alphabetically upon the ballots according to the surnames of the candidates. Ballots in all said primary elections shall be cast, counted and canvassed and the result of the election announced and certified in Baltimore City and in each of the counties of the State, as now provided by this Article for general elections; and the said primary elections shall be held and conducted and determined in the manner and form provided by this Article for general elections, and subject to all the regulations, requirements and provisions as prescribed by this Article for general elections in so far as the same are or may be applicable to said primary elections and except as may be herein provided * * *."

Sec. 63 (referred to in Sec. 224-A) comes within the general election portion of Art. 33. Sec. 224-A of the 1937 Act repeals and re-enacts Ch. 228 of the Acts of 1933 (Sec. 224-A of the Code, 1935 Supp.). The 1933 Act was drawn so that Baltimore City could use its then owned 50 voting machines in more precincts, providing for two machines per precinct. At that time the machines were used only in general elections and were not used in primary elections, because under Sec. 86 ballots had to be preserved four months, which time would extend beyond

the general election date following the preceding primary.

Sec. 224-A requires the designation of the party to appear just above the name of each such candidate, referring to the names of the candidates of each party, meaning party candidates in a general election and not a candidate seeking nomination by a political party. Sec. 224G (c) covers primary candidates seeking nomination by a political party, by providing that the ballot label for each group of candidates seeking nomination by a political party shall contain the name or designation of the political party. There is no necessity for needlessly repeating on a primary ballot the name of the political party after each name.

In a primary election a party is a candidate for nomination by his party, and not a party candidate.

Sec. 224F (f), in referring to a primary, uses the language "to vote only for the candidates seeking nomination by the political party."

Sec. 224-G (e) uses the language "the names of all candidates, nominated or seeking nomination by a political party."

Sec. 224-G (h) provides:

"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 column by parties."

This Respondent alleges that the elimination of the party designation after each primary candidate's name would permit even larger type for the printing of the contestant's name.

This Respondent further alleges that the form and arrangement of ballot labels is left to the discretion of the Board of Supervisors of Election, under Sec. 224-G (g) providing 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."

The ballot labels on the Automatic machine are susceptible of being printed in a variety of forms and arrangements, in the discretion of the Board of Supervisors of Election. These forms may be in such manner as suit the construction of the Automatic machine, and also shall be determined by the Board of Supervisors of Election as nearly as may be in accordance with this subtitle.

Ninety percent of all voting machines used in the United States are of the Automatic type, and are used in Baltimore City and in over 3,500 cities, towns and villages in the United States, and they have been and are being used successfully by persons with normal vision. The first criticism as to the size of the type or print now comes from an unsuccessful competitor.

There are some makes of machines which possibly might need larger type to be clearly readable by persons with normal vision. The Automatic machine has its ballot labels on a direct line of vision with the eyes of a standing average voter. This is because the Automatic party rows are horizontal. The Shoup machine, for example, has its party rows arranged vertically so that some of the names of candidates are on a level with the lower part of the voter's body instead of the voter's eyes.

D. This Respondent denies that the Automatic Voting machine violates the letter and spirit of any provision of Sec. 224-A. The language in Sec. 224-A—

"that the designation of the party or principle which each candidate represents shall appear just above the name of each such candidate."

refers to general elections, as hereinbefore mentioned. In a primary the aspirant hopes to represent his party in the following general election.

This Respondent alleges that exact uniformity (so far as practicable) prevails on the face of the Automatic machine as to the size and face of printing all candidates' names and party designations.

E. This Respondent again says (answering the same repetitious allegation) that on a primary ballot the des-

ignation of the party does not have to appear just above the name of each candidate for nomination. Sec. 224-A, referred to by the Plaintiff, applies to general elections. The letter and spirit of the law is complied with in the primary ballot used under Plan A in first and second choice voting by printing the place of residence of the candidate for nomination once after the name of each respective candidate where his name appears for first choice voting in large, clear, bold type.

F. This Respondent says that the sample Automatic machine contains adequate directions to the voter as required by law. Sec. 63, referred to by the Plaintiff, comes under the general election portion of Art. 33 of the Code. The sample Automatic machine fully complies with, and is susceptible of complying with, Sec. 224-A of the Voting Machine Act, and all other applicable existing laws.

G. The Plaintiff properly quotes from Sec. 224G (g) of the Voting Machine Act. The expression "as nearly as may be" gives discretionary power to the Board of Supervisors of Election in preparing the form and arrangement of ballot labels so as to suit the construction of the machine and to adapt the paper ballot law to the use of voting machines. This Respondent says that the question of whether or not the Shoup machine carries out the law is not an issue in this case. This Respondent denies that the Automatic machine fails to follow the law and violates its provisions, and on the contrary says that the Automatic machine complies with all provisions of existing law and observes every mandatory provision of the law.

H. This Respondent denies that the sample Automatic machine fails to comply with paragraph 44 of the specifications and denies that the Board could not lawfully award the contract to this Respondent, and says that the Automatic 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. No other type of machine considered by the Board has this extent of flexibility in accommodating on one machine primary ballots of one, two, three or more political parties.

I. This Respondent admits that the Plaintiff has properly quoted a portion of the provisions of the specifications. This Respondent denies that the award and contract are in violation of any provisions of the specifications and denies that the Automatic voting machine fails to comply with and violates the Declaration of Rights and the Constitution of Maryland and the Election Laws of Maryland. This Respondent denies that Secs. 14 and 15 of the Charter of Baltimore City apply to or govern the action of the Voting Machine Board. The Board was not obliged to ask for competitive bids. The Board reserved the right to reject any and all bids. However, the Board drew the specifications, after full and impartial hearings being accorded to representatives of both the Shoup Corporation and the Automatic Corporation, so that both

machines would comply with the specifications, in order that competitive bids could be made. The bid of the Automatic Corporation, and the contract which followed, gives to Baltimore City the best voting machine made, and besides it saves the City over $200,000.00.

13. Answering the thirteenth paragraph of the Bill of Complaint, this Respondent denies that the sample Automatic machine violates the Declaration of Rights, the Constitution and Election Laws and the Specifications and the Charter of Baltimore. The Respondent denies that it is necessary to change said machine to comply with any legal requirement and says that the said sample machine is valid and legal in all respects. This Respondent denies that the Voting Machine Board in making the said award and contract with this Respondent abused its discretion and authority or took any wilful and arbitrary action and denies that any of the actions of the Voting Machine Board are illegal, null and void, and on the contrary alleges that the said Board made said award and contract, having in mind what was best for the public interests in conformity with paragraph 14 of the specifications, which 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."

14. Answering the fourteenth paragraph of the Bill of Complaint, this Respondent says that the saving of over $200,000.00 to Baltimore City in purchasing the Automatic machine in preference to the Shoup machine is substantial and real, and not purely mythical as the Complainant alleges. This saving benefits the Complainant and all other taxpayers of the City. This Respondent alleges that the Automatic Voting Machine Corporation and its predecessors have been in business since 1899; that this Respondent is the oldest and most substantial Voting Machine Company in existence; its factory, self-owned and operated, is the most complete, best organized and best conducted factory of its kind; 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 the voting machine which the Board has contracted to purchase is the best voting machine made. The purchase of 910 machines from this Respondent saves Baltimore City over $200,000.00. The unit price for the Automatic machine is $826.95, while the unit price of the Shoup bid, $1,047., was 26.6% higher than the Automatic bid.

Further answering said paragraph fourteen, this Respondent says:

A. This Respondent denies that its machine has only eight party rows of 40 candidates each and says that it has nine party rows of 40 candidates each, all of which has been hereinbefore more fully answered. The validity of the Shoup voting machine is not an issue in this case. The Automatic machine mentioned in the contract is susceptible of being used in all primary, special, general and other elections.

B. The Automatic voting machine, covered by the contract, is not equipped for personal choice voting, and as hereinbefore mentioned personal choice voting is not required or permitted by the provisions of the organic law and the election laws of Maryland. Personal choice voting was omitted in the specifications and personal choice voting is not required under the contract. This Respondent says that the price charged Baltimore City for the 50 machines purchased by the City from this Respondent in 1928, does not affect or bear any relation to the present contract. Those 50 machines were purchased over a long period of time in instalments extending over several years, and the unit price of said 50 machines, considering the quantity and the method of deferred payment thereof, can have no possible bearing on the issue involved in this suit. In 1928 when the City purchased said 50 machines, the question of the right of personal choice voting was perhaps somewhat debatable.

The Legislature in 1924 (Acts of 1924, Ch. 581, Sec. 54, now Code Art. 33, Sec. 62) revoked the privilege of per-

sonal choice voting as it had existed under Ch. 2, Sec. 49 of the Extra Session of 1901, and as it had existed under the Acts of 1896, Ch. 202, Sec. 49, and which read as follows:

"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."

However, in 1924, the Legislature, while striking out this provision from Sec. 62, neglected to amend Sec. 80 of Art. 33, which also apparently recognized personal choice voting as provided in Sec. 62. Even in 1927, by Ch. 370, the Legislature repealed and re-enacted said Sec. 80 with amendments and still apparently recognized the right of the voter to exercise personal choice voting as provided in Sec. 62. It was not until 1931, by Ch. 120, that the Legislature eliminated the provision in said Sec. 80 by striking out the right of personal choice voting. In the interim Baltimore City purchased 50 Automatic machines from this Respondent in 1928, at which time the question, by virtue of Sec. 80, may have been somewhat in doubt as to whether or not personal choice voting was permissible. The equipment for personal choice voting was installed in said 50 machines in 1928. However, the personal choice voting equipment on the said 50 machines has been blocked off and does not affect in any way the use of those machines in all primary and general elections under the existing laws of Maryland.

This question indeed was passed on by the Attorney General of Maryland who ruled in 1926, as follows:

"May 29, 1926.

"H. Fillmore Lankford, Esq.,
Attorney at Law,
Princess Anne, Md.

"Dear Mr. Lankford: The Attorney General has requested me to answer your letter of May 17th, in which you ask for an opinion as to whether or not the voters may now write on the ballot the names of persons for

whom they desire to vote, since the passage of Chapter 581 of the Acts of 1924, the general purpose of which was to shorten the ballot by eliminating blank spaces thereon.

"This inquiry has been very carefully considered by the Attorney General, and he is of the opinion that it is not now permissible for a voter to write on the ballot the name of any person for whom he may desire to vote. Inasmuch as Section 62 of the Code of 1924, does not authorize the writing of additional names on the ballot by a voter, the provision contained in Section 80 and reading 'or other than the name or names of any other candidate written by a voter on the ballot as provided by Section 62, become nugatory.

"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.

Very truly yours,

WILLIS R. JONES,

Asst. Attorney General."

The Attorney General of Maryland also definitely ruled in the years 1936 and 1937 that personal choice voting is not permissible in Maryland. The subject matter of personal choice voting was discussed by the Voting Machine Board and representatives of the Shoup Corporation and the Automatic Corporation prior to the bids and it was definitely understood that the sample machines should not be equipped for personal choice voting. The sample Automatic machine under the contract, and the 910 machines being built under the contract, therefore, are not equipped for personal choice voting. The contract was made in the light of existing statutes forbidding personal choice voting and in the light of continued opinions by the Attorney General since 1926 that personal choice voting is prohibited, and also in the light of the fact

that the Act of 1924, prohibiting personal choice voting, has been accepted in practice throughout the State since that time. The Voting Machine Board had a perfect legal right to make a valid and binding contract for machines without personal choice voting equipment. The contract price per machine for the 910 machines, of course, would have been higher if personal choice voting equipment had been required.

This Respondent, however, is prepared to furnish, and will furnish, at the option of the Voting Machine Board, 910 machines at the said contract price of $826.95 for each machine, with sufficient space to contain the mechanism and equipment for personal choice or write-in voting. This Respondent gave this option to the Voting Machine Board by submitting two types of sample machines, one with space for the write-in equipment and mechanism, and one without such space. The difference between the two types of sample machines is very slight, the one with the said space merely having a slightly higher top. The Voting Machine Board, at its option, may have such slight additional space in the top of the machine if it so desires, or may have the machines without such slight additional space, either of which, under the contract, are to be furnished, and will be furnished, at the said unit contract price of $826.95 per machine. This Respondent, however, desires that the Voting Machine Board promptly choose which of the sample types submitted it desires to have, so as to accomodate this Respondent's factory in the building of said machines, so that they may be delivered within the delivery dates mentioned in the contract.

If this Honorable Court should decree that write-in equipment and mechanism actually must be installed at this time in said machines, then this Respondent will furnish and install such additional write-in equipment and mechanism at this time, charging therefor the sum of $82.00 for such additional equipment and mechanism installed in each machine. The installation of such write-in equipment and mechanism in the said 910 machines at this time would increase the cost of the price per machine from $826.95 to $908.95. If, however, such additional write-in equipment and mechanism should not be

ordered at this time, but should be ordered at some future time after the said 910 machines are delivered, then at such future time the cost to the Voting Machine Board for furnishing and installing said write-in equipment and mechanism will be a reasonable amount commensurate with the cost of material and labor at such future time.

C. This Respondent says that the question of the equipment for first and second choice voting on the Shoup machine is immaterial and irrelevant in this case. This Respondent again denies that it is necessary to crowd the names and descriptions of two candidates under one voting device on the Automatic machine and denies that the use of the Automatic machine will lead to any confusion or disfranchisement of voters. This Respondent denies that the cost and value of the equipment in the Shoup machine for first and second choice voting has any bearing upon the respective bids of the two companies, and denies that the cost to the Shoup Corporation of having its machine or its equipment manufactured, through sub-contractors or otherwise, has any relation or bearing to the issues here involved.

This Respondent denies that the Automatic voting machine fails to afford securities and advantages in the use thereof, and says that its machine is the best machine made, and further says that the question of the securities and advantages, if any, of the Shoup machine is not involved in this case.

15. Answering the fifteenth paragraph of the Bill of Complaint, this Respondent says that its sample machine is in the custody of the Voting Machine Board and that the Plaintiff need have no fear of any change being made in the equipment and mechanism on said machine.

16. Answering the sixteenth paragraph of the Bill of Complaint, this Respondent denies that the Automatic voting machine violates any provisions of law therein cited, and again denies that Secs. 14 and 15 of the Charter of Baltimore City are applicable to this case, and denies that Baltimore City will waste or lose $752,524.50 or any part thereof, and alleges that Baltimore City will receive the best possible value therefor, and this Respondent denies that the Complainant and other taxpayers of Balti-

more City will suffer irreparable injury, damage and loss by the carrying out of said contract.

17. Further answering the Bill of Complaint, this Respondent says that Plan A 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 as part hereof and marked "Automatic Exhibit Plan B," and which is hereinafter referred to as 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 re-arrange the form of the primary ballot of 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 Ch. 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. 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.

18. 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. 224-A 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.

19. Further answering the Bill of Complaint, this Respondent says that Sec. 224-A 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 interest."

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.

20. Further answering the Bill of Complaint, this Respondent says that great confusion, and also expense

might ensue if this Respondent's contract with the Voting Machine Board should be declared null and void. The Board of Supervisors of Election of Baltimore City, pursuant to the mandate of Ch. 94 of the Acts of 1937, has rearranged the precincts of the City for the prospective voting machines, by reducing the number of precincts from 685 to 471. The poll books and maps have been and are being rearranged to meet the change of precincts. Without voting machines in 1938, the City would be in a terrible state of chaos and confusion, which would likely disfranchise many voters. The Board of Supervisors of Elections of the City has been and still is making all necessary plans and preparations to use machines throughout the City. Estimated economies, in the election costs to the city for 1938, by the use of machines, amount to over $102,000. Delay in the delivery of machines might also jeopardize the position of this Respondent and of the sureties on the bond. This Respondent has been and is now proceeding with its performance of the contract, and has made purchases of large quantities of materials for said machines, and has started to fabricate said materials into the making of said machines at its factory at Jamestown, New York.

21. 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 she 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 many of the allegations of the Bill of Complaint are speculative, argumentative, theoretical, irrelevant, inconsistent and immaterial; 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 with its proper costs.

And in duty bound, etc.

ARMSTRONG, MACHEN & ALLEN,

Solicitors for Automatic Voting Machine Corporation.

AUTOMATIC VOTING MACHINE CORPORATION,

By RUSSELL F. GRIFFEN,

Vice-President.

(Affidavit Annexed.)

Defendant's Automatic Exhibits Plan A and Plan B to be presented under separate cover.

TESTIMONY TAKEN IN OPEN COURT.

(Filed 11th October, 1937.)

Baltimore, Md., October 4, 1937.

The above entitled causes came on to be heard before his Honor Judge Samuel K. Dennis at ten o'clock A. M.

Counsel present:

Charles G. Page, Esq., on behalf of the plaintiff Norris.

Messrs. Willis R. Jones and Isaac Lobe Straus, on behalf of the plaintiff Daly.

Charles C. G. Evans, Esq., on behalf of the defendants Mayor and City Council of Baltimore and R. Walter Graham.

Arthur W. Machen, Esq., and Wendell D. Allen, Esq., on behalf of the defendant Automatic Voting Machine Corporation.

Paul F. Due, Esq., on behalf of the defendant Voting Machine Board.

(Mr. Page) If your Honor please, as a preliminary to the opening of the case, your Honor is aware that there are two cases, Daly vs. Jackson and Norris vs. Jackson, which are pending for hearing. At the suggestion of several of the counsel I prepared a stipulation which we propose to file, subject to your Honor's approval, which reads as follows:

"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, each party reserving the right to object to any testimony offered; 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."

With your Honor's approval, I will file that in the case. I do not see the representative of the Attorney General here, and his signature is still missing.

(Stipulation filed but omitted from Record.)

(Opening statement to the Court on behalf of the Plaintiff Wm. S. Norris then made by Mr. Page.)

(Opening statement to the Court on behalf of the plaintiff Hattie B. Daly then made by Mr. Jones.)

(Opening statement to the Court on behalf of the Voting Machine Board was then made by Mr. Due.)

(Opening statement to the Court on behalf of the Automatic Voting Machine Corporation was then made by Mr. Allen, supplemented by Mr. Machen.)

(Mr. Jones) If your Honor please, before you take a recess, Mrs. Daly is here, and if it is not admitted she is a taxpayer I want to put her on the stand to testify and let her go, because she is nursing and wants to get away. Is that admitted?

(All admitted Mrs. Daly is a taxpayer.)

(Thereupon, accompanied by the counsel and parties interested in the above causes, the Court went out to the adjacent corridor to inspect a sample machine of the Automatic Voting Machine Corporation which has the paper roll inserted for write-in voting.)

(Mr. Allen) Your Honor, I believe I neglected to mention a fact that your Honor probably knows anyhow, that is that first and second choice voting was admitted in Maryland in 1912, and in this quarter of a century it has been used three times in Maryland.

(Mr. Evans) Your Honor, might I, for the purpose of the record, make a statement before testimony is started, and that is this: From the title of the case I was not absolutely certain whether it was the intention to sue the members of the Board of Estimates in their individual capacities, and I communicated with counsel for both plaintiffs and I was informed that they did not intend to sue the members in their individual capacities and did not seek any relief against the Board of Estimates as such, but merely insofar as those members were members of the Voting Machine Board and, therefore, with the knowledge and consent of attorneys for both plaintiffs, no answer was filed on behalf of the Board of Estimates as such.

(Mr. Page) And that statement is also correct in regard to the plaintiff Norris.

I first offer in evidence a stipulation which has been signed by all the parties in the Norris case, with the exception of the Attorney General, who is acting as solicitor for the Board of Supervisors of Baltimore City. He has filed an answer in which he submits himself to the Court and I will later get his signature if deemed necessary.

(The Court) All right.

(Stipulation referred to then marked in evidence "Plaintiff's Exhibit No. 2".)

(20)

PLAINTIFF'S EXHIBIT NO. 2.

STIPULATION.

(Filed 11th October, 1937.)

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of any party to this cause to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

(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 during the month of July, 1937, 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, said notice, specifica-

tions and form of proposal are the same as those appearing in Stipulation Exhibit No. 6, except that blanks appearing therein have been filled.

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

(4) 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).

(5) 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 each; 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.

(6) That paragraph 47 of the Specifications requires that samples of machines to be bid on be set up in the office of the Supervisor of Election in the Court House in Baltimore; and prior to the submission of said bids, the Voting Machine Board delivered to the respective bidders copies of requirements with regard to the ballot to be arranged upon the sample voting machines installed in accordance with said provision of the Specifications; and thereafter, prior to the submission of said bids, the Automatic Corporation and the Shoup Corporation each installed samples of said forty (40) candidate Type A, Size 1 machine in said office. A copy of said requirements submitted to the Automatic Corporation is attached hereto, marked "Stipulation Exhibit No. 1".

(7) 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 Elec-

tion Laws of the State of Maryland; that thereafter the Board of Supervisors of Election of Baltimore City requested an opinion from the Attorney General of Maryland in accordance with a letter addressed to the Attorney General, a copy of which is attached hereto and made part hereof marked "Stipulation Exhibit No. 2"; and thereafter the Attorney General rendered his opinion to the Board of Supervisors of Election, a copy of which is attached hereto marked "Stipulation Exhibit No. 3". Plans A and B therein mentioned are attached to the opinion marked Stipulation Exhibit No. 3 A.

(8) That Stipulation Exhibits Nos. 2 and 3 were thereupon submitted to the Voting Machine Board at a meeting thereof held on or about the 8th day of September, 1937, and the said Voting Machine Board thereupon passed resolutions approving the Automatic Voting Machine bid and authorizing the execution of a contract with the Automatic Corporation, copies of which said resolutions are attached hereto marked "Stipulation Exhibits Nos. 4 and 5" respectively; and thereafter the said Voting Machine Board entered into a contract and bond, copies of which are attached hereto marked "Stipulation Exhibits Nos. 6 and 7" respectively, except that there is omitted from the copy of the contract the following material which was attached thereto:

Photographs as to Exterior and Interior of Factory to accompany Affidavit as to facilities, etc.—Required by paragraph (42) of Specifications.

Two Affidavits Required by paragraph (42).

Descriptive Matter Required by paragraph (45) in Parts I, II and III omitted.

it is agreed that the original parts so omitted may be offered in evidence by any party to this cause.

(9) That on October 17, 1936, the Attorney General rendered an opinion, a copy of which is attached hereto, marked "Stipulation Exhibit No. 8", on July 22, 1937 the Board of Supervisors of Election requested a ruling from the Attorney General, a copy of which is attached hereto marked "Stipulation Exhibit No. 9", to which the

Attorney General replied by letter, a copy of which is attached marked "Stipulation Exhibit No. 10"; (in addition thereto, the Attorney General on May 29, 1926, rendered an opinion, a copy of which is attached, marked Stipulation Exhibit No. 11).

CHARLES G. PAGE,
Solicitor for plaintiff, William S. Norris.

....

Attorney General, Solicitor for Board of Supervisors of Election of Baltimore City.

PAUL F. DUE,
Solicitor for the Voting Machine Board.

CHARLES C. G. EVANS,
Solicitor for the Mayor and City Council of Baltimore.

ARMSTRONG, MACHEN & ALLEN,
Solicitors for the Automatic Voting Machine Corporation.

STIPULATION EXHIBIT NO. 1.

THE BOARD OF SUPERVISORS OF ELECTIONS.

Rooms 21-23-25 Court House.
Baltimore.

J. George Eierman, President
Walter A. McClean
Daniel B. Chambers
Lindsay C. Spencer, Chief Clerk

July 22, 1937.

Automatic Voting Machine Corporation,
Jamestown, New York.

Gentlemen:

With reference to ballots to be arranged by you upon the sample machines to be set up in the office of the Su-

pervisors of Election on or before the day for opening bids, as provided in Section 47 of the Specifications adopted by the Board created and constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937, which Specifications we expect to have ready tomorrow in their final mimeotyped form:

On your forty-candidate machine please arrange the ballot label in accordance with the sample ballots heretofore furnished to you, namely,

the Republican ballot used in the Primary Election of 1934 in the 27th Ward—5th Legislative District—2nd Congressional District;

The Democratic ballot used in the Primary Election of 1934 in the 22nd Ward—6th Legislative District—3rd Congressional District.

On your fifty candidate machine please arrange ballot label in accordance with the directions herewith enclosed.

It is, of course, understood that the machines, as set up, must comply with the provisions of law to the effect that they shall permit the voter to vote for every candidate for whom he is entitled to vote and to prevent his voting for a greater number of candidates than can legally be nominated or elected, as indicated on the sample ballots furnished you and in the enclosed directions.

Very truly yours,

BOARD OF SUPERVISORS
OF ELECTIONS,

(Signed) LINDSAY C. SPENCER,

Chief Clerk.

LCS:EWW
Encl.

Same letter to Shoup Voting Machine Corporation.

DIRECTIONS FOR PRIMARY ELECTION BALLOT TO BE SET UP ON THE FIFTY CANDIDATE MACHINE.

4 Republican candidates for Governor, with provisions for 1st & 2nd choice, in compliance with the terms of Section 203 of the Election Laws (Article 33 of the Annotated Code of Public General Laws)

4 Democratic candidates for Governor, with similar provisions for 1st & 2nd choice

3 Republican candidates for United States Senator, with similar provisions for 1st & 2nd choice

3 Democratic candidates for United States Senator, with similar provisions for 1st & 2nd choice

3 Republican candidates for State Comptroller, with Similar provisions for 1st & 2nd choice

3 Democratic candidates for State Comptroller, with similar provisions for 1st & 2nd choice

3 Republican candidates for Attorney General, with similar provisions for 1st & 2nd choice

3 Democratic candidates for Attorney General, with similar provisions for 1st & 2nd choice

3 Republican candidates for Clerk of the Court of Appeals, with similar provisions for 1st & 2nd choice

3 Democratic candidates for Clerk of the Court of Appeals, with similar provisions for 1st & 2nd choice

4 Republican candidates for Member of the House of Representatives, of whom 1 is to be nominated

4 Democratic candidates for Member of the House of Representatives, of whom 1 is to be nominated

4 Republican candidates for Judge of the Court of Appeals, of whom 1 is to be nominated

4 Democratic candidates for Judge of the Court of Appeals, of whom 1 is to be nominated

4 Republican candidates for Chief Judge of the Supreme Bench, of whom 1 is to be nominated

4 Democratic candidates for Chief Judge of the Supreme Bench, of whom 1 is to be nominated.

16 Republican candidates for Associate Judge of the Supreme Bench, of whom 8 are to be nominated

16 Democratic candidates for Associate Judge of the Supreme Bench, of whom 8 are to be nominated

12 Republican candidates for Judge of the Orphans' Court, of whom 3 are to be nominated

12 Democratic candidates for Judge of the Orphans' Court, of whom 3 are to be nominated

4 Republican candidates for State's Attorney, of whom 1 is to be nominated

4 Democratic candidates for State's Attorney, of whom 1 is to be nominated

4 Republican candidates for Clerk of the Superior Court, of whom 1 is to be nominated

4 Democratic candidates for Clerk of the Superior Court, of whom 1 is to be nominated

4 Republican candidates for Clerk of the Circuit Court, of whom 1 is to be nominated

4 Democratic candidates for Clerk of the Circuit Court, of whom 1 is to be nominated

4 Republican candidates for Clerk of the Circuit Court Number 2, of whom 1 is to nominated

4 Democratic candidates for Clerk of the Circuit Court Number 2, of whom 1 is to nominated

4 Republican candidates for Clerk of the Baltimore City Court, of whom 1 is to be nominated

4 Democratic candidates for Clerk of the Baltimore City Court, of whom 1 is to be nominated

4 Republican candidates for Clerk of the Criminal Court, of whom 1 is to be nominated

4 Democratic candidates for Clerk of the Criminal Court, of whom 1 is to be nominated

4 Republican candidates for Clerk of the Court of Common Pleas, of whom 1 is to be nominated

4 Democratic candidates for Clerk of the Court of Common Pleas, of whom 1 is to be nominated

4 Republican candidates for Sheriff, of whom 1 is to be nominated

4 Democratic candidates for Sheriff, of whom 1 is to be nominated

4 Republican candidates for Register of Wills, of whom 1 is to be nominated

4 Democratic candidates for Register of Wills, of whom 1 is to be nominated

4 Republican candidates for State Senator, of whom 1 is to be nominated

4 Democratic candidates for State Senator, of whom 1 is to be nominated

16 Republican candidates for Member of the House of Delegates, of whom 6 are to be nominated

16 Democratic candidates for Member of the House of Delegates, of whom 6 are to be nominated

4 Republican candidates for City Surveyor, of whom 1 is to be nominated

4 Democratic candidates for City Surveyor, of whom 1 is to be nominated

8 candidates for Female Member of the Republican State Central Committee at Large, of whom 2 are to be elected

4 candidates for Male Member of the Republican State Central Committee for the District, of whom 1 is to be elected

4 candidates for Female Member of the Republican State Central Committee for the District, of whom 1 is to be elected

16 candidates for Delegate to the Republican State Convention of whom 7 are to be elected.

4 candidates for Member of the Republican State Central Committee from the Ward, of whom 1 is to be elected

12 candidates for Member of the Democratic State Central Committee, of whom 3 are to be elected

4 candidates for Delegate at Large to the Democratic Convention, of whom 1 is to be elected

16 candidates for Delegate to the Democratic Convention, of whom 6 are to be elected.

STIPULATION EXHIBIT NO. 2.

THE BOARD OF SUPERVISORS OF ELECTIONS.
ROOMS 21-23-25 COURT HOUSE.
Baltimore.

J. George Eierman, President
Walter A. McClean
Daniel B. Chambers
Lindsay C. Spencer, Chief Clerk

August 26, 1937.

Hon. Herbert R. O'Conor,
Attorney General of Maryland,
Baltimore Trust Building,
Baltimore, Maryland.

Dear Sir:

At a meeting of the Board of Supervisors of Elections of Baltimore City held August 26, 1937, the resolution herein enclosed was unanimously adopted.

In connection therewith we direct your attention, specifically, to the following points as to which the machines offered by the Automatic Voting Machine Corporation are alleged to be in violation of and in conflict with the particular provisions of the Election Laws of Maryland:

(1)

On the machines submitted by said Company as samples, where the voter desires to vote for first and second choices among candidates for State-wide office, the machine is so arranged that one lever, or voting device, must be used to register the vote for both first choice and second choice candidates. In other words, instead of having a separate lever, or voting device, for first choice candidate and second choice candidate, respectively, first and second choice candidates are grouped under a single lever and voted together by the operation of the one lever. It is alleged that this method constitutes "group voting" and is in conflict with Section 224-F, subsection (i) of the Voting Machine Act of 1937 which requires that voting machines purchased thereunder shall "have voting devices for separate candidates".

(2)

It is further alleged that the machines offered by the said Automatic Voting Machine Corporation as samples are inadequate and insufficient under Section 224-G of the 1937 Voting Machine Act in respect to the arrangements for voting for first and second choice candidates for State-wide office for the reason that said machines 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 by persons with normal vision".

The point is made that if the form and arrangement of the ballot labels is set up on said machines in accordance with the provisions of Section 63 of Article 33 of the Election Laws of Maryland, which provides that—

"to the name of each candidate for State-wide office or Congress shall be added the name of the county or city in which the candidate resides"—

it will be necessary to use a type so small as to constitute a violation of the spirit, if not the letter, of Section 65 of the General Laws of the State, which provides that all ballots be printed—

"in clear, plain, bold and legible Roman capitals, twelve-point, generally known as pica type, one-eighth of an inch high or in depth, and the printing of said names of said candidates and of their respective party designations shall also be uniform in style and appearance throughout the ballot; and it shall be the duty of the Board of Supervisors of Elections for Baltimore City and of the Board of Supervisors of Elections for each county to cause all ballots to be used by the voters of said city, and the several counties, to be printed in the manner and form as aforesaid."

The above question presents itself only in respect to the arrangement of ballots for voting for first and second choice candidates for State-wide office.

In connection with the question above presented, it is further alleged that the character and size of type which must be used in the premises aforesaid is prohibited by Section 224-G of the Voting Machine Act which provides that the printing shall be—

"in black ink upon clear white material of such size as will fit the ballot frame, and in plain, clear type so as to be clearly readable by persons with normal vision."

(3)

In machines submitted by the Shoup Voting Machine Company as samples, separate spaces and levers, or voting devices, are provided to enable the voter to vote separately and independently his first choice and second choice candidates for State-wide offices. We should like to be advised whether the form and arrangement aforesaid meets the requirements of the Voting Machine Act and the General Election Laws of the State.

If so, we should like to be advised if the Automatic Voting Machine Company's machines would meet such requirements if the arrangements in respect to first and second choice voting were made in accordance with Plan B attached to the enclosed Resolution of the Board of Supervisors of Elections.

In considering these questions, you will, of course, give due weight to Section 224-F of the Voting Machine Act, which provides in part as follows:

"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 * * *."

It may also be useful for you to consider, in connection with these questions, the effect of Section 3 of the Voting Machine Act, which 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."

The matters above specifically set out present the only questions arising under the Election Laws which have been raised in connection with the machines offered in response to the advertisement soliciting bids. Unless, therefore, your examination should disclose other matters or questions in respect to the Election Laws, it will not be necessary for you to extend your consideration beyond the points presented in this communication.

The machines are set up in the office of the Supervisors of Elections, and we will be glad to exhibit the same to you or your representative at any time and afford you full opportunity to examine the exact mechanical arrangements concerned in or connected with the foregoing questions.

Very truly yours,

(signed) BOARD OF SUPERVISORS
OF ELECTIONS.

J. GEORGE EIERMAN,

President.

MEETING
of the
BOARD OF ELECTION SUPERVISORS
of
BALTIMORE CITY

August 26, 1937

Upon motion by Mr. McClean, seconded by Mr. Chambers, and unanimously carried, it was

RESOLVED: That the Attorney General of the State of Maryland be requested to advise this Board—

(1) Whether a legal ballot can be set up and voted on either one or both of the sample machines submitted by the Automatic Voting Machine Corporation, under the Election Laws of the State of Maryland.

(2) If not, whether a legal ballot can be set up and voted on either one or both of said machines if said machines be arranged in the particulars as shown upon the accompanying diagram marked Plan B. In connection with the aforegoing, the opinion of the Attorney General is requested upon the legal questions raised and presented in the document attached hereto entitled, "Brief on Behalf of Shoup Voting Machine Corporation, Showing that the Automatic Voting Machine Does Not Comply with Specifications or the Election Laws of Maryland."

The opinion of the Attorney General is requested with respect to questions affecting the Election Laws of Maryland, and not the specifications.

The machines referred to in the aforegoing motion are the two types, or sizes, of the machines, to wit, 40-bank and 50-bank, submitted by each company.

STIPULATION EXHIBIT NO. 3.

OPINION FROM ATTORNEY-GENERAL OF MARYLAND.

Ruling on Question Asked is Handed Down By State Official.

September 8, 1937.

The Board of Supervisors of Elections,
Court House,
Baltimore, Md.

On August 26th, 1937, the Board of Supervisors of Elections formally adopted a Resolution requesting the Attorney-General to advise your Board whether legal ballots could be set up and voted upon voting machines submitted by the Automatic Voting Machine Corporation and by the Shoup Voting Machine Corporation, and also, whether a legal ballot could be set up and voted upon a modified plan proposed by the Automatic Corporation and marked "Plan B," in the event that its first plan was not acceptable. You submitted data in connection with your request for a ruling by this Department.

It might not be amiss to emphasize that in complying with the request, we do not undertake to give legal advice to the members of the Board of Estimates of Baltimore City, the present members of which are to collaborate with your Board in the purchasing of voting machines, as provided for in the recent Act of the General Assembly.

Furthermore, one of the questions submitted by you, to wit: whether the modified plan by one of the bidding companies would comply with the law, may bring up the question as to whether a machine submitted with the bid and set up under one arrangment can be re-arranged. Inasmuch as we have no right to voice an opinion upon this question, we reiterate that this point is not ruled upon in this communication.

By Section 224-A of Article 33 of the Code, as amended by Chapter 94 of the Acts of 1937, you are made ex-officio members, along with the members for the time being, of the Board of Estimates of Baltimore City, of a new Board created by said Act which is authorized and directed to purchase voting machines for use throughout the City at all primary, general, special and other elections held after January 1st, 1938. We understand that pursuant to advertisement, bids have been submitted by the Automatic Voting Machine Corporation and the Shoup Voting Machine Corporation, but that neither bid has as yet been acted upon, and that a contention has been made by the Shoup Corporation that the sample machine submitted by the Automatic Corporation could not be legally used in a primary election in the event that three or more candidates of a particular party are seeking nomination by that party for Statewide office.

You, as the Board of Supervisors of Elections, are desirous of being advised whether, in the opinion of this office, in the event that the purchasing Board should award the contract to the Automatic Voting Machine Corporation, the Automatic's machine as now arranged, hereinafter referred to as the plan "A" arrangement, could be used in primaries where first and second choice voting obtains, and if not, whether such machine, if rearranged in accordance with a different plan hereinafter referred to as plan "B" could be legally used in such cases.

Inspection of the actual operation of the Automatic voting machines has been afforded, the briefs and oral arguments of the respective counsel for the bidders have been made. Under the plan "A" arrangement, which is set up to illustrate the manner in which the machine operates in the event of three candidates of a particular party for governor, the name of each candidate is inserted on a ballot label in a separate parallel row. Three vote indicators are located immediately above each candidate's name, and on each ballot label under the vote indicator to the extreme left, is the statement "First Choice Only." 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." The machine permits a voter to vote first choice by manipulating the first vote indicator only. If, on the other hand the voter desires to vote both a first and second choice he can only do this by manipulating the second or third vote indicator depending upon which candidate's name he desires for second choice. By manipulating either second or third vote indicators appearing above the parallel column in which a particular candidate's name is inserted, such manipulation will automatically indicate the voter's choice for that candidate for first choice and for one or the other of the candidates for second choice, depending upon which of the other candidate's name appears immediately beneath such vote indicator.

It is contended that this arrangement is in violation of Sub-Section (i) of Section 224-F of Article 33 of the Code, which provides:

"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; * * *."

the argument being that by a proper construction of this section it is necessary to have a separate vote indicator for each candidate for first and second choice so arranged that the voter can not only vote for such candidate for first choice by the manipulation of one vote indicator, but that he may vote for his second choice candidate by the manipulation of a separate vote indicator. This argument is predicated on the assumption that when three or more persons are seeking nomination by a particular party for a State-wide office, they become, by virtue of Section 203 of Article 33, a candidate for first choice and also a candidate for second choice, and consequently the voting machine must be so constructed and arranged as to have a vote indicator capable of being separately manipulated for each choice.

It will be noted that while Sub-Section (i) of Section 224-F above quoted, uses the expression "have voting de-

vices for separate candidates,'' Sub-Section 4 of Section 224-E does not define the words ''voting devices,'' but defines the words ''vote indicator'' to mean the levers, knobs or handles attached to the face of the machine by which the voter indicates his choice of candidates or decision of question. We do not understand however, that any contention is made that these expressions are not synonymous, and in view of the fact that the words ''vote indicator'' appear nowhere in the body of the Act, it would seem that such contention of counsel would be without merit.

If it be assumed that the expressions are synonymous, and further that candidates for State office for whom the voter has the privilege of casting a first and second choice vote, are in fact candidates for each such choice, then a literal construction of the expression ''have voting devices for separate candidates'' would seem to require each voting machine used in a primary where first and second choice voting is permissible, to be equipped with a vote indicator, capable of separate manipulation to indicate the first and second choice vote of the voter. It becomes necessary, therefore, to determine (A) whether candidates for whom provision must be made on the ballot to enable them to receive ''first choice'' and ''second choice'' votes, are in fact separate and distinct candidates for each such choice, whether the whole context of Section 224-F (i) read in connection with other provisions of Article 33, requires a separate vote indicator whose separate operation would indicate the voter's first choice vote separately and his second choice vote separately.

(A) It is suggested that in cases where two or more persons are seeking the nomination for one office and each is entitled to receive first choice votes and second choice votes under the provisions of Section 203, that this does not make each such person in effect two candidates, because each is only a candidate for one office and could not file separately as a candidate for first choice for such office and as a candidate for second choice for such office; that in reality a voter is permitted to cast alternative votes for a single nomination for a single office, and if he indicates his first choice and also his second choice he is in effect only casting his vote for one nomination for one

office. With this contention we are unable to agree. While it is true that a candidate seeking the nomination for an office cannot file as a first choice candidate for such office, and as a second choice candidate for such office, nevertheless in cases where there are more than two candidates for the nomination for an office each person seeking such nomination becomes in fact a candidate for the first choice votes and a candidate for the second choice votes of each voter qualified to vote for the several candidates for such office. When a voter casts his first choice vote for one candidate and his second choice vote for another candidate, he is casting two votes for separate candidates. This fact is clearly recognized by the provisions of Section 203, where the expression "First Choice Candidate" and "Second Choice Candidate" are repeatedly found.

(B) It is suggested that even if each candidate for an office is a candidate for both first and second choice votes, nevertheless when the expression "have voting devices for separate candidates" is construed in the light of the concluding part of Sub-Section (i) of Section 224-F, it would not require an arrangement which would permit a voter to vote for first choice and second choice by separate manipulations of separate vote indicators; that the expression is qualified by the further statement "so that" at any primary election one or more adjacent rows or columns may be assigned to the candidates of a party; that this expression qualifies the previous language to such an extent that this requirement is gratified if the separate candidates for nomination by the various parties can be arranged in adjacent rows or columns.

While it may be conceded that the suggestion has force, we do not feel that we can say with any degree of certainty that the Courts would adopt so narrow a construction, especially in view of the provisions of Sections 63, 203, 224-F (d) and 224-G, which seem to indicate a fixed policy to require that ballots, whether paper or on ballot labels in voting machines be so arranged as to permit voters to vote separately for any person and for or against any question appearing on the ballot.

It must ever be borne in mind that the provisions above

referred to were enacted to afford full opportunity to the citizen to exercise his franchise without infringement and consequently nothing which might tend to confuse and therefore operate to diminish his voting rights ought to be permitted.

We, are, therefore, of the opinion that the voting machine, before it can be validly used in a primary election where first and second choice voting obtains, must be equipped with separate vote indicators for each candidate for first and second choice so arranged as to permit a person to vote for such a candidate for first choice by the manipulation of a single vote indicator and for each candidate for second choice by the manipulation of a separate vote indicator.

You have also requested in the event that our opinion was adverse to the plan "A" arrangement, whether, assuming the Automatic voting machine was re-arranged in accordance with a different plan herein referred to as plan "B," such machine could be validly used in primary elections where first and second choice votes obtain.

Under plan "B," according to the diagram submitted with your letter, which is adapted for first and second choice voting for three candidates for the office of Governor, the names of each candidate appears in each of three separate columns; above each of the three names in each column there is a vote indicator which, when manipulated would indicate the choice of the voter for such named candidate for first choice. In the second and third columns there is likewise a vote indicator above each of the three names and such vote indicators can be manipulated separately and will register the voter's second choice vote for the particular candidate whose name is immediately below the particular indicator. We think that this arrangement is in effect the same as that employed by the Shoup Corporation.

We have no hesitation in advising you that the Automatic Voting Machine if arranged in conformity with plan "B" may be validly used in a primary election where first and second choice voting obtains. It is of course, obvious that some necessary adjustment must be made in the body of the machine to permit the indicators

for second choice, upon manipulation to register a second choice vote only and not at the same time register a first choice vote. Representatives of the Automatic Machine Corporation state that they can and will adjust their machine so that it may be operated in accordance with the plan "B" arrangement without additional cost to the City.

For a number of years the City of Baltimore has owned fifty Automatic voting machines which have heretofore been used in general elections. In this connection it is to be noted that by Section 224-A, the last Legislature directed your Board in all future elections to use these machines together with such others of such type and make as the Purchasing Board shall acquire.

In your request for legal advice you very properly observe that the questions presented relate solely to an alleged conflict with the State election laws. You specifically indicate that you do not raise any other question than those pertaining to the adequacy or inadequacy of the particular machines when considered in the light of the Maryland laws. In this regard we cannot too strongly state that we do not voice any preference in favor of either bidder, by implication or otherwise, so long as the machines fulfill the requirements of law. We confine our statement to the legal points entirely in advising you as members of the Board of Supervisors of Election, that if you are satisfied that the Automatic machine can be arranged to conform to Plan "B" it would then be susceptible of operation in all elections where first and second choice voting obtains.

Summarizing the points above discussed, you are advised that:

(A) The arrangement of the Automatic voting machine, as submitted with the bid, and referred to in your communication as plan "A," does not comply with the election law, because it does not make possible separate voting for first and second choice candidates, as required by law.

(B) The arrangement of the Automatic voting machine under plan "B," does conform to legal requirements.

(C) The question as to whether it is legally possible at this date to effect a re-arrangement of the machine submitted with the sealed bids, is not a question for this office to rule upon, and we, therefore, voice no opinion on this phase of the matter.

Trusting that the above sufficiently answers your inquiries,

We beg to remain,

Very truly Yours,

HERBERT R. O'CONOR,

Attorney-General.

HILARY W. GANS,

Deputy Attorney-General.

STIPULATION EXHIBIT NO. 3A

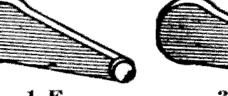
Automatic
PLAN "A"

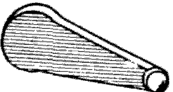
GOVERNOR

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

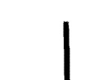
1st Choice Only	1st Choice with Phillips Lee GOLDSBOROUGH 2nd Choice	1st Choice with Harry W. NICE 2nd Choice

PLAN "B"

1	2	3

GOVERNOR

TURN DOWN ONE POINTER FOR FIRST CHOICE, THEN ONE POINTER FOR SECOND CHOICE IN THE SAME ROW.

 1 F REPUBLICAN Phillips Lee **GOLDSBOROUGH** Baltimore City 1st Choice	2 F REPUBLICAN Harry W. **NICE** Baltimore City 2nd Choice	3 F REPUBLICAN H. Webster **SMITH** Baltimore City 2nd Choice
1 G REPUBLICAN Harry W. **NICE** Baltimore City 1st Choice	2 G REPUBLICAN H. Webster **SMITH** Baltimore City 2nd Choice	3 G REPUBLICAN Phillips Lee Goldsborough Baltimore City 2nd Choice
1 H REPUBLICAN H. Webster **SMITH** Baltimore City 1st Choice	2 H REPUBLICAN Phillips Lee Goldsborough Baltimore City 2nd Choice	3 H REPUBLICAN Harry W. **NICE** Baltimore City 2nd Choice

STIPULATION EXHIBIT NO. 4.

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 Corporation 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 Elections 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.

STIPULATION EXHIBIT NO. 5.

RESOLVED: That the bid of the Automatic Voting Machine Corporation for furnishing and delivering complete as specified nine hundred and ten (910) manually operated, nine-party, forty bank three hundred and sixty candidate type Voting Machines at and for the sum of eight hundred and twenty-six dollars and ninety-five cents ($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.

STIPULATION EXHIBIT NO. 6.

(Parts in bold face type represent material added to complete the contract finally executed with the Automatic Voting Machine Corporation.)

VOTING MACHINE BOARD.

(Board Created and Constituted By Chapter 94 of the Laws of Maryland, Regular Session of 1937.)

Baltimore, Md.

NOTICE OF LETTING

SPECIFICATIONS

PROPOSAL

CONTRACT AND BOND

For

FURNISHING AND DELIVERING VOTING

MACHINES AND DOING OTHER WORK.

NOTICE OF LETTING

Sealed bids or proposals, in duplicate, endorsed "PROPOSAL FOR FURNISHING AND DELIVERING 910 VOTING MACHINES AND DOING OTHER WORK", addressed to the Board constituted by Charter 94 of the Laws of Maryland, Regular Session of 1937, will be received at the office of the Comptroller of Baltimore City, Room 204, City Hall, Baltimore, Maryland, until 12 o'clock, Noon, Eastern Standard Time, Wednesday, August 11, 1937, at which time they will be publicly opened and read by the aforesaid Board in Room 231 of said City Hall.

Specifications, proposal forms and other contract documents may be obtained at the office of the Supervisors of Election of Baltimore City, Room 25, Court House, Baltimore, Maryland, on and after July 23, 1937. A charge of Five Dollars ($5.00) will be made for each set of specifications, etc., which amount will not be refunded.

A certified check of the bidder, drawn on a solvent clearing house bank, in the amount of Twenty-five Thousand Dollars ($25,000.00) and made payable to "Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937", must accompany each bid.

The Contractor will also be required to furnish bond in the amount of the contract price as called for in the specifications.

The Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937, reserves to itself the right to reject any or all bids or proposals and/or to waive technical defects and/or to make such award as it may deem best for the public interests. Bids, when filed, shall be irrevocable.

HOWARD W. JACKSON,

Chairman of Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937.

SPECIFICATIONS

DEFINITIONS:

1. Whenever the words or expressions defined under this heading or pronouns used in their stead occur in the contract documents, they shall have the meanings here given.

"Voting Machine Board"—The 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 as constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937, or its duly authorized representative.

"Supervisors of Election"—The Board of Supervisors of Election of Baltimore City or its duly authorized representative.

"Contractor"—The party entering into the contract

for the performance of the work required to be done acting directly or through his agents or employees.

"Work"—Any or all things agreed to be furnished or done by or on the part of the Contractor and which are required in the complete performance of the whole or any part of the contract.

"Bidder"—Any individual, firm or corporation submitting a proposal for the work contemplated, acting directly or through a duly authorized representative.

"Surety"—The body corporate, which is bound with and for the Contractor, on the bond furnished in connection with the project, and which bond forms a part of the contract documents.

"Proposal"—The approved prepared form on which the bidder is to submit or has submitted his proposal for the work contemplated, and including the qualification sheets, affidavits and descriptive matter submitted therewith.

"Specifications"—The definitions, descriptions, directions, provisions and requirements, contained herein, and all written supplements thereto, made or to be made, pertaining to the performance of the work, and the materials and workmanship to be furnished under the contract.

"Contract"—All things contained in the specifications, plans, proposal, agreement and bond, and therein referred to, are to be considered as one instrument forming the contract, also any and all supplemental agreements which could reasonably be required to complete the work contemplated.

In order to avoid cumbersome and confusing repetition of expressions in these contract documents, etc., whenever it is provided that anything is, or is to be, or to be done, if, or, as, or when, or where "contemplated", "required", "directed", "specified", "authorized", "ordered", "given", "designated", "indicated", "considered necessary", "deemed necessary", "permitted", "suspended", "approved", "acceptable", "unacceptable", "suitable", unsuitable", "satisfactory", "un-

satisfactory", "sufficient", or similar expressions, they shall be taken to mean and intend "contemplated", "required", "directed", "specified", "authorized", "ordered", "given", "designated", "indicated", "considered necessary", "deemed necessary", "permitted", "suspended", "approved", "acceptable", "unacceptable", "suitable", "unsuitable", "satisfactory", "unsatisfactory", "sufficient", etc., by or to the Voting Machine Board.

It should be understood thoroughly by all concerned that all things contained or referred to herein, the "Notice of Letting", the "Advertisement for Proposal Bids", the "Specifications" (both general and detailed), the "Definitions of Terms", the "Instructions to Bidders", the "Award and Execution of Contract", the "General Provisions", the "Proposal", the "Agreement", the "Bond", as well as all other papers attached to or bound with any of the above, are hereby made a part of these specifications and contract, and are to be considered one instrument constituting the contract documents. The intent is to make them explanatory one of the other. No papers attached to or bound with any of the above shall be detached therefrom, as all are a necessary part thereof.

The sub-headings printed in these specifications are intended for convenience of reference only, and shall not be considered as having any bearing on the interpretation thereof.

INSTRUCTIONS TO BIDDERS

FAMILIARITY WITH PROPOSED WORK:

2. The Bidder is required to examine carefully the proposal, specifications and other contract documents for the work contemplated, and it will be assumed that he has familiarized and satisfied himself as to the conditions and obstacles to be encountered, as to the character, quality and quantities of work to be performed and materials to be furnished, and as to the requirements of these specifications, and other contract documents, and he must be prepared to execute a finished job in every

particular, without any extra charge whatever, except as may be specifically provided for elsewhere in these specifications.

FAMILIARITY WITH LAWS, ETC.:

3. The Bidder is assumed to have made himself familiar with all Federal, State, Local and Municipal laws, ordinances, rules and regulations which in any manner affect those engaged or employed in the work, or the materials or equipment to be furnished or used in or upon the work, or in any way affect the work, and no plea of misunderstanding will be considered on account of ignorance thereof. If the Bidder or Contractor shall discover any provision in the plans, specifications, or contract which is contrary to or inconsistent with any such law, ordinance, rule or regulation, he shall forthwith report it to the Voting Machine Board in writing before filing his bid.

OBTAINING SPECIFICATIONS, ETC.:

4. Specifications, proposal forms and other contract documents may be obtained at the office of the Board of Supervisors of Election, Room 25, Court House, Baltimore, Maryland. A charge of $5.00 will be made for each set of specifications, etc., and this amount will not be refunded.

FORM OF BIDS:

5. All bids must be made in duplicate upon the blank forms of proposal attached hereto and must give the prices for each of the two sizes of "Type A" voting machines specified, and, if the Bidder elects to bid on "Type B" voting machines, such bids must also give the prices for each of the two sizes of "Type B" voting machines specified. All prices must be given both in words and in figures, and all bids must be signed by the bidder with his name and address.

In submitting a bid, the proposal sheet must not be removed from the specifications, but the book deposited intact, together with the descriptive matter and affidavits called for herein.

SIGNATURES:

6. Proposals must be signed correctly by the bidder with his signature in full. Post-office address, county and state of the bidder must be written or printed in full after the signatures, and such address is the one, in the absence of written directions to the contrary, to which notice of the award of the contract may be mailed or delivered, but the said notice may be served on the bidder or any agent of the bidder. Owing to the difficulty in deciphering signatures, a typewritten copy of the same should be attached.

When a firm or partnership is a bidder, the agent who signs the name of the firm or partnership to the proposal shall state, in addition, the names and addresses of the individuals composing the firm. When a corporation is a bidder, the person signing shall state under the laws of which state the corporation is chartered and the name and title of the officers having authority under the by-laws to sign contracts. If practicable, the proposal shall also bear the seal of the corporation, attested by its Secretary. Anyone signing the proposal as agent must file with it legal evidence of his authority to do so.

CERTIFIED CHECK:

7. No bid will be considered unless accompanied by a certified check of the bidder drawn upon a solvent clearing-house bank, payable to the Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937, for the sum of Twenty-five Thousand Dollars ($25,000.-00), which will be forfeited to said Board as liquidated damages in case an award is made and the contract and bond are not promptly and properly executed and delivered. Within ten (10) days after the award of the contract will be taken as fulfilling the requirements of prompt execution and delivery of the contract and bond.

CERTIFIED CHECKS RETURNED:

8. The certified checks of the unsuccessful bidders will be returned after the contract is awarded, and the check of the successful bidder will be returned to him after the proper execution of the contract and bond.

IRREGULAR PROPOSALS:

9. Proposals may be rejected if they show any omissions, alterations of form, additions not called for, conditional bids or alternate bids not called for, or irregularities of any kind.

DELIVERY OF PROPOSALS:

10. (a) Fill out the form of proposal marked "ORIGINAL—not to be detached", bound in the contract documents, and leave it bound therein.

(b) Fill out the form of proposal marked "Duplicate", which is a separate, detached copy of the proposal.

(c) Enclose and seal the contract documents (in which the original proposal is bound), the detached "Duplicate" copy of the proposal, the certified check, the "Descriptive matter", and the "Affidavits" required, in a strong opaque envelope, addressed to the Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937, marked outside "Proposal for Furnishing and Delivering 910 Voting Machines and Doing Other Work", and also marked with the name and address of the Bidder.

(d) Deliver to the Comptroller of Baltimore City, Room 204, City Hall, Baltimore, Maryland, at or before twelve o'clock, Noon, Eastern Standard Time, on the date set for the opening of bids.

NO WITHDRAWAL OF PROPOSALS:

11. Bids, when filed, shall be irrevocable.

OPENING OF PROPOSALS:

12. Proposals will be publicly opened and read by the Voting Machine Board at 12 o'clock, Noon, Eastern Standard Time, on the date set in the "Advertisement for Proposal Bids", or "Notice of Letting", in Room 231, City Hall, Baltimore, Maryland. Bidders or their authorized agents are invited to be present.

QUALIFICATIONS FOR BIDDERS:

13. Before the contract will be awarded to any bidder, he will be required to furnish evidence satisfactory to the Voting Machine Board that he has all the following qualifications:

(a) Ability, equipment, organization and financial resources sufficient to enable him to furnish and deliver all of the voting machines successfully within the time required.

(b) All bidders must have been successfully and actively engaged in the sale and delivery of voting machines of the types and sizes, etc., bid upon, for a continuous period of at least two (2) years immediately preceding the day upon which bids will be opened.

As evidence of the above qualifications, the bidder is required to submit with his bid on the form attached to the proposal or bid sheet several examples that will show the similarity, comparative size and contract cost of work previously done by him, its general character, location and date of completion.

The attention of the bidders is also directed to the descriptive matter to be submitted by them with their bids as called for in Paragraph 45 of these specifications, and to the sample machines to be set up by bidders in the office of the Supervisors of Election on or before the day bids are submitted, as called for in Paragraph 47 of these specifications, and to the affidavits to be furnished with bids as called for in Paragraph 42 of these specifications.

RIGHT TO REJECT PROPOSALS, ETC.:

14. 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.

CONTRACT BOND:

15. The successful bidder will be required to give bond of a corporate surety company, to be approved by the Voting Machine Board, doing business in the City of Baltimore, State of Maryland, within ten (10) days after the date of the award of the contract, in the amount of the contract price, in the form attached hereto and which is made a part hereof, with appropriate insertions.

Whenever the surety on the bond so furnished in accordance with the preceding paragraph shall be deemed by the Voting Machine Board to be insufficient or unsatisfactory, it may, in its discretion, within ten (10) days after notice to that effect mailed to the address of the Contractor, require the Contractor to furnish and deliver a new bond to the Voting Machine Board in the same penalty and on the same conditions, with surety satisfactory to said Board, and this duty shall continue on the part of the Contractor whenever and so often as said Board shall require a new bond with a satisfactory surety or sureties. Upon failure of the Contractor to furnish the aforesaid new bond within ten (10) days after said notice is mailed to his address, the Voting Machine Board, through its proper agent or agents, may withhold all payments due to the Contractor, stop all further work under said contract and re-let the unfinished work at the expense of the Contractor in any manner which it may deem best to protect the public interests.

FAILURE TO EXECUTE CONTRACT:

16. The successful bidder shall properly execute the formal contract and furnish the bond herein provided for, both of which shall be subject to the approval of the City Solicitor of Baltimore City as to form, terms and conditions. Failure to comply with these requirements within ten (10) days after the award shall be just cause for the annulment of the award. It is understood and agreed that in the event of annulment of the award, the bidder shall forfeit, to the use of the Voting Machine Board, the amount of the certified check deposited with his proposal, not as a penalty, but as liquidated damages.

GENERAL PROVISIONS.

LEGAL ADDRESS:

17. The address given in the bid or proposal is hereby designated as the legal address of the Contractor. Such address may be changed at any time by notice in writing delivered to the Voting Machine Board. The delivering at such legal address or the depositing in any post-office, in a post-paid, registered wrapper, directed to such legal address of any notice, letter or other communication to the Contractor shall be deemed to be a legal and sufficient service upon the Contractor.

SUB-CONTRACTOR:

18. The Contractor shall give his personal attention constantly to the faithful performance of the work, shall keep the same under his own control, and shall not assign by power of attorney or otherwise, nor sublet the work or any part thereof without the previous written consent of the Voting Machine Board. He shall state to the Voting Machine Board, in writing, the name of each Sub-Contractor he intends employing, the portion of the work which he is to do or the material which he is to furnish, his place of business and such other information as the Voting Machine Board may require in order to know whether such Sub-Contractor is reputable and reliable and able to perform the work or to furnish the material as called for in the specifications.

Only such Sub-Contractors as are acceptable to and approved by the Voting Machine Board will be allowed on the work.

In the event of any assignment or assignments by the Contractor, either legal or equitable, of any of the moneys payable under the contract documents or of the Contractor's claim thereto, such assignment or assignments shall be subject to all the terms, conditions, provisions and reservations contained in the contract documents, and no assignee or assignees shall have any greater right, title or interest in or to the subject-matter of any such assignment or assignments than the Con-

tractor would have had, if such assignment or assignments had never been made. No such assignment or assignments shall affect any payments to be made under this contract unless and until the Voting Machine Board shall have received at least ten (10) days written notice thereof.

The Contractor shall not be released from any of his liabilities or obligations under this contract should any Sub-Contractor fail to perform in a satisfactory manner the work undertaken by him.

The Contractor agrees that he is as fully responsible for the acts and omissions of his Sub-Contractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

Nothing contained in the contract documents shall create any contractual relations between any Sub-Contractor and the Voting Machine Board.

LAWS AND REGULATIONS:

19. The Contractor at all times shall observe and comply with all Federal, State, local and/or municipal laws, ordinances, rules and regulations in any manner affecting the manufacture, furnishing or delivering of the voting machines or the work, and all such Orders or Decrees as may exist at present and those which may be enacted later, of bodies or tribunals having jurisdiction or authority over the work, and shall indemnify and save harmless the Voting Machine Board, the individual members of said Board, the Supervisors of Election, the Mayor and City Council of Baltimore, the State of Maryland and all of the officers, agents and employees of any of them against any claim or liability arising from or based on the violation of any such Law, Ordinance, rule, regulation, order or decree, whether such violations be by the Contractor or any Sub-Contractor or any of their agents and/or employees.

PERMITS, LICENSES, CHARGES, NOTICES:

20. The Contractor shall procure and pay for all permits and licenses, pay all royalties, fees and charges, and give all notices necessary and incident to the due and lawful prosecution of the work.

PATENT RIGHTS:

21. Whenever any machine, apparatus, article, material, means, appliance, process, composition, combination or thing called for by these specifications is covered by Letters Patent, Copyrights or Trade-Marks, the successful bidder must secure, before manufacturing, furnishing, delivering, using or employing such machine, apparatus, article, material, means, appliance, process, composition, combination, or thing, the assent, in writing, of the Owner or Licensee of such Letters Patent, Copyrights or Trade-Marks, and file the same with the Voting Machine Board; the said assent shall cover not only the use, employment and incorporation of such machine, apparatus, article, material, means, appliance, process, composition, combination or thing in the said voting machines, equipment and accessories, but also the permenent use thereafter of such machine, apparatus, article, material, means, appliance, process, composition, combination or thing in and in connection with the use of said voting machines, equipment and accessories, for the purposes for which they or any of them are intended or adapted.

The Contractor shall be responsible for any and all claims and demands of every kind, character or description made against the Voting Machine Board, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election or the State of Maryland, their agents and employees, for any actual or alleged infringement of patents, copyrights or trademarks in or by the manufacturing, construction, furnishing and/or delivery of any such machines, apparatus, articles, materials, means, appliances, process, composition, combination or thing, in the performance and completion of the work and/or in the purchase or subsequent

use of said voting machines, equipment and/or accessories, for their intended purposes, and shall save harmless and indemnify the Voting Machine Board, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election and the State of Maryland, their agents and employees, from any and all costs, expense and damages of every nature, including solicitors' and attorneys' fees, which the Voting Machine Board, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election or the State of Maryland, their agents and employees, may be obliged to pay by reason of any such actual or alleged infringement of patents, copyrights or trade-marks.

It is expressly understood and agreed, however, that in no event shall the liability of the surety under the terms and provisions of this paragraph, numbered 21, entitled "Patent Rights", exceed the aggregate sum of Four Hundred Thousand Dollars. ($400,000.00).

SUPERVISION BY VOTING MACHINE BOARD:

22. The work is to be carried out under the supervision of the Voting Machine Board and to its entire satisfaction. The work and materials shall be strictly of the best quality of the kinds herein specified and should any work or materials other than those specified or shown be introduced into the work, the Voting Machine Board, or its authorized agent, shall have full power to reject them and they shall be promptly and properly removed by the Contractor after being notified to do so.

AUTHORITY OF VOTING MACHINE BOARD:

23. 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 all cases, decide questions which may arise relative to the fulfillment of the contract or to the obligations of the Contractor thereunder.

To prevent disputes and litigations, a Committee consisting of the Chief Engineer and the City Solicitor of the Mayor and City Council of Baltimore and the Secretary of the Voting Machine Board will be the referee in case any question touching the contract shall arise between the Contractor and the Voting Machine Board, and the determination, decision and/or estimate of a majority of said Committee shall be final and conclusive upon the Contractor, and shall also be a condition precedent to the right of the Contractor to receive any moneys under the contract.

DISCREPANCIES, ETC.:

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. Any errors or omissions in the specifications may be corrected by the Voting Machine Board when such corrections are necessary for the proper fulfillment of their intention as construed by it.

The Voting Machine Board shall make all necessary explanations as to the meaning and intention of the specifications and shall give all orders and directions, contemplated either herein or hereby or in any case in which a difficult or unforseen condition shall arise in the performance of the work.

In all cases of doubt as to the true meaning of the specifications, plans and/or drawings, the decision of the Voting Machine Board shall be final and conclusive.

IDEMNIFICATION:

25. The Contractor shall pay, indemnify and save harmless the Voting Machine Board, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election and the State of Maryland, their agents and employees, from all suits, actions, claims, demands, damages, losses, expenses and/or costs of every kind and description to which the Voting Machine Board, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election and the State of Maryland, or either

of them, their agents and employees, may be subjected or put by reason of injury (including death) to persons or property, resulting from the manner or method employed by the Contractor, his agents and employees, or Sub-Contractors, or from any neglect or default of the Contractor, his agents and employees, or Sub-Contractors, in the performance of this contract, or any part thereof, or from, by or on account of any act or omission of the Contractor, his agents, and employees or subcontractors, and whether such suits, actions, claims, demands, damages, losses, expenses and/or costs be against, suffered or sustained by the Voting Machine Board, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election and the State of Maryland, their agents and employees, or be against, suffered, or sustained by other corporations and persons to whom the Voting Machine Board, the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election or the State of Maryland, their agents and employees, may become liable therefor; and the whole or so much of the moneys due or to become due the Contractor under the Contract as may be considered necessary by the Voting Machine Board, may be retained by the said Voting Machine Board until such suits or claims for damages or injuries shall have been settled or otherwise disposed of, and satisfactory evidence to that effect furnished to the Voting Machine Board.

ANNULMENT OF CONTRACT:

26. If the Contractor fails to perform the work under the contract with sufficient skilled workmen and proper equipment and/or with sufficient proper materials to insure the prompt completion of said work, except in cases for which an extension of time is provided, or shall perform the work unsuitably or neglect or refuse to promptly remove and/or properly repair, renew and/or replace materials, machines, equipment and/or accessories which shall be rejected as or found to be defective or unsuitable, or shall discontinue the prosecution of the work, or if the Contractor shall become insolvent or be declared bankrupt, or commit any act of bankruptcy or insolvency, or allow any final judgment to stand against him unsat-

isfied for a period of forty-eight (48) hours, or shall make an assignment for the benefit of creditors, or shall fail to make prompt payment to all Sub-Contractors and/or material men for material and/or labor supplied, or shall persistently disregard any State, Federal, local and/or municipal laws, ordinances, rules and regulations pertaining to the work, or shall disregard the instructions of the Voting Machine Board, or from any other cause whatsoever shall not carry on the work in an acceptable manner, the Voting Machine Board may give notice in writing, mailed to the Contractor and/or his surety of such delay, neglect or default, specifying the same, and if the Contractor, within a period of three (3) days after such written notice is mailed, shall not proceed in accordance therewith, then the Voting Machine Board shall have full power and authority, without prejudice to any of its other rights or remedies and without violating the contract, to terminate the employment of the Contractor and to take the prosecution of the work out of the hands of said Contractor, and may enter into an agreement for the completion of said contract according to the terms and provisions thereof, or use such other methods as, in its opinion, shall be deemed expedient and necessary for the completion of said contract in accordance with the specifications, and within such time as in the judgment of the Voting Machine Board the public interests may require. In the event of any of the aforesaid circumstances arising at any time or times, the Voting Machine Board shall have the right to withhold, without payment of interest, any sum or sums of money due or to become due the Contractor until the interests of the Voting Machine Board have been fully protected to the satisfaction of the said Board. All costs and expenses incurred by the Voting Machine Board, together with the costs of completing the work under the contract, may be deducted from any moneys due or which may become due said Contractor. In case the cost and expense so incurred by the Voting Machine Board shall be less than the sum which would have been payable under the contract if it had been completed by said Contractor, then the said Contractor shall be entitled to receive the difference; and in case such cost and expense shall exceed the sum which would have been payable under the contract, the Contractor and/or the surety shall be liable therefor, and

shall pay the amount of the difference to the Voting Machine Board within ten (10) days after written notice mailed to the Contractor and/or surety. The expense, loss or damage, incurred by the Voting Machine Board through the Contractor's default shall be certified by the Voting Machine Board and such certifications shall be conclusive and recognized and accepted as the correct amount of the loss sustained by the Voting Machine Board by any and all parties concerned.

NO LIMITATION OF LIABILITY:

27. It is understood and agreed that any and all of the duties, liabilities and/or obligations imposed upon or assumed by the Contractor and the Surety, or either of them, by or under the contract documents, shall be taken and construed to be cumulative, and that the mention of any specific duty, liability or obligation imposed upon or assumed by the Contractor and/or the Surety under the contract documents shall not be taken or construed as a limitation or restriction upon any or all of the other duties, liabilities and/or obligations imposed upon or assumed by the Contractor and/or the Surety by or under the contract documents.

REMEDIES CUMULATIVE:

28. All remedies provided in the contract documents shall be taken and construed to be cumulative; that is, in addition to any and all other remedies provided therein, and to any remedies in law or equity which the Voting Machine Board would have in any case.

CONTRACTOR'S WORK AND EXPENSE:

29. All things required by the contract documents to be done, furnished and/or installed shall be done, furnished and/or installed by the Contractor at the Contractor's entire cost and expense, unless otherwise expressly provided therein.

CONTRACTOR LIABLE FOR DAMAGES SUSTAINED:

30. In case the Voting Machine Board shall purchase voting machines, equipment, accessories, apparatus, articles, things or materials in the open market or by contract, as herein specified, the Contractor shall remain liable for all damages sustained by the Voting Machine Board on account of his failure to fulfill the contract, and any action taken in pursuance of the above provision of the contract shall not affect or impair any right or claim of the Voting Machine Board for damages for breach of any of the covenants of the contract by the Contractor.

SCOPE OF WORK:

31. The work to be done is to cover the completed work called for in the specifications and other contract documents. The Contractor shall furnish all implements, machinery, tools, equipment, materials and labor necessary to the performance of the work and shall furnish and do everything necessary to make the work perfect, complete, neat and finished, and the Contractor shall leave all of the work to be done under this contract in this condition at the time when the work is finally inspected.

QUALITY OF MATERIAL AND WORKMANSHIP:

32. All materials furnished and all work done in carrying out the contract shall be of the best quality and especially adapted to the service required. Wherever the characteristics of any materials are not particularly specified, such materials shall be used as is customary in first-class work of the nature for which the materials are employed.

CLAIMS TO BE MADE PROMPTLY:

33. Should the Contractor be of the opinion, at any time or times, that he is entitled to any additional compensation whatsoever, (over and above the unit price stipulated in these contract documents or over and above extra work ordered in writing by the Voting Machine

Board) for damages, losses, costs and/or expenses alleged to have been sustained, suffered or incurred by him in connection with the project herein contemplated, he shall in each instance, within five days after such alleged damages, losses, costs and/or expenses shall have been sustained, suffered or incurred, make a written claim therefor to the Voting Machine Board. On or before the fifteenth day of the calendar month succeeding that in which such damages, losses, costs and/or expenses shall have been sustained, suffered or incurred, the Contractor shall file with the Voting Machine Board a written, itemized statement of the details and amount of each such claim of damage, loss, cost and/or expense, and unless such claim and statement shall be thus made and filed, in each such instance, the Contractor's claim for such additional compensation shall be held and taken to be absolutely invalidated, and he shall not be entitled to any compensation on account of such alleged damage, loss, cost and/or expense.

The provisions of this paragraph shall be held and taken to constitute a condition precedent to the right of the Contractor to recover; they shall also apply to all claims by the Contractor in anywise relating to the complete project, and even though the work involved may be regarded as "outside the contract".

It is understood and agreed, however, that nothing in this paragraph contained shall be held or taken to enlarge in any way the rights of the Contractor or the obligations of the Voting Machine Board under these contract documents.

SCOPE OF PAYMENTS:

34. The Contractor shall receive and accept the compensation, as provided in the Bid or Proposal, in full payment of all freight and hauling charges, taxes, fees and royalties and for furnishing all voting machines, accessories, apparatus, materials, labor, tools and equipment and for performing all work contemplated and embraced under the contract, also for all loss or damage arising from any unforeseen difficulties or obstructions which may be encountered during the prosecution of the

work, until its final acceptance by the Voting Machine Board, and for all risks of every description connected with the prosecution of the work, and for any actual or alleged infringements of patents, trade-marks or copyrights, and for completing the work and the whole thereof, in an acceptable manner, according to the specifications and other contract documents. No payment of any moneys or of any retained percentage, nor any approval or acceptance of any machines, equipment and/or accessories, shall in any way or in any degree prejudice or affect the obligations of the Contractor to repair, renew and/or replace, at his own cost and expense, at any time or times after such payment, approval or acceptance, and in accordance with the five-year guarantee, maintenance and repair obligations set forth in Paragraph 41 hereof, any defective machines, work, materials, equipment and/or accessories furnished, done and/or delivered by him under the contract, and the Contractor shall be and continue to be liable to the Voting Machine Board for failure so to do.

PARTIAL PAYMENTS:

35. Payments will be made from time to time for such number of said voting machines which have been furnished and delivered by the Contractor in accordance with the contract, as soon as possible after said machines and all equipment and accessories thereof have been so furnished and delivered by the Contractor and inspected and accepted by the Voting Machine Board. Said payments will be made to the Contractor through the Comptroller of Baltimore City, as provided for in said Chapter 94 of the Laws of Maryland, Regular Session of 1937, and in Ordinance 396, approved April 13, 1937, of the Mayor and City Council of Baltimore. However, an amount equivalent to ten (10) per centum of the contract unit price for each voting machine so furnished, delivered, inspected and accepted shall be retained by the Voting Machine Board until after all of the machines, equipment and accessories, purchased under this contract, shall have been furnished and delivered by the Contractor and finally inspected and accepted by the Voting Machine Board, provided further, that no pay-

ment of any of said 10 per cent retained shall be made before the first day of January, 1939. The said 10 per cent shall be deducted from each and every payment made under the entire contract.

FINAL ACCEPTANCE AND PAYMENT:

36. Whenever it appears to the Voting Machine Board that the Contractor shall have completed the furnishing and delivering of all the voting machines, equipment and accessories called for by the contract, the Voting Machine Board shall make or cause to be made an inspection of all the said voting machines, equipment and accessories.

If, upon such inspection, the Voting Machine Board finds that all of said voting machines, equipment and accessories have been properly furnished and delivered by the Contractor in accordance with the contract, and are not in need of repairs, renewals, replacements and/or corrections as herein provided for, the said Board shall cause to be paid to the Contractor, through the Comptroller of Baltimore City (as provided for in said Chapter 94 of the Laws of Maryland, Regular Session of 1937 and in said Ordinance 396) the whole amount of money then due the Contractor under this contract, less any deductions the Voting Machine Board may be entitled to make under the provisions of the Contract or otherwise.

If, upon such inspection, the Voting Machine Board finds that any of said voting machines, equipment and/or accessories are in defective or imperfect condition and/or in need of repairs, renewals and/or replacements as and for the reasons set forth in Paragraph 41 hereof, headed "Guarantee, Maintenance and Repair Obligations", the Voting Machine Board shall so notify the Contractor in writing, and the Contractor shall thereupon promptly and properly, and at his entire cost and expense, make any and all such needed repairs, renewals and/or replacements and correct all such defects or imperfections. Upon any failure of the Contractor so to make all said repairs, renewals, replacements and/or corrections, the Voting Machine Board shall be fully authorized to have said repairs, renewals, replacements and/or

corrections made by others in any manner which it deems advisable and to charge to and collect from the Contractor and his surety the entire cost and expense thereof. The Voting Machine Board shall also be fully authorized to apply the whole or any part of any sums of money and/or retained percentages otherwise due the Contractor to the payment of any and all such costs and expenses so incurred by it in having such repairs, renewals, replacements and/or corrections so made.

Upon the satisfactory completion of all of said repairs, renewals, replacements and/or corrections, the said Voting Machine Board shall cause to be paid to the Contractor, in the manner hereinbefore referred to, the whole amount of money (if any) then due the Contractor, less any deductions the Voting Machine Board may be entitled to make under the provisions of the contract or otherwise.

The last payment made as aforesaid to the Contractor shall be deemed to be and shall be accepted by all of the parties hereto as the final payment to be made to the Contractor, all prior payments being considered partial estimates and subject to correction in said final payment.

PAYMENTS MAY BE WITHHELD:

37. In the discretion of the Voting Machine Board, any and all payments otherwise due the Contractor may be withheld, without payment of interest, if and as long as the Contractor is in default in the performance of any of his obligations under the contract.

LAST PAYMENT TO TERMINATE LIABILITY:

38. The acceptance by the Contractor of the final payment made as provided in Paragraph 36 shall operate as and be a release to the Voting Machine Board and every agent or employee thereof, from all claims and liabilities to the Contractor for anything done or furnished for or relating to the work, or for any act or neglect of the Voting Machine Board or of any person relating to or affecting this work.

DELIVERIES AND QUANTITIES:

39. The Contractor shall deliver said voting machines, equipment and accessories ready for proper use and/or operation in accordance with all provisions of law and of these contract documents in the quantities and on or before the respective dates hereinafter set forth:

Two hundred (200) on or before March 1st, 1938; two hundred (200) more on or before April 1st, 1938; two hundred (200) more on or before May 1st, 1938; and the balance of three hundred and ten (310) on or before July 1st, 1938. Time is of the essence of this contract.

The voting machines shall be delivered free of all charges to such place or places in the City of Baltimore, State of Maryland, as the Supervisors of Election may designate in writing on or before the date or dates of delivery.

The Voting Machine Board reserves the right to increase the number of voting machines, together with their equipment and accessories, to be furnished and delivered by the Contractor at his accepted bid price under this contract, provided that such increase shall not exceed fifty machines and provided further that said right shall be exercised by the Board at the time of the award of this contract or within two months thereafter. Such additional machines, equipment and accessories, if so purchased, shall be delivered on or before July 1st, 1938.

LIQUIDATED DAMAGES:

40. For each and every calendar day, that the Contractor is in default in furnishing and delivering each voting machine with equipment and accessories as and at the time required under the contract, the Contractor shall pay to the Voting Machine Board the sum of Five Dollars ($5.00) per machine, which sum is hereby agreed upon not as a penalty, but as liquidated damages which the Voting Machine Board will suffer by reason of such default; provided, that the Voting Machine Board shall have the right at its discretion to extend the time or times for the furnishing and delivering of said voting

machines, equipment and accessories beyond the time or times herein stated. The Voting Machine Board shall be fully authorized and empowered to deduct and retain the amount of any demages, determined as hereinbefore stipulated, for each calendar day per machine that the Contractor shall be so in default after the time or times fixed in the contract, or after any later date or dates to which the said time or times may have been extended by the Voting Machine Board, from any moneys due or to become due to the Contractor under the provisions of the contract at any time after such damages are so incurred. The permitting of the Contractor to go on and finish the work or any part of it after the time or times fixed for its completion, or after the date or dates to which the time or times for completion may have been extended, shall in no wise operate as a waiver on the part of the Voting Machine Board of any of its rights under the contract.

GUARANTEE, MAINTENANCE AND REPAIR OBLIGATIONS:

41. 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, any 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, and shall make good and all imperfections or defects in the materials, mechanism and workmanship of any and all of said voting machines, equipment and/or accessories, provided that said voting machines, equipment and/or accessories shall be properly cared for, and, provided further, that said repairs, renewals and/or replacements are not made necessary by the action of the elements, fire, accident or malicious destruction.

If, during the said period of five (5) years (after a fair trial and after the Contractor shall have been given a reasonable opportunity to replace defective parts), any voting machines, equipment and/or accessories furnished

under the contract documents, shall fail to properly operate and perform the work for which said machines, equipment and/or accessories were purchased, the Contractor shall furnish in place thereof new machines, equipment and/or accessories of the same size, type and character at his sole cost and expense, and in the event of the failure of the Contractor so to do, upon demand of the Voting Machine Board, the Contractor shall promptly return to the Voting Machine Board the amount of money paid to the Contractor for such machines, equipment and/or accessories which have failed to properly operate or perform the work for which said voting machines, equipment and/or accessories were purchased.

All the obligations of the Contractor contained in this paragraph headed "Guarantee, Maintenance and Repair Obligations" shall also apply at all times after any of the voting machines, equipment and/or accessories have been furnished and delivered by the Contractor and until the expiration of said five-year period.

AFFIDAVITS CONCERNING PARTIES IN INTEREST:

42. Each bidder must file with his bid an affidavit that no official, officer, agent, representative or employee of the Supervisors of Election, the Mayor and City Council of Baltimore or the State of Maryland is or shall become interested, directly or indirectly, as a contracting party, partner, stockholder, surety, agent, representative, employee or otherwise, in this contract or in any matters or things relating thereto.

If a bid is submitted by a corporation, the affidavit shall be made by an executive officer of said corporation, having full knowledge of all the facts and having the authority to make such affidavit and such affidavit shall contain the names and residences of all the officers of said corporation. If the bidder is a partnership, the affidavit shall be made by one of the partners and said affidavit shall contain the name and addresses of all of the partners and all other persons who may have an interest in the partnership.

Each bid shall be accompanied by a sworn statement that the bidder has the necessary facilities, experience and financial resources to properly and promptly manufacture, construct, supply, furnish and deliver the voting machines upon which he has submitted a bid, in strict accordance with all of the terms and provisions of the contract documents. Such statement must contain in detail all of the facilities and financial resources possessed by the bidder.

Should any of the statements, information, matters or things set forth in the affidavit or statements above referred to be found to be false, the certified check accompanying the bid of such bidder shall be retained by the Voting Machine Board as liquidated damages and not as a penalty.

VOTING MACHINES, ETC., TO BE FURNISHED:

43. 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 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. All voting machines must be properly equipped with lights, electric wiring, connections, instruction models and all other accessories that may be necessary to properly install and operate said voting machines in such places as are ordinarily used for polling places in the City of Baltimore, State of Maryland.

SIZE AND TYPE OF VOTING MACHINES:

44. All bidders must submit bids upon each of the following two sizes of "Type A" voting machines:

Type A—Size 1. A manually operated voting machine which shall contain nine (9) vertical or horizontal rows of levers or devices for voting for nine (9) different political parties; sufficient spaces and levers or devices for operators of said machines to record their votes in connection with at least twenty (20) questions or special

measures, and forty (40) voting devices in each of the nine (9) political party rows or columns.

Type A—Size 2. A manually operated voting machine which shall contain nine (9) vertical or horizontal rows of levers or devices for voting for nine (9) different political parties; sufficient spaces and levers or devices for operators of said machines to record their votes in connection with at least twenty-five (25) questions or special measures, and fifty (50) voting devices in each of the nine (9) political party rows or columns.

All bidders may (but are not required to) submit bids upon each of the following two sizes of "Type B" voting machines:

Type B—Size 1. An electrically operated voting machine, which machine shall also be so constructed and equipped as to be easily and readily capable (without additional expense or appreciable delay) of manual operation, and which machine shall conform in all other respects to the requirements above set forth for "Type A—Size 1" voting machines.

Type B—Size 2. An electrically operated voting machine, which machine shall also be so constructed and equipped as to be easily and readily capable (without additional expense or appreciable delay) of manual operation, and which machine shall conform in all other respects to the requirements above set forth for "Type A—Size 2" voting machines.

In case the Voting Machine Board decides to purchase electrically and manually operated voting machines (i.e. "Type B" machines) the successful bidder will be required to furnish and deliver twenty (20) voting machines fully equipped for use and operation on the direct electrical current now available in such places as are ordinarily used for polling places in the City of Baltimore, State of Maryland; and the balance of the voting machines purchased under this contract shall be fully equipped for use and operation on the alternating electrical current now available in such places as are ordinarily used for polling places in said City of Baltimore.

Notwithstanding the provisions last above set forth, the successful bidder agrees (in case the award is made for electrically and manually operated machines) to make, promptly and properly and at his sole cost and expense, any and all adjustments, changes, alterations and/or replacements of the motors and/or electrical equipment in any one or more of said voting machines which the Supervisors of Election shall deem necessary, from time to time, in order to permit the proper operation of said voting machines for their intended uses and purposes on the electrical current available at such places in the said City of Baltimore as may be selected from time to time for use as polling places. This obligation on the part of the successful bidder shall apply at any time or times during the entire period from the date of the award of the contract to the date of the expiration of the five year guarantee, maintenance and repair obligations set forth in Paragraph 41 of these Specifications; and no such adjustment, change, alteration and/or replacement of motors and/or electrical equipment shall in any way or to any extent release the successful bidder from any or all of his duties, obligations and/or responsibilities under this contract.

Said "Type A—Size 1" voting machine is hereby designated as the "manually operated nine (9) party, forty (40) candidate type".

Said "Type A—Size 2" voting machine is hereby designated as the "manually operated nine (9) party, fifty (50) candidate type".

Said "Type B—Size 1" voting machine is hereby designated as the "Electrically and manually operated nine (9) party, forty (40) candidate type".

Said "Type B—Size 2" voting machine is hereby designated as the "Electrically and manually operated nine (9) party, fifty (50) candidate type".

While each bidder is required to bid upon both sizes of "Type A" voting machines as specified herein, and while each bidder may (but is not required to) submit bids upon both sizes of "Type B" voting machines as specified herein, only one make, type and size of voting

machines will be purchased, and the Voting Machine Board reserves the right to select, in its discretion, the type, make and size of voting machines to be purchased, and regardless of any differences between the bid prices for manually operated voting machines and the bid prices for electrically and manually operated voting machines.

DESCRIPTIVE MATTER:

45. Each bidder must submit with his proposal illustrations or photographs of the exterior and mechanism of the voting machines which he proposes to furnish, together with written or printed detailed descriptions of all the materials used or to be used in the manufacture and construction of each and every part of said voting machines, as well as a written or printed detailed description and data pertaining to the operation, dimensions, weight and mechanism of said voting machines. All such descriptive matter submitted with bids shall be and become a part of said bids.

INSTRUCTIONS FURNISHED BY CONTRACTOR:

46. The Contractor must furnish with each voting machine such written or printed detailed instructions and data as shall easily and conveniently allow the Supervisors of Election, their agents and employees, to properly and efficiently prepare the voting machines for use and operation at elections in the polling places ordinarily occupied in the City of Baltimore, State of Maryland.

SAMPLES:

47. On or before the day that a bidder submits his bid, he shall set up, at his sole cost, expense and risk, in the office of the Supervisors of Election, located in the Court House, Baltimore City, Maryland, the following samples of the voting machines, equipment and accessories, such as he proposes to furnish and deliver if awarded the contract:

A sample of each size of the "Type A" machines, if the bidder is bidding on "Type A" only;

If the bidder is bidding on both "Type A" and "Type B" machines, it will be sufficient for him to so set up samples of each size of "Type B" only, provided that at any time after the bids have been opened, every bidder who has submitted samples of "Type B" only, shall, at his own expense and risk, and promptly upon written notice from the Voting Machine Board, remove from his said "Type B" samples all equipment pertaining to the electrical operation of his said samples, and thereafter said sample machines, without said electrical equipment, shall be held and taken to be said bidder's samples of manually operated (Type A) machines which he proposes to furnish and deliver if awarded this contract.

All "Type B" sample machines, as originally set up by the bidder, shall be equipped with D. C. motors.

Upon each sample machine so set up, there shall be arranged such sample ballots as may be specified by the Supervisors of Election. Such ballots shall provide space for a contest for officials on said ballots in the case of every office to be filled. Such sample machines may be subjected to such tests as the said 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. Such sample machines, equipment and accessories, shall remain in place until the contract is awarded to the successful bidder or until all bids are rejected, and the sample machine so set up by the successful bidder and upon which his bid is accepted (together with all equipment and accessories) shall thereafter remain in place until all of the machines, equipment and accessories, to be furnished by him shall have been delivered and accepted, and such sample machine, equipment and accessories, may, in the discretion of the Voting Machine Board, be accepted as one of the machines, equipment and accessories, to be delivered under the contract.

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 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.

EQUIPMENT TO BE FURNISHED WITH EACH MACHINE:

48. Each bidder shall furnish with each such sample machine, and the Contractor shall also furnish with each voting machine furnished and delivered under the contract documents the following additional equipment:

(1) Two (2) or more portable or fixed electric light fixtures, complete with two (1)—fifty (50) watt electric bulbs and not less than twelve (12) feet of first quality flexible electric fixture cord, which electric lights shall give sufficient light to enable voters, while in the voting machine booth or enclosure, to read the ballot-labels, and suitable for the use of election officers in examining the counters contained in the voting machines.

(2) One (1) mechanically operated model of a portion of the face of each voting machine to be furnished, for the instruction of electors.

(3) All necessary keys, tools, parts, accessories and equipment necessary for the proper operation and maintenance of the voting machines called for under these specifications. The keys to be so furnished shall be furnished in duplicate sets attached to separate key rings, together with a metal plate on which shall be stamped the number of the voting machine for which such keys shall be used.

(4) Each machine shall be enclosed in a metal case suitable for storing and capable of being locked against tampering.

(5) One full set of printed directions for the use, op-

eration, care and preparation of the machine for election purposes.

(6) All necessary written or printed instructions and supplies to election officers and custodians of voting machines for preparing such machines for and conducting the first primary election and the first general election at which any or all of the said voting machines are to be used.

INSTALLATION AND INSTRUCTION WORK:

49. The Contractor, at his sole cost and expense, shall, by sufficient competent and experienced representatives associated with said Contractor: (1) assist the Supervisors of Election, their agents and employees, in the installation of the said voting machines in the polling places ordinarily used in the City of Baltimore, State of Maryland, and the instruction work incident thereto prior to the first primary election and the first general election at which any or all of said voting machines are used and prior to any special election which may occur on or before the date of the first election at which any or all of said voting machines may be used; and (2) fully and properly instruct all the judges of election in Baltimore City in the proper use and operation of such voting machines prior to each of the aforesaid elections.

APPROVED:

Board Constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937.

By: HOWARD W. JACKSON,

Chairman.

ORIGINAL—Not To Be Detached.

BID OR PROPOSAL.

Proposal of **Automatic Voting Machine Corporation,**

Address, **Jamestown, New York.**

Made this **Eleventh** day of **August, 1937.**

Bids open **August 11, 1937.**

Certified check $25,000.00.

To the Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937,

Baltimore, Maryland.

Gentlemen:

The undersigned agree to furnish and deliver voting machines for use in the City of Baltimore, State of Maryland, and to do other work in connection therewith, all in strict accordance with the attached specifications and other contract documents, at and for the following unit prices:

Type A—Size 1. For furnishing and delivering, complete as specified, nine hundred and ten (910) manually operated nine party, forty candidate type voting machines, the sum of **Eight Hundred Twenty-six** dollars and **ninety-five** cents (**$826.95**) each; or

Type A—Size 2. For furnishing and delivering, complete as specified, nine hundred and ten (910) manually operated nine party, fifty candidate type voting machines, the sum of **Nine Hundred Twenty** dollars and **fifty** cents (**$920.50**) each; or

Type B—Size 1. For furnishing and delivering, complete as specified, nine hundred and ten (910) electrically and manually operated nine party, forty candidate type voting machines, the sum of————————dollars and cents ($————————) each; or————————————

Type B—Size 2. For furnishing and delivering, complete as specified, nine hundred and ten (910) electrically

and manually operated nine party fifty candidate type voting machines, the sum of———————————— dollars and————————cents ($—————) each.

The foregoing prices are to include and cover the furnishing of all materials and labor requisite and proper, and the providing of all necessary machinery, tools, apparatus and means for performing the work, and the manufacturing, furnishing and delivering of the voting machines, appurtenances, equipment, accessories and supplies and the doing of all the above mentioned work, in the manner set forth, described and shown in the specifications and other contract documents.

Note: Each and every person bidding and named above must sign here. In case of firms, give the name of the firm and the first and last names of each member, in full, with residence.

In case a bid shall be submitted by or in behalf of any corporation, it must be signed in the name of such corporation by some authorized officer or agent thereof, who shall also subscribe his name and office. If practicable, the seal of the corporation shall be affixed.

(Signature) AUTOMATIC VOTING MACHINE CORPORATION,

(Signed) RUSSELL F. GRIFFEN,

Vice-President.

Address: Jamestown, Chataugua County, New York.

(Seal.)

Attest:

(Signed) M. L. BADHORN,

Secretary.

TYPEWRITTEN COPY OF SIGNATURES.

(Paragraph 6)

AUTOMATIC VOTING MACHINE CORPORATION,

By RUSSELL F. GRIFFEN,

Attest: Vice-President.

MARTIN L. BADHORN,

Secretary.

THE CORPORATION IS A DELAWARE CORPORATION

Address: JAMESTOWN, N. Y.

STATEMENT REQUIRED

by Paragraph 6

I, RUSSELL F. GRIFFEN, Vice-President of the Automatic Voting Machine Corporation, Jamestown, New York, hereby state that said corporation is chartered under the laws of the State of Delaware; and that W. H. Staring, Cleveland, Ohio, President; B. G. Tremaine, Jr., Cleveland, Ohio, Vice-President, and I, Russell F. Griffen, Jamestown, New York, Vice-President, are the officers of the corporation having authority under the by-laws to sign contracts.

(Signed) RUSSELL F. GRIFFEN,

Vice-President,

Automatic Voting Machine Corporation,
Jamestown, New York.

(This Form Must Be Filled Out.)

BIDDER'S QUALIFICATION AND EXPERIENCE SHEET.

Bidder must fully set forth his qualifications and experience as called for in Paragraph 13 of the specifications. If necessary for completeness, use additional pages and insert them at this point.

Paragraph 13 requires the bidder to furnish evidence satisfactory to the Voting Machine Board of certain qualifications:

(a) Ability, equipment, organization and financial resources.

These points are covered in the affidavit we are submitting in compliance with the provisions of Paragraph 42, which affidavit is made part of this bid. We desire to say that our factory has been used in the business of manufacturing and marketing voting machines for thirty-nine years. The original company has been reorganized, and its name has been changed several times, as new capital and plant and machinery and patents were acquired. The last change took place in 1929. We have, in operation, in various counties, cities and towns of the United States more than twenty-five thousand voting machines manufactured by us. We sold the City of Baltimore fifty voting machines in the year 1928, and those machines have been in use in the City of Baltimore since delivery by us. We have supplied New York City with 4,525 voting machines and have a contract with New York for 250 more, Philadelphia with more than 1,500 voting machines, San Francisco with 1,300 machines, and we have contracted to deliver and have manufactured and delivered voting machines in other large cities, and our machines are being used at the present time in more than 120 cities of the United States.

Our plant at Jamestown, New York, is the largest in the country devoted exclusively to the manufacture of voting machines. We are now manufacturing voting machines for several cities, and up to the present time, although we have had more business than any other simi-

lar company, we have never defaulted on a contract, or failed to meet any obligation assumed by us with any public authority. We own and operate a manufacturing plant at Jamestown, New York. It has a capacity of from 4,000 to 5,000 voting machines annually. Our machinery is modern and in good condition. The original cost of our plant, machinery and equipment was $738,987.15, and the details of the plant and machinery are set out in the accompanying affidavit required by Paragraph 42.

The plant is operated by an experienced staff of executives, most of whom have been in the business for a long period of time. During the past two years we have employed an average of 325 persons daily. In addition to our long experience in manufacturing, we have the same successful experience in installing voting machines and in instructing election officials in the proper operation of the machines.

Our financial resources are described in detail in the affidavit. As of November 30, 1936, the end of the last fiscal year, we had current assets of $1,252,883.27 and total assets of $2,276,473.10. Our current liabilities were but $102,107.74, and we had a surplus of $1,487,064.47. There has been no material change in the financial status of the company since the last statement. The accuracy of our financial statement is attested by accounting firm of Ernst & Ernst.

We can deliver all of the voting machines successfully within the time required, and we are certain that we have the equipment and resources to deliver all of them substantially in advance of the time fixed by the specifications.

(b) We have been successfully and actively engaged in the sale and delivery of voting machines of the type and sizes bid upon for a continuous period of at least two years, as required by the specifications. In fact, the history of this company goes back thirty-nine years to 1898, and although it has been reorganized, and there have been changes in the name, the same company has been continuously in business, and within the past five or ten years has made many thousands of voting machines of the type and sizes bid upon.

As evidence of the above qualifications we submit the following examples taken from contracts successfully performed since the year 1930. All of the voting machines in the examples are of the same general character as those described in these specifications. They are manually operated. They all have nine rows, some with fifty columns and others with forty columns. They are made of similar materials to those proposed to be used in Baltimore, and mechanically are substantially the same, except that the Baltimore machine does not provide for voting for personal choices instead of candidates nominated by political parties and petitions. On the other hand, the Baltimore machines will provide for voting first and second choices, as provided by the Maryland primary laws, and the machines are especially designed for this purpose, as such voting is not provided for under the primary election laws elsewhere. The Baltimore machine will also provide for voting for members of political committees and delegates to conventions, as required by the Maryland primary election laws.

In general appearance and measurements, the Baltimore machine will be similar to those used elsewhere as cited in the examples on the next page attached hereto.

The examples of similar contract are:

	Date	Number of Machines	Size (All 9 rows) Number of Columns	Price Each Machine	Total Amount of Contract	Contract Delivery Date	Date Shipped
Philadelphia, Pa.	8/18/30	500	50	$1,203.67	$601,385.00	10/1/30	9/25/30
Luzerne Co., Pa..............	9/9/30	125	40	1,095.50	136,937.50	10/11/30	9/17/30
Delaware Co., Pa........	9/17/30	310	40	1,093.80	339,078.00	7/1/31	6/20/31
Northampton Co., Pa.	5/4/31	50	40	1,096.33	54,816.50	10/1/31	8/9/31
Luzerne Co., Pa..............	5/8/31	275	40	1,095.50	301,262.50	8/1/31	7/23/31
N. Hempstead, N. Y....	5/9/31	60	50	1,115.00	66,900.00	9/30/31	6/2/31
Hempstead, N. Y............	5/19/31	155	40	1,064.91	165,061.05	9/30/31	9/29/31
Philadelphia, Pa............	8/24/31	200	50	1,246.02	349,284.00	10/1/31	9/19/31
Philadelphia, Pa............	1/20/32	800	50	1,094.27	875,416.00	4/1/32	1934 (in litigation)
Delaware Co., Pa............	2/15/32	90	40	1,093.80	98,442.00	2/15/32	1/15/32
Luzerne Co., Pa............	3/12/32	60	40	1,089.00	65,340.00	4/1/32	3/24/32
Dauphin Co., Pa............	3/3/33	79	40	1,080.00	85,320.00	7/1/33	6/12/33
Luzerne Co., Pa..............	8/29/35	75	50	1,089.00	81,675.00	9/2/35	9/1/35
Essex Co., N. J................	3/15/37	600	50	1,029.12	617,472.00	4/25/37	4/14/37

Dallas County, Texas, bought 179 voting machines in 1936, all of which are 50 column machines. We have just delivered 310 9-row, 50-column voting machines for Union County, N. J., in advance of the contract delivery date.

AGREEMENT.

THIS AGREEMENT, made this **8th** day of **September,** 1937, by and between **Automatic Voting Machine Corporation,** hereinafter called the Contractor, and the Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937, hereinafter called the Voting Machine Board.

WHEREAS, the contract for furnishing and delivering nine hundred and ten (910) manually operated voting machines of the nine party, **40 bank 360** candidate type, and doing other work, and subject to all the conditions, covenants, stipulations, terms and provisions contained in certain specifications and in a certain bid or proposal, copies of which are hereto attached and in all respects made a part hereof, has recently been awarded to the Contractor by the said Voting Machine Board at and for the unit price per voting machine named therefor in the said proposal attached hereto,

AND WHEREAS, it was one of the conditions of said award that a formal contract should be executed by and between the Contractor and the said Voting Machine Board evidencing the terms of the said award,

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, that the Contractor doth hereby covenant and agree with the said Voting Machine Board that **it** will well and faithfully furnish and deliver said nine hundred and ten (910) manually operated voting machines of the nine party, **40 bank—360** candidate type and do other work in strict accordance with each and every one of the conditions, covenants, stipulations, terms and provisions contained in said specifications and said bid or proposal at and for a sum equal to the aggregate cost of furnishing and delivering said voting machines and doing said work at the unit price per voting machine named therefor in the said bid or proposal attached hereto, and will well

and faithfully comply with and perform each and every obligation imposed upon it by said specifications, bid or proposal and the terms of said award. Time is of the essence of this agreement.

AND the Voting Machine Board doth hereby covenant and agree with the Contractor that it will pay or cause to be paid to the Contractor when due and payable under the terms of said specifications and of said award, the above mentioned sum and that it will well and faithfully comply with and perform each and every obligation imposed upon it by said specifications or the terms of said award.

IN WITNESS WHEREOF, said **Automatic Voting Machine Corporation, by its Vice-President, has executed these presents and caused its corporate seal to be hereto affixed, duly attested by its Secretary,** and the said Voting Machine Board has caused these presents to be signed in its name by its Chairman.

AUTOMATIC VOTING MACHINE CORP., (Seal)

By: **(Signed) RUSSELL F. GRIFFEN,** (Seal)

Vice-President

Attest: **(Signed) MARTIN L. BADHORN,** (Seal)

Secretary

Witness:

(Signed) B. L. CROZIER.

BOARD CONSTITUTED BY CHAPTER 94 OF THE LAWS OF MARYLAND, REGULAR SESSION OF 1937.

By: **(Signed) HOWARD W. JACKSON,**

Chairman

Witness:

(Signed) WALTER A. McCLEAN,

Secretary.

STIPULATION EXHIBIT NO. 7.

FIDELITY AND DEPOSIT COMPANY
of Maryland
BALTIMORE

KNOW ALL MEN BY THESE PRESENTS, that we, the Automatic Voting Machine Corporation of Jamestown, New York, as Principal, and the Fidelity and Deposit Company of Maryland, a Corporation of the State of Maryland, and the New Amsterdam Casualty Company, a Corporation of the State of New York, as Sureties, are held and firmly bound unto the Board constituted by Chapter 94 of the Laws of Maryland, Regular Session of 1937, (hereinafter called the "Voting Machine Board"), the individual members of said Board, the Mayor and City Council of Baltimore, the Supervisors of Election of Baltimore City and the State of Maryland, jointly and severally, (hereinafter called "Obligees"), in the full and just sum of SEVEN HUNDRED FIFTY-TWO THOUSAND FIVE HUNDRED TWENTY-FOUR AND 50/100 DOLLARS ($752,524.50) lawful money of the United States of America as follows: The Principal and the Fidelity and Deposit Company of Maryland, as Surety, jointly and severally, in the sum of THREE HUNDRED SEVENTY-SIX THOUSAND TWO HUNDRED SIXTY-TWO AND 25/100 DOLLARS ($376,262.25) and no more, the Principal and the New Amsterdam Casualty Company, as Surety, jointly and severally, in the sum of THREE HUNDRED SEVENTY-SIX THOUSAND TWO HUNDRED SIXTY-TWO AND 25/100 DOLLARS ($376,262.25) and no more, lawful money of the United States of America to be paid to the said Obligees, or to their certain attorney, to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The Obligors herein expressly agree that for the purpose of allowing a joint action against any or all of them and for that purpose only this bond shall be treated as the joint and several as well as the several obligation of each of the Obligors.

WHEREAS, the above bounden Automatic Voting Machine Corporation has entered or is about to enter into a contract with the said Voting Machine Board, bearing even date herewith for furnishing and delivering nine hundred and ten (910) manually operated voting machines of the nine-party, forty candidate type and doing other work, upon certain terms and conditions in said contract more particularly mentioned; and

WHEREAS, it was one of the conditions of the said award of the said Voting Machine Board, and pursuant to which said contract was entered into, that these presents should be executed.

NOW, THEREFORE, THE CONDITIONS OF THIS OBLIGATION ARE SUCH, that if the above bounden Automatic Voting Machine Corporation shall well and truly perform, fulfill and comply in all respects with all the undertakings, covenants, terms, conditions and agreements of the said contract, and its obligations thereunder, including the proposal, specifications and/or drawings, etc., therein referred to, and made a part thereof, during the original term of said contract, and any extension or extensions thereof that may be granted, from time to time, by the said Voting Machine Board, with or without notice to the Sureties, and during the term or terms of any and all guarantee, maintenance and/or repair obligations contained in the said proposal, specifications and/or drawings, etc., and shall also well and truly perform, fulfill and comply in all respects with all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may be made hereafter, with or without notice to the Sureties and shall indemnify and save harmless the said obligees, their agents and employees, against and from all costs, expenses, damages, injury or loss to which the said Obligees, their agents and employees, may be subjected by reason of any wrongdoing, misconduct, want of care or skill, negligence or default upon the part of the said Automatic Voting Machine Corporation, its agents or employees, or in any other manner arising, directly or indirectly, from any and all causes whatsoever, in or about the execution or performance of the contract, including said proposal, specifications and drawings, etc.,

during the original term of said contract and/or any authorized extension or modification thereof and/or during the term or terms of any and all guarantee, maintenance and/or repair obligations arising under the terms and conditions of the proposal, specifications and/or drawings, etc., and shall promptly settle, pay and satisfy all claims, demands and suits made or instituted against the said Automatic Voting Machine Corporation by any and all persons, firms and/or corporations for the nonpayment of labor performed in and about the furnishing and delivering of said voting machines or the work to be done under the contract for which the said Automatic Voting Machine Corporation is liable, including any and all extra work that may become a part of the contract, and for all material furnished and used in furnishing and delivering said voting machines or doing the work to be done under the contract for which the said Automatic Voting Machine Corporation is liable, and shall save and keep harmless the said Obligees, their agents and employees, against and from all losses to them, or any of them, from any cause whatever, including actual or alleged patent, trade-mark and copyright infringements, as set forth in said specifications, in furnishing and delivering said voting machines and doing other work, then this obligation to be void; otherwise to be and remain in full force and virtue in law.

IT IS PROVIDED, HOWEVER, that in no event shall the aggregate liability of the Sureties under the terms and provisions of paragraph number twenty-one (21) of the specifications entitled "Patent Rights", exceed the sum of FOUR HUNDRED THOUSAND DOLLARS ($400,000.00), the liability of the said Fidelity and Deposit Company of Maryland under said paragraph being limited to TWO HUNDRED THOUSAND DOLLARS ($200,000.00) and the liability of the New Amsterdam Casualty Company being limited to TWO HUNDRED THOUSAND DOLLARS ($200,000.00.).

IT IS PROVIDED, FURTHER, that no person, firm and/or corporation other than the said Obligees shall have any right, title or interest in, to and/or under this instrument until and after the said Obligees shall have been fully paid and/or reimbursed for any and all costs, expenses, damages, and/or losses of every kind, nature

and description sustained by them, or any of them, or which may be sustained by them, or any of them, and as to which they, or any of them, are or may be entitled to indemnification under the terms of this instrument.

IN WITNESS WHEREOF, the said Automatic Voting Machine Corporation has caused this bond to be signed in its name by its Vice President and Secretary and the Fidelity and Deposit Company of Maryland and the said New Amsterdam Casualty Company have caused this bond to be signed in their names by their duly authorized attorneys-in-fact and their corporate seals to be hereunto affixed this 8th day of September, in the year 1937.

AUTOMATIC VOTING MACHINE CORPORATION.

(Signed) By RUSSELL F. GRIFFEN,
Vice President.

(Signed) MARTIN L. BADHORN,
(Corporate Seal) Secretary.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Signed) By OWEN A. DONEGAN,
Attorney-in-Fact.

(Corporate Seal.)

Witness:

(Signed) WILLIAM DEATSON.

NEW AMSTERDAM CASUALTY COMPANY.

(Signed) By M. R. GOSWEILER,
Attorney-in-Fact.

(Corporate Seal.)

Witness:

(Signed) E. F. DOBSON.

Approved as to form and legal sufficiency:

(Signed) PAUL F. DUE,
Special Counsel to the Voting Machine Board.

Approved:

(Signed) J. GEORGE EIERMAN,
Member, Voting Machine Board.

(Signed) WALTER A. McCLEAN,
Member, Voting Machine Board.

(Signed) DANIEL B. CHAMBERS,
Member, Voting Machine Board.

(Signed) B. L. CROZIER,
Member, Voting Machine Board.

(Signed) HOWARD W. JACKSON,
Chairman, Voting Machine Board.

(Signed) R. WALTER GRAHAM,
Member, Voting Machine Board.

(Signed) R. E. L. MARSHALL,
Member, Voting Machine Board.

(Signed) GEORGE SELLMAYER,
Member, Voting Machine Board.

(Power of Attorney Omitted.)

(STIPULATION EXHIBIT NO. 8.)

October 17, 1936.

Board of Supervisors of Elections
of Baltimore City.

"Upon the rendition on Friday last by the Court of Appeals of the decision, upholding the opinion rendered by this department that the names of candidates endorsed by the Union Party could not legally be placed on the ballot in Maryland in the approaching Presidential Election, you request my opinion as to whether a ballot will be invalidated if the voter writes in or upon it the name of any person whose name is not printed upon the ballot.

"In our correspondence of several weeks ago, in regard to this subject, you proposed this question for de-

termination, but inasmuch as we had been notified that Court action would be instituted for the purpose of having the Union Party candidates on the ballot, I preferred to await the outcome of the proceedings, because of the possibility that the names might be ordered to be certified to the respective election boards.

"Now that both the Baltimore City Court and the Court of Appeals of Maryland have decided that the ruling was correct, it is entirely in order for us to announce, in advance of the election, for the information and benefit of voters in the State, what action must be taken concerning ballots upon which the voter has written in names.

"Prior to 1931, it was permissible for a voter to write in the name of a candidate, under certain circumstances. The fact that such a course was possible is borne out by the provisions of the then existing law, Section 80 of Article 33 of the Code which provided inter alia that the judges of election should reject ballots marked in certain ways. In the section referred to, the Legislature had provided the ballots should not be rejected containing the name or names of any candidates written by the voter on the ballot as provided in Section 62.

"As another indication that under the pre-existing situation voters could write in the name of a person of their choice, was the fact that the official ballots contained blank spaces to afford such opportunity to the voters.

"However, the General Assembly of Maryland in 1931, by Chapter 120 of the Acts of that session, repealed and re-enacted the section regulating the actions of election judges. In the newly enacted statute the words above quoted were omitted, and the law as it now stands provides that the election judges must reject any ballots upon which 'there shall be any mark on the ballot other than the crossmark in a square opposite the name of a candidate'.

"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.

"You are therefore, advised that a ballot upon which a voter has written the name of a person for whom he desires to vote, must not be counted."

HERBERT R. O'CONOR,

Attorney General.

(STIPULATION EXHIBIT NO. 9.)

July 22, 1937.

Hon. Herbert R. O'Conor,
Attorney-General of Maryland,
Baltimore Trust Building,
Baltimore, Maryland.

Dear General O'Conor:

We are writing to request an opinion from you as to the proper interpretation of Section 224F, Sub-sections (c) and (d) of Chapter 94 of the Acts of 1937, concerning voting machines to be acquired by this Board under the authority of this Act.

The provisions in question read as follows:

"224F. Every voting machine acquired or used under the provisions of this Sub-title shall:

"(c) Permit each voter, at other than primary elections, to vote a ticket selected from the nominees of any and all parties and from independent nominees;

"(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;".

It has been suggested to this Board that Sub-section (c) required the machines to be so constructed as to per-

mit a voter to vote for any candidate whose name is printed on the ballot, and that Sub-section (d) requires that the machines be so constructed as to permit a voter to write the name of any person for whom he may wish to vote on the machine, in the event the Legislature should in the future authorize such action, or in the event the law passed a few years ago, taking away from the voter the privilege of writing in the candidate of his choice in blank spaces left for that purpose, should be declared unconstitutional.

This Board has also been informed that in most of the States where the question has arisen the Courts have held that the Legislature may not constitutionally deprive a voter of the right to vote for a candidate of his choice, even though that candidate's name may not be printed on the ballot, and that the voter, otherwise qualified, has a vested right to write in the candidate of his personal choice, provided his name is not printed on the ballot. (We have not been referred to these decisions and have had no opportunity to check.)

In an opinion rendered to this Board under date of October 17, 1936, you advised us that the writing in of names is illegal, but it is proper to note that your attention was not at that time called to any constitutional question.

Inasmuch as bidders under the specifications which have been prepared by this Board must bid upon a machine to conform to the Act as well as to the specifications prepared by the Board, it is essential that we have an authoritative ruling upon the question presented by this letter, and, as our specifications have been completed and will be advertised tomorrow, we urgently request that you let us have your ruling at the earliest possible time.

Very truly yours,

BOARD OF SUPERVISORS
OF ELECTION,

LINDSAY C. SPENCER,
Chief Clerk.

LCS:EWW

(STIPULATION EXHIBIT NO. 10.)

The State Law Department,
1901 Baltimore Trust Building,
Baltimore, Maryland.

July 24, 1937.

The Board of Supervisors of Elections,
21 Court House,
Baltimore, Maryland.

Att: Mr. Lindsay C. Spencer.

Gentlemen:

We acknowledge receipt of your letter in which you ask our opinion upon the question whether voting machines to be acquired by your Board under recent legislation should provide spaces to enable voters to indicate a "write-in" preference, as an alternative to voting for candidates duly nominated in accordance with law.

Prior to 1931 it was legally permissible in this State for voters to write in the name of a candidate not listed on the official ballot. Code, Article 33, Section 80 (1924 Edition). However, in that year such provision was stricken from the statute books by Chapter 120 of the Acts of 1931. Section 80 now provides that the judges shall reject any ballots "if there shall be any mark on the ballot other than the cross-mark in a square opposite the name of a candidate * * *".

This language in our judgment now prohibits a write-in vote in Maryland, and such was our conclusion in an opinion to your Board last October 17th. 21 Opinions of the Attorney General, page 354. Although incorporated in our election laws for six years, this statute has never been assailed in the courts and its constitutionality has never been questioned. Although the courts of some states have indicated that to prohibit write-ins may violate the constitutional right of a citizen to vote for the

person of his choice, our own courts have not in any way suggested its invalidity under our own Constitution; and until they do so, we hold this statute to be constitutional, valid and effective.

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

Having stated our view of the law, we deem that we have fulfilled our function as your legal adviser. We do not consider that it is a part of our duty to suggest to your Board what kind or type of voting machine is to be purchased, or whether such machine shall provide for write-in voting, or for other contingencies which, while not legal now, may be legalized in the future by statutory change or by court interpretation. We consider that such a question is a matter of policy for the determination of your Board.

In reaching this conclusion, we have carefully examined Chapter 94 of the Acts of 1937 (Code Article 33, Section 224 to 224-W inclusive), with special reference to Section 224-F, sub-sections (c) and (d). Sub-section (c) states that voting machines purchased by your Board shall permit voters to vote a ticket selected from the nominees of any and all parties and from independent nominees. Sub-section (d) provides further that voters shall be allowed to vote "for any person and for any office for whom and for which he is lawfully entitled to vote".

We find nothing in such language to negative the apparent legislative intent, as expressed in the 1931 statute, that write-in votes shall not be permitted in this State.

We trust that the above fully answers your inquiry.

Yours very truly,

(Signed) HERBERT R. O'CONOR,

Attorney General.

HRO'C:EH

(STIPULATION EXHIBIT NO. 11.)

(ATTORNEY GENERAL'S OPINION, VOL. 11, PAGE 96.)

May 29, 1926.

H. Fillmore Lankford, Esq.,
Attorney at Law,
Princess Anne, Md.

DEAR MR. LANKFORD: The Attorney General has requested me to answer your letter of May 17th, in which you ask for an opinion as to whether or not the voters may now write on the ballot the names of persons for whom they desire to vote, since the passage of Chapter 581 of the Acts of 1924, the general purpose of which was to shorten the ballot by eliminating blank spaces thereon.

This inquiry has been very carefully considered by the Attorney General, and he is of the opinion that it is not now permissible for a voter to write on the ballot the name of any person for whom he may desire to vote. Inasmuch as Section 62 of the Code of 1924, does not authorize the writing of additional names on the ballot by a voter, the provision contained in Section 80 and reading 'or other than the name or names of any other candidate written by a voter on the ballot as provided by Section 62' become nugatory.

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.

Very truly yours,

WILLIS R. JONES,
Asst. Attorney General.

(The Court) Now, the stipulation applies to both cases?

(All agree that stipulation applies to both cases.)

HARRY MERTZ,

a witness of lawful age, produced on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Page:

Q. Mr. Mertz, what is your position and occupation? A. State Purchasing Agent.

Q. And where is your office? A. Saratoga and Davis Streets, Whitaker Building, sixth floor.

Q. You said you were State Purchasing Agent? A. Yes.

Q. Under what Bureau do you operate? A. Central Purchasing Bureau.

Q. Section 3 of Article 78 authorizes you to promulgate regulations. I show you a booklet entitled "General Rules and Regulations Governing Competitive Bids for Central Purchasing Bureau of Maryland" and ask you what that is?

(Mr. Due) We object, your Honor.

(The Court) Well, you want to prove by Mr. Mertz that the Board paid no attention to his department and bought these machines?

(Mr. Page) And certain other——

(The Court) Well, Mr. Due and the rest of them all admit that. They contend that it was unnecessary.

(Mr. Due) We admit for the purposes of the record they paid no attention to Mr. Mertz or his purchasing bureau, yes, because it was unnecessary to do that.

(The Court) And your contention is that it was unnecessary.

(Mr. Due) Yes, sir.

(Mr. Page) I offer in evidence the general rules and

regulations just mentioned which I understand Mr. Mertz to say are the regulations and rules which have been adopted by his department.

(Mr. Allen) We object.

(The Court) Objection sustained. Have them marked for identification.

(Mr. Page) Exception noted.

(Rules and regulations referred to then marked "Plaintiff's A" for Identification.)

(Omitted but may be referred to in Court.)

Q. Has it or not been the position of your department in the past that purchases made by the Board of Supervisors of Election of Baltimore City should be made through your department?

(Mr. Allen) We object.

(The Court) Objection sustained. I do not understand that the Board of Supervisors of Election as such is making this purchase.

(Exception noted.)

(Mr. Page) Suppose I make this tender: We offer to prove by this witness that the Board of Supervisors of Election is one of the boards which has purchased through the Central Purchasing Agent, and that is one of the boards included in a list at the end of "Plaintiff's Exhibit for Identification A," which purports to list the boards which are subject to the jurisdiction of the Central Purchasing Agent.

(The following State Departments appeared in the list referred to: DEPARTMENTS, Adjutant General—State Auditor—Central Purchasing Bureau—State Comptroller—Conservation Department—State Department of Education—Department of State Employment and Registration—Executive Department—State Department of Forestry—State Game Warden—Hall of Records—State Department of Health—Insurance Department of the State of Maryland—State Law Depart-

ment—Department of Legislative Reference—Maryland State Library—Department of State Mechanical Engineering—State of Maryland Military Department—Department of Militia—Department of Militia—Department of Public Buildings and Grounds—Secretary of State—State Tobacco Warehouse—State Treasurer—Vocational Rehabilitation Service. COMMISSIONS, Athletic Commission—State of Maryland Aviation Commission—Bank Commissioner—Geological and Economical Survey Commission—Commission of Higher Education of Negroes—Commission of Industrial Accident—Commissioner of Labor and Statistics—Commissioner of Land Office—Maryland State Planning Commission—Maryland State Police—Maryland Veteran*d* Commission—Milk Control Commission—Maryland Bureau of Mines—Commissioner of Motor Vehicles—Parole Commissioner—Public Library Advisory Commission—Public Service Commission of Maryland—Maryland Racing Commission—State Roads Commission—State Survey Commission—State Tax Commission—State Weather Service. BOARDS, Board of Agriculture—Board of Examiners of Public Accountants—Board of State Aid and Charities—Board of Examiners of Chiropody—Board of Examiners of Chiropractic—Board of Examiners of Dental—Board of Examiners and Supervisors Electrical—Supervisors of State Board of Elections—State Board of Hairdressers and Beauty Culturists—Board of Examiners Homeopathic—Board of Law Examiners—Live Stock Sanitary Service (Maryland Board of Agriculture)—Liquor Board—Board of Medical Examiners—Board of Mental Hygiene—Board of Motion Picture Censors—Board Moving Picture Operators—Board of Examiners of Nurses—Board of Examiners of Optometry—Board of Examiners of Osteopathic—State Board of Examiners and Supervisors of Paper Hangers—Board of Pharmacy—State Board of Commissioners of Plumbing—State Board Stationary Engineers—State Board of Undertakers—State Veterinary Medical Board—State Board of Welfare. INSTITUTIONAL GROUP, State Hospital Crownsville—State Hospital Eastern Shore—House of Correction—Maryland Training School for Colored Girls—Miners Hospital—Montrose School for Girls—Morgan College—Maryland Normal School

for Colored Youth—Maryland State Penal Farm—Maryland Penitentiary—State Training School Rosewood—St. Mary's Female Seminary—Maryland State School for the Deaf—Springfield State Hospital—State Hospital Spring Grove—State Teachers College—State Teachers College—State Teachers College—Maryland Training School for Boys—Maryland Tuberculosis Sanatorium—Maryland Tuberculosis Sanatorium—Maryland Tuberculosis Sanatorium—Maryland Tuberculosis Sanatorium—University Hospital—University of Maryland —University of Maryland—University of Maryland. COURTS, Clerk of Court of Appeals—Court of Appeals —Baltimore City Court—Circuit Court No. 1—Circuit Court No. 2—Court of Common Pleas—Criminal Court—Peoples Court—Register of Wills—Superior Court of Baltimore City—Traffic Court.)

Q. Mr. Mertz, in the practice of your board do you at all times, yourself, construct the specifications for the purchase of material which are purchased by the various boards under your jurisidiction?

(Mr. Allen) Objected to.

(Objection sustained; exception noted.)

(Mr. Page) I offer to prove by the witness that though he usually makes his own specifications, or at least his bureau make their own specifications, that where the specifications require any expert knowledge or unusual acquaintance with the particular thing to be purchased, Mr. Mertz and his bureau permit the purchasing board to draw up the specifications, which he then approves.

(The Court) Well, that indicates that Mr. Mertz and his bureau are very common-sense minded gentlemen. Other than that I don't see that it is of any interest.

(Mr. Page) Well, it is excluded then, and your Honor grants me an exception?

Thereupon—

LINDSAY C. SPENCER,

a witness of lawful age, produced on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Page:

Q. What is your full name, sir? A. Lindsay C. Spencer.

Q. And what is your official position, Mr. Spencer? A. Chief Clerk to the Board of Supervisors of Election of Baltimore City.

Q. And how long have you been such? A. Something more than two years.

Q. Are you acquainted with the work which has been done with regard to redistricting and relisting of precinct books subsequent to the passage of the Voting Machine Act? A. Yes, sir.

Q. Will you tell us what has been done in that regard, shortly, I mean? A. As I recollect, some of the preliminary work was done in a tentative way before the actual passage of the Act. The first step is to have plans drawn of every precinct in the city with the blocks shown on those plans, the blocks which compose the precincts. That was done. Then the books must be gone through, book by book, and the numbers inserted in each block. In other words, to make myself plain, we will find John Smith registered, his address shows that he is in the block bounded by Patterson Park Avenue, Monument Street, Madison Street, and Collington Avenue. There is a mark made there, and so on, through the book, until each block shows the number of persons registered there.

After that is done, the map of each ward is gone over, and in that map is made a figure in each block to show the number of people registered from that block. After

all that is done, the new precinct lines are drawn in on the map.

Q. Just pause there, Mr. Spencer. How many precincts were there prior to the Act, and how many subsequent? A. 685 prior to the Act; 471 now.

(Mr. Allen) How many? 471?

(The Witness) Yes.

(Mr. Page) Go ahead.

A. After that, what is known as the key work is done. That is to say—of course, you know there are two books to each precinct, one clerk will take one of those books and the other clerk will take the other, and they will go through them, marking the number of the new precinct opposite each name, where the transfer is to be made to another precinct. For instance, take the second precinct of the First Ward; part of that precinct may now go in the new first precinct; and they put a "1" in red or blue pencil before each name which is to be transferred from the old second precinct to the new first precinct.

Q. Has that action of that transcribing involved your doing anything to the old precinct books? In other words, have they been cancelled? A. They are being cancelled. The transcribing hasn't been reached yet, Mr. Page.

Q. I see. Well, will they be cancelled? A. Yes, and a number of them have already been cancelled. After that key work is done, then the actual transcription must be done. That has been practically completed, and you understand what that involves? That means transcribing every name which goes in a different book from which it is in now. In putting it in that particular book, not only the name is put in but everything on every line. I would say that most lines have fourteen or fifteen entries, depending, of course, on the naturalization as to how many entries there are; but I would say at least fourteen on every line, including the address, color, affiliations, and so forth.

Q. And how long have you been employed on that work, Mr. Spencer? A. I think the actual transcription,

the key work and the actual transcription, began, I think I would be safe in saying, within two weeks after the decision of the Court of Appeals in the case last spring.

Q. Around May? A. That decision was late in May. I think this work began early in June. I think only about a week after that decision.

Q. Well, it was during May then? A. Yes. Now, after that transcription is done, all that has to be carefully proof-read, because we must keep mistakes down to a minimum. If a voter goes to the booth in the precinct and it develops that his name has not been transcribed, that, of course, will make complications, and that must be kept down to the absolute minimum, and, therefore, everything is carefully proof-read. Both the transcription and the proof reading on the scale which we have to do it this year, involves an extra force.

Then the erasure of names is the next thing, the erasure of names from the book in which they have been transcribed is the next thing that has to be done, and I should say possibly twenty or twenty-five per cent of that has been completed.

Q. And this work will continue how long, in your judgment, before it is completed? A. The work I have described, probably all but the erasure of the names, I should say ought to be completed in about two or three weeks. The erasure of the names may take us a few weeks longer.

Q. Now, changing the precincts into 471 precincts is done to accommodate the precincts to the added voting capacity afforded by voting machines, isn't that correct? A. Yes. You asked me about the completion of the work. I am speaking about the completion of that work. After that, the next thing in order is to have the new maps made, and that work has been given out and begun, and after those maps are made without coloring, each must be proof-read and then afterwards colored. And, in addition to that, the boundaries of the new precincts must be described in wards. That has been done.

Q. Now, I think you have given a sufficient outline of what you have done and plan to do, for my purpose at

least, Mr. Spencer. I will come back to the question I just referred to; the re-precincting into 471 precincts; that re-precincting was done because the voting machines are now capable of handling more than could be handled at an ordinary polling place where there were paper ballots, is that correct? A. That is correct, yes sir. I might say that there would have been a certain amount of re-precincting done this year anyway, but on a very much smaller scale. That was simply to equalize the precincts where there has been a shift in population.

Q. So that if paper ballots had to be used you would have to again revert to the old precinct boundaries? A. Not necessarily to the old precinct boundaries, but to precinct boundaries very different from the ones we have now.

Q. And if that be necessary, would it be fair to say that you would use approximately the same time in undoing the work you have done as you used in doing it? A. Yes, sir. The only way to avoid that would be to split precincts into two polling places, and that may not be practicable.

Q. You would have to again copy the names of voters back into the new precinct books and cancel the old ones and do all the other things you have been speaking about? A. As I see it, we would have to get an entirely new set of books, because it would not be practicable to put back names into the books, you wouldn't have space for it. However, so many names have been erased, you wouldn't have space for the names in the same book, if they were transcribed back there again.

Q. Now, Mr. Spencer, it falls to your Board to train the judges of election who take charge of these machines, doesn't it? A. Yes, sir.

Q. Will you have judges who are new or judges who have held over from some former time when you go into the 1938 primary and general elections? A. There will be no hold-overs. We may, of course, in a good many instances probably will appoint judges who have had previous experience, but they will have to be all reappointed or new ones appointed, and I may add that very few of them have had any experience with voting machines.

Q. From what do you select your names of election judges? A. The custom for many years, as I understand, has been to—at least, ever since I have been there—to call on the ward executives of the two parties to furnish the names of the judges whom they can recommend.

Q. And when is that done? A. The law requires the judges to be appointed not later than July 1. That work of asking for names begins, I should say, two or three months before that, about April or May.

Q. Your appointments, however, are actually made on or about July 1, is that right? A. That's correct.

Q. Is that your plan with regard to the appointments next year? A. Yes, sir, as far as we can get the names in by that time. Mr. Jones knows something about that.

Q. So that you plan to instruct your new group of judges after July as to the operation of voting machines, and you plan to use the time between then and the first primary election, as much as you need, to give instructions to those new judges, is that correct? A. As much of it as we need, and we will need every day of it.

Q. And the primaries are held between the 8th and 15th of September, is that right? A. Yes.

Q. And your general election is held this year on the 8th of November, I believe? A. Yes, that's correct.

Q. State how many machines it will be necessary for you to have on hand in order to properly instruct the various judges of election? A. Well—let's see (pondering)—that involves a little calculation. Just excuse me a minute——

(The Court) Well, would you say fifty?

(The Witness) Possibly fifty.

Q. (By Mr. Page) There are eighteen hundred and eighty-four judges in the new setup, four hundred and seventy-one precincts, counting four judges to each precinct would give you eighteen hundred and eighty-four judges, and it is necessary for you to instruct those eighteen hundred and eighty-four judges with regard to the machines between the first day of July and the 8th

of September, when they might come in use? A. That's right.

Q. Now, have you made any estimate of the time which will be necessary for the Board of Supervisors of Election to construct a ballot and so arrange the machines as to be equipped for the primary election on the 8th of September? A. To the best of my recollection, the law allows up to fifteen days before the primary election for a candidate to withdraw, or else, for a candidate to file. It is fifteen days before the election when you know finally what form the ballot is going to take, and I am speaking now of the primary election. Conceivably it might be shorter than that, because there might be a lawsuit. I remember——

Q. Well, now, let me put the question this way: If you had the machines in your hands before the fifteenth of August, would that be sufficient time to arrange them and prepare them for the ballot on the 8th of September? That allows somewhat more time than you have mentioned as your minimum. A. The actual arrangement of the ballot would have to be done in less time than that.

Q. Well, have you made any study of the time necessary to adjust the machines for a ballot, assuming that they can be adjusted properly?

Q. Can you estimate the most time that would be necessary? A. In order to adjust the machines?

Q. Yes, a machine that has been given you or a group of machines that have been given you, so that each one of them can be used in the primary election? A. Well—the time it would actually take?

Q. Yes, how much time would you need, or your board need, to get your machines in order after they have been delivered? A. Well, if the ballot becomes known, the time it would take would depend, to a very large extent, on whether Plan A or Plan B was adopted.

Q. Well, you couldn't commence to adjust your machines for an election until you had a ballot in your hands, is that correct? A. That's correct.

(Mr. Page) Well, that answers the question, and that's all I want to ask you.

Questions by Mr. Jones:

Mr. Spencer, do you know which of the machines in the courtroom is the forty-bank machine that was selected by this board for purchase? Can you identify it by number?

(The Court) Well, I understand that the Board didn't undertake to purchase the specimen machine that was set up there; the machine that was there on exhibit.

(Mr. Jones) Well, our position is, of course, that they had to buy, under the specifications, a machine which was in all respects representative of the type which they were buying, and that they did select a particular machine.

(The Court) Well, you don't want Mr. Spencer to inadvertently decide something that the Board might hereafter be called upon to defend in a lawsuit?

(Mr. Jones) Oh, no, your Honor, but there is no dispute about it, everybody at the trial table knows which one it is.

(The Court) Well, I know, but you just put a little extra word in your question which I want to eliminate.

(Mr. Jones) I want to eliminate it, too, if it is objectionable. All I want to know is, can he identify the particular machine.

(The Court) Can you identify the machine that was exhibited to the Board when it was examining this question and determining what it was all about? I take it the Automatic company furnished two types of machines?

A. They furnished two sizes, fifty-candidate and forty-candidate. The forty-candidate machine which was exhibited to the Board is this machine over here (indicating), No. 33068.

(Mr. Jones) Now, your Honor, we would like that machine to be regarded as in evidence, for the purposes of this case.

(The Court) Very good.

Q. Now, Mr. Spencer, are you able to tell the Court whether or not there have been any changes in the

mechanism in that machine since the time this contract was awarded? A. There has not.

Q. And that machine is set up for what has been referred to in this case as Plan A? A. Correct.

Q. Now, you told his Honor that the time required for setting this machine up for an election would depend largely upon whether Plan A or Plan B was used? A. That is my understanding.

Q. Well, do you know of your own knowledge how much additional mechanism and equipment would be required to set up Plan B as distinguished from Plan A? A. No.

Q. And your only source of information on the subject, I guess, is from the Automatic Voting Machine Corporation, is it? A. That's correct.

Q. Now, this machine doesn't have, of course, personal choice equipment, does it, this forty-bank machine?

(Mr. Due) What's that question?

(Mr. Jones) Personal choice equipment. I mean, equipment for personal choice of candidate by the voter.

A. I think I would prefer to call that "write-in" voting equipment.

Q. Well, write-in voting equipment, it doesn't have that? A. No. So far as I am informed, none of the machines submitted by either bidder had a full set of write-in equipment.

Q. Well, you mean you don't agree with the testimony of Mr. Weiss on that? A. I didn't hear his testimony; but I understand that his testimony was that he had sixty-five per cent of that equipment in his machine.

(Mr. Jones) Your Honor, we think that that statement ought to be stricken out, because the record will speak for itself. He says he didn't hear the testimony, but he understood so and so, and we think that that ought to come out, and it is not responsive to the question.

(The Court) Very well. That doesn't help you any and it doesn't hurt you any.

(Mr. Jones) No, sir.

Q. Now, with respect to the extra mechanism and equipment that would be required to accommodate the Shoup machine to Plan B on this forty-bank machine, do you know whether that equipment is in the forty-bank machine now?

(Objected to; objection sustained.)

(Mr. Jones) I ask him does he know.

(The Court) If he did know it wouldn't make any difference. He is a very able lawyer but I never understood him to set himself up as a mechanic or a mechanical genius.

(Mr. Jones) Exception.

(The Court) Now, whether it is or isn't there doesn't make any difference, as I see it, in deciding the point of law involved in this case.

(Mr. Jones) It is conceded that the fifty voting machines heretofore purchased by the City do have provisions made in those machines for the writing-in of a candidate of the individual choice of the voter?

A. I understand that they do.

(Mr. Page) Have the fifty machines which have been in the possession of the Board of Supervisors of Election ever been used in a primary election for first and second choice, up to this time? A. So far as I know, they haven't.

Q. And how long have they been in the possession of the Board? A. I believe some eight or nine years.

CROSS EXAMINATION.

By Mr. Due:

Q. Have those fifty machines been used in any primary elections, Mr. Spencer? A. I believe not.

Q. What's the reason for that?

(Mr. Jones) Well, now, we object to that. He has been there only two years.

(The Court) Objection sustained.

Q. (By Mr. Due) Why haven't they been used in the two-year period since you have been there?

(The Court) Objection sustained.

(Mr. Due) What I want to bring out, your Honor, is that the first and second choice voting had nothing to do with it.

(The Court) Mr. Due, I can't help you any further. The objection has been sustained.

(Mr. Due) All right, I note an exception. That's all.

(Mr. Allen) Could I ask Mr. Spencer what is the law as to how long a primary ballot has to be preserved after a primary election?

(Objected to.)

(Mr. Jones) Four months is the time, although that isn't evidence. Let's keep our record straight, Mr. Allen.

Q. Now, Mr. Spencer, you testified in chief that the precincts have been reduced in number from 685 to 471, and that there are four judges to each precinct; for the purposes of this record will you tell us the economies that will be effected in the year 1938——

(The Court) I will sustain an objection to that.

(Mr. Jones) I object.

(Mr. Allen) Exception.

(The Court) It doesn't make any difference in this case whether these machines work out an economy or not. My jurisdiction doesn't extend to determining that, nor shall I be influenced by it.

Q. (By Mr. Allen) Mr. Spencer, the delivery date in the contract, I believe, they start March 1, 1938? A. That's correct.

Q. Now, Mr. Spencer, under the specifications which are in evidence the Automatic company submitted two sample machines, one a forty-candidate machine and the other a fifty-candidate machine. You, of course, are

familiar with those two samples, are you not? A. Fairly well.

Q. Now, on the fifty-candidate machine, Mr. Spencer, do you recall the panel that was placed on the top front of the machine, which closed up the slots for write-in equipment?

(Mr. Straus) Now, your Honor, may I offer an objection to that?

(The Court) Sustained. The fifty-bank machine was rejected. That is not in this case.

(Mr. Straus) That is correct. The forty-bank machine is the only one before the Court.

(The Court) The only question I have to decide is whether apparatus more or less of this type—whether it is more or less, of course, you gentlemen can't agree on—is or is not the kind of a machine that this Board can lawfully adopt, not something which is out of the window. It is going to be difficult enough to decide the case we have without deciding a case we haven't.

(Mr. Machen) All we want to show, your Honor, is that he gave them an option between a tall machine and the short one.

(The Court) Well, I am pretty sure everybody will take your word for it. It is in evidence before the Court that both machines were before the Board and the Board took the smaller machine.

(Mr. Machen) But it has not been produced in evidence yet that the larger machine has——

(The Court) Well, now, listen: If this machine complies with the statute and state constitution it is within the discretion of the Board, the Board will take it and I can't disturb the award; whether the Board made a good or bad bargain I have got to let it stand if it affords the voter those constitutional rights which the law says he should have.

(Mr. Allen) Well, may I ask Mr. Spencer a question? Do you know the circumstances under which the Attorney General was asked for an opinion on this subject of write-in voting in July of 1937? A. Yes.

(Mr. Allen) Will you state what they were? A. There had been opportunity given to the only two prospective bidders of whom we had any knowledge, the Automatic Voting Machine Corporation and the Shoup Voting Machine Company, to see the original draft of the specifications and to suggest changes. The Shoup company suggested a number of changes, and one of the changes which they suggested was with regard to this matter of write-in voting. They pressed that suggestion before the Voting Machine Board, and it was finally decided to ask—I should say they suggested, the Shoup Voting Machine Company, as I remember, suggested that the question be submitted to the Attorney General, and it was so submitted.

Q. (By Mr. Allen) Now, Mr. Spencer, I asked you if you would bring up to this court some sample ballots, paper ballots, prior to 1924, which show, I think, the form of the write-in space, and I will ask you, sir, if you have such sample ballots with you? A. Yes, sir.

Q. What years are they for? A. I brought up the ballot for 1919, which was before the fewer elections amendment, quadrennial elections amendment; the ballot of 1923, which was subsequent to the quadrennial elections amendment; and the ballot of 1926, which was after the change in the law which did away with the extra space for write-in voting.

Q. Would you produce those samples, please, sir?

(Witness produces sample ballots as requested.)

(Mr. Allen) Now, I would like to introduce in evidence sample ballot of November 4, 1919.

(Ballot referred to marked "Defendant's Exhibit A".)

(Mr. Allen) Also sample ballot of 1923.

(Ballot of 1923 marked "Defendant's Exhibit B".)

(Mr. Allen) Also sample ballot of 1926.

(Ballot of 1926 marked "Defendant's Exhibit C".)

(Ballots here omitted. The earlier two have blank spaces for write-in purposes after each group of candi-

dates for each office. The 1926 ballot omits the blank write-in spaces. 1926 ballot is substantially smaller than the earlier two.)

(Mr. Allen) Mr. Spencer, there was some discussion in the opening statements in this case that under the former practice that existed before 1924, the write-in of free choice of candidate's name applied only in general elections and not in primary elections. Are you familiar with that fact? A. So far as I know, it was never used in primary elections.

Q. Just confined to general elections? A. So far as I know.

(Mr. Allen) Yes, I think that is all, sir.

(Mr. Page) Now, I asked the Automatic Voting Machine Corporation to bring in a sample of the machinery necessary to adjust their voting machine, or sample machine to conform to the machine to be manufactured under the contract. Have you got that machinery in the courtroom, Mr. Allen?

(Mr. Allen) That machinery is in the courtroom in the back of this machine, which is a duplicate of the sample forty-bank machine, with the exception that this machine has the primary on the Republican ballot of 1934 under Plan B instead of Plan A; and with the further exception that this machine on which Plan B now exists, has a higher top, making slightly more box space in it, so that it would be capable of having the write-in equipment installed in it later on if the courts should require it.

(Mr. Allen) Well, while Mr. Spencer is here, I neglected to ask him something, and with your Honor's permission may I make an offer through Mr. Spencer?

(The Court) Mr. Spencer, come back to the stand.
Lindsay C. Spencer (recalled).

(Mr. Allen) In view of your Honor's ruling on the evidence, can I make an offer through Mr. Spencer?

(The Court) Certainly.

(Mr. Allen) We offer to show that the Automatic Voting Machine Corporation delivered two sample machines

to the Voting Machine Board, one a forty-candidate machine which is here exhibited in court with Plan A on it; the other was a fifty-candidate machine, identical with the forty-candidate machine with two exceptions: First, that it has fifty rows for candidates' names instead of forty; and that the top of it was just slightly higher than the top of the forty-candidate machine, merely making a little more box space in the top; and that the Automatic Voting Machine corporation gave to the Voting Machine Board the option of taking either machine of either type it so desired, and that this forty-candidate machine with this box space in top, is susceptible of having installed therein write-in voting equipment and mechanism if the Court should decide that it is essential and necessary. That is my offer.

(Objected to.)

(The Court) Objection sustained.

(Mr. Page) Now, I am repeating my request in my subpoena for the material which has been asked for here, which will enable this machine (indicating) to operate under Plan B, as it is alleged your contract requires you to do, in the event that the Voting Machine Board wants it.

(Mr. Allen) Well, as I say, we have here a machne with Plan B on it, and I would like to demonstrate this to his Honor——

(Mr. Page) We don't want the machine, all we want is the equipment that you say you can add to this machine in order to enable it to vote under Plan B.

(The Court) Well, you want somebody to take a screw driver and take this apparatus out of this machine and put it on the table?

(Mr. Page) Yes, sir, so that we can see it.

(Mr. Allen) Well, we object to that.

(Mr. Page) We want to see what it is, whether it is infinitesimal, or whether substantial.

(The Court) Well, I don't care whether it is infinitesimal or substantial, there is no difference in price. It

doesn't make any difference to me whether Plan B machine weighs a thousand pounds more than Plan A. One says it does the work, and the other is subject to the objections which the Attorney General has made.

(Mr. Jones) Well, your Honor, it makes a difference whether it can be done or not.

(The Court) Yes, there is a material difference in them, that difference is material, but it depletes the Automatic's revenue, it doesn't deplete the City's revenue.

(Mr. Page) Well, I am offering it, and I wish to obtain this machinery so that experts here can examine it.

(The Court) The experts here can examine it out of court. The Court will not suspend operations so that experts can examine it.

(Mr. Page) Well, they can do it during the evening, or tomorrow morning.

(The Court) Do you object? Objection sustained.

(The Court) I understand, you want to show that the difference between A and B is material?

(Mr. Page) Yes, sir, very material.

(The Court) Now, in answer to that, or, in criticism of that, let me say this, if I may: That I am not interested in weight, the number of springs, the number of cogwheels, the size or appearance of B as distinguished from A. What I am interested in, and what would seem to me to be material is, are they the same price? The two machines, the Shoup and the Automatic, were in substantially honest competition, according to all the facts which are ascertainable, before the bids were submitted.

(Mr. Page) Your Honor, I call on the Automatic Voting Machine Corporation to produce this witness that I subpoenaed to produce this machinery.

(Mr. Allen) Call Mr. Griffen, the vice-president of the Automatic Voting Machine Corporation.

Thereupon—

RUSSELL F. GRIFFEN,

a witness of lawful age, produced on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Page:

Q. What is your name, sir? A. Russell F. Griffen.

Q. And what is your position or occupation? A. Vice-president of the Automatic Voting Machine Corporation.

Q. Which is a defendant in these cases? A. Yes, sir.

Q. Mr. Griffen, are you acquainted with the operation of the sample machine which was deposited with the Board of Supervisors of Election preliminary to this contract and which was accepted under that contract? A. Yes, sir.

Q. And that's the machine which has already been introduced in evidence on my right here? A. Yes, sir.

Q. Will you state whether that machine is capable of voting in a primary election held under Section 203 of Article 33 of the Code, where first and second choice voting is necessary, whether that machine is capable, as it now stands, of being adjusted so that it can permit voting under so-called Plan B which has been offered in evidence in this case? A. Yes, sir, with a few small adjustments.

Q. Now, will you answer the question directly, Mr. Griffen: Is it, without any additional machinery, able to be adjusted to vote under Plan B? A. Well, if you will revise that and call them attachments instead of machinery, I will answer it.

Q. Yes. Well, without any additional equipment put it that way. A. Yes. That machine is equipped to vote first and second choice candidates under Plan A, and is not equipped to vote Plan B without extra attachments.

Q. Will you tell us what attachments are necessary to equip this machine so that it will vote as required by Plan B? A. The attachments consist of a few short channels, plus additional straps, produced in our factory at little or no extra cost.

Q. You said a few short channels. How many? A. It depends entirely, counsellor, on the ballot situation.

Q. Presuming that the ballot situation is the one which was given you to comply with by the Voting Machine Board? A. I think that there are two or four small channels required.

Q. Have you got such channels available here in court? A. Yes, sir, they are on that machine, and we would be very glad to show the Court that mechanism.

Q. Can you distinguish the machinery which would be added from the rest of the machinery? A. Yes, sir, yes, sir.

(Mr. Page) Now, if I can be permitted to see that without going over the whole machine, maybe that will satisfy me.

(Mr. Allen) All right, you and the Judge. That's perfectly all right.

(The witness and counsel then move over to the sample machine in question.)

(Mr. Allen) Now, if your Honor please, suppose we limit this to counsel? After all, this is a patentable device, and we don't think that the President of the Shoup Voting Machine Corporation, Mr. Wiess, ought to be over here to inspect our particular mechanism. I mean, we were not accorded that privilege in his device.

(The Court) What difference does that make? He can go to the Patent Office and see how your machine works, can't he.

(Mr. Allen) I guess he can, yes.

(Mr. Straus) Your Honor, it may be the subject later in the case of expert testimony, and we think we ought to be able to see it.

(The Court) Well, I have ruled with you, Mr. Straus. Do you want me to change my mind?

(Mr. Straus) No, sir, no, sir.

(The Court) The only thing I want to state, I do not intend to have any such scene as we had this morning out in the corridor when certain people took advantage of the opportunity to enter into a discussion with experts on the other side.

(Demonstration of the sample voting machine then followed. Demonstrator unidentified and not sworn.)

(Demonstrator) The first act, your Honor, of course, is to close the curtain (suiting the action to the word.)

(The Court) Yes, I understand that; that sets it in operation and stops it when you come out.

(Demonstrator) If you will notice, in this row, the candidates are listed underneath, similar to the adjustment shown you on Plan B, the first choice, Goldsborough; second choice, Nice; or, second choice, Smith. The voter may turn down for his first choice, the lever over the candidate for first choice; then, if he so desires, he may indicate second choice among the other two candidates by turning down the lever over the desired name, with the cross appearing after voting the one second choice (indicating); that, of course, automatically locks the other second choice so that he can not split his variable vote between the two (illustrating). Also, when a voter votes for a candidate for second choice alone, it would automatically disqualify his ballot. These remain locked all over the face of the machine until he has voted first choice; and after he has voted first choice—and in this instance I shall elect to vote for a candidate on the second line—the second choice of all other candiddates are locked on the other lines. He must indicate his second choice in the same line where he makes his first choice, these all remain locked, the second choices, and that prevents him from voting once first choice here and then come down and vote his second choice here. He must vote his second choice from between the other two candidates on the same line with his first choice. So that it is absolutely fool-proof.

And the same thing applies to any other votes. Here we have three candidates; I shall vote for France (illustrating); that automatically locks the first choice for Hill and Miller, and it locks first choice for Hill and Miller in the other rows. I must mark my second choice in the same row as I mark my first choice.

(Mr. Allen) Well, suppose you want to change your mind; how do you do that?

(Demonstrator) That is important. I should have mentioned this, Mr. Jones: When a voter turns down a first choice and then turns down a second choice, the machine must be so constructed that he can not return his first choice without turning back his second choice, too; which otherwise would leave the second choice vote on the machine alone. In our machine, when he returns the first choice it returns the second choice with it, automatically (illustrating).

(The Court) Then you will start to vote all over again?

(Demonstrator) Vote all over again, that's right.

(Mr. Jones) Now, go to the third one, Dr. France and Miller for United States Senator.

(Demonstrator) France and Miller?

(Mr. Jones) Yes.

(Demonstrator) Now, you want me to return first choice?

(Mr. Jones) Yes.

(Demonstrator) (Complying) Is that satisfactory?

(Mr. Jones) Well, all right.

(Mr. Weiss) May I see you do that?

(The Court) No, you haven't been sworn.

(Mr. Jones) Well, this man hasn't been sworn either, your Honor.

(Mr. Page) Well, this is all preliminary to finding out what machinery is necessary.

(The Court) Well, now, Mr. Page wanted to see what machinery there was which distinguished Plan A from Plan B, and that's what we are here for.

(Demonstration followed as to the particular equipment necessary, not reported, after which the respective parties returned to their seats, and the Court resumed the bench.)

(Mr. Allen) Now, Mr. Griffen, will you show his Honor the equipment for Plan A, what that consists of?

(The Court) Now, Mr. Griffen, there was a demonstration, which was made not under oath by the technician, and the Court was shown how Plan A was converted so as to operate as Plan B, you understand? The Court was shown the mechanism, and it appeared to the Court that the extra mechanism necessary to convert A Plan into a working B Plan was comparatively light, weighing perhaps a couple of pounds, and comparatively simple in construction, and your expert says that extra equipment costs about two dollars.

(The Witness) Yes.

(The Court) Now, have you any comment to make on or any change or correction to make in that statement?

(The Witness) Our exact production cost on the equipment necessary to equip the ballot, as we submitted it with the sample, is $1.94 per machine.

(The Court) That is, to convert Plan A working machine into Plan B working machine?

(The Witness) That's correct, your Honor.

(Mr. Allen) But it doesn't cost the City anything, does it?

(The Witness) No, sir.

(The Court) Anything else, gentlemen?

(Mr. Allen) Yes, sir. I made some suggestion about Mr. Weiss and Mr. Shoup of the Shoup Corporation seeing it; I want to say that in the demonstration that just took place, everybody in the courtroom, including his Honor, all the counsel, Mr. Shoup and Mr. Weiss, the

President of the company, and everybody had a good look at it.

(Mr. Page) All right.

(The Court) Well, it appeared to the Court that they weren't lacking in interest.

(Mr. Allen) No, sir.

Q. (By Mr. Page) Now, Mr. Griffen, you have made a statement that there were what you described as two channels and nine straps, which are metal straps, which must be added to this machine in order to permit voting under Class B Plan where there are three candidates. Would the cost of adding that equipment be materially different if there were more than three candidates? For instance, if there were six? A. Not at all, not at all. No, sir, I think I have stated in the record the cost to us on that equipment is $1.94.

(Mr. Page) Yes.

(The Witness) If we were required to furnish that material for the City of Baltimore, you can readily understand that on a production basis those channels and straps could be manufactured for much less than $1.94 per machine, so that if you required six channels or nine channels, something you have never had in the history of Maryland, the cost to us would not be in excess of $1.94 per machine.

Q. $1.94 per machine, for any number—— A. For any number.

Q. —— of candidates? A. For any number that is conceivable.

Q. So long as they could be handled in the forty-bank? A. Yes, sir.

(The Court) Well, those so-called straps are just about the size of a thin ribbon?

(The Witness) Yes, your Honor, and those straps are convertible to other straps, or for the use on indorsed candidates. Of course, they are not known in Maryland, but the so-called indorsing channel is convertible to this

channel, and we consider it a part of our regular equipment.

Q. (By Mr. Page) Is that equipment that you have just shown us something that can be attached and placed on the machine, if it becomes necessary? A. Yes, sir, it is entirely portable and can be placed wherever the conditions of the ballot require.

Q. How long does it take you to attach and detach that equipment? A. The time element is about ten minutes.

(Mr. Page) Well, then, Mr. Griffen, I will ask you to detach the equipment that has just been mentioned and we will offer it in evidence.

(Mr. Allen) What's that? You offer what in evidence?

(Mr. Page) I asked him to detach the equipment, which he says can be done in ten minutes, and we will offer it later in evidence.

(The Court) Do you object?

(Mr. Allen) Yes, sir.

(The Court) Objection sustained.

(Mr. Allen) Well, your Honor, I mean—the only reason we object, your Honor, is——

(The Court) Well, I don't care what your reasons are. I can see a good many sound reasons for not doing it. In the first place, it takes too much time.

(Mr. Page) Well, that's the easiest way of doing it, your Honor.

(Mr. Allen) This witness stated that this equipment can be put on Plan A machine just by putting the attachment to it. Isn't that sufficient?

(Mr. Page) What I wanted was to discover what the actual equipment was.

(The Court) Well, listen, if he has to use this additional equipment it costs him eighteen or nineteen hundred dollars more.

(Mr. Allen) It costs the City nothing.

(The Court) And it costs the City nothing; and you have got an added weight of a few ounces, and it costs less than two dollars per machine to the manufacturer and nothing to the City, and it can be put on and taken off, I imagine, in less time than it takes to change a tire on an automobile.

(Mr. Allen) Yes, sir.

(Mr. Page) Well, then, if that is so I will ask the witness to detach it.

(The Court) Mr. Page, I want to be patient with you, but what use is there in doing that? He hasn't got his factory here and I won't permit him to use the courtroom for a factory.

(Mr. Page) Well, if he will do it later it is all right, I don't object to that; what I am thinking of is to demonstrate to the Court——

(The Court) Well, that demonstration won't affect me one way or the other.

(Mr. Page) It will be the easiest way to describe it in some other court, your Honor.

(The Court) Well, the easiest way is for me to sustain the objection, and give Mr. Page, Mr. Jones and General Straus all exceptions.

(Mr. Page) Exception noted.

Q. Mr. Griffen, it has been stated in preliminary conversation but not in the record: Is the machine which was submitted as a sample and which has been introduced in evidence, capable of voting for what is known as "write-in" choice? A. Voting for persons not nominated?

(Mr. Page) Yes, persons not on the ballot.

A. No, sir.

Q. Will you tell us whether it is capable, as it stands, of alteration for and substitution of additional equip-

ment which may permit it to be voted for a write-in candidate? A. Yes, sir.

Q. Now, in the opening statement it was stated that the height of the machine wasn't sufficient as it stands at present to permit such write-in voting; is that correct? A. I think that is correct, yes.

Q. In other words, you were incorrect in your statement a minute ago that this machine as it is at present built is capable of receiving additional equipment which will enable it to be used for write-in voting? A. I don't think that was the question.

(The Court) He didn't say that. He said it was not capable.

(Mr. Page) Yes, I am speaking of whether it is possible to change this sample machine as it now stands by adding additional equipment so as to enable it to vote write-in choice. A. Yes, sir.

Q. And you say it is so possible, although it has been stated in the opening statement that the machine as it now stands doesn't have enough height, is that correct? A. Let me make it perfectly clear; that it would require alteration, but it is susceptible of being changed to a write-in machine.

Q. Well, tell us what alterations to this machine would be necessary? A. The curtain lever would be raised approximately two inches; slots would be inserted on the front of the blank panel, and a paper roll connected on the rear.

Q. That's what I understood. A. Yes.

Q. And would the outside measurements of the machine have to be changed? A. The raising of the curtain lever two inches would obviously raise the present height of the machine approximately that same distance.

Q. So that the whole body of the machine would also have to be raised? A. That can be done through an additional plate, rather than junking the entire face of the machine.

Q. I see, you put additional plates in on each side? A. That is correct, yes.

Q. Now, it has been estimated that the cost was substantial in order to make a change from the machine as it stands in order to build another forty-candidate machine similar to this, assuming that this additional equipment on it would be capable of operating for a write-in choice; what is your guess or estimate of the additional cost of such a machine alone? A. In submitting our bid to the Board, and with the full knowledge and belief that the write-in vote was not required, we quoted a price that was eighty-two dollars less than what otherwise would prevail if, in our judgment, the write-in requirement was a part of the law.

Q. So that would be the charge if there was write-in equipment? A. That's correct.

Q. Now, does your company admit that it is responsible for the insertion of the write-in equipment, if it should be determined that write-in equipment is necessary in order to make this machine legal?

(Mr. Page) It has already been stated, your Honor, but I want it in the record.

A. I think the specifications——

(Mr. Due) We object.

(The Court) Sustained. That is putting a matter of law to him.

(Mr. Page) I asked the witness whether he will recognize such a responsibility; not what his opinion of the contract is. I will myself suggest that his ultimate opinion is erroneous, but I think that for the purposes of the record, and for the purposes——

(The Court) Well, listen, this gentlemen's attorneys have said that in their opinion the Automatic company can not be required under its contract to furnish a write-in machine at the present price.

(Mr. Page) And that's what I wanted in the record.

(The Court) In other words, eighty-two dollars will

be the cost of the write-in equipment, and if that equipment is required, the City, in their judgment, will have to pay that eighty-two dollars.

(Mr. Page) Well, that's what I wanted in the record.

(The Court) Well, you have the assurance of counsel that is their opinion.

(Mr. Page) Yes. And counsel have also stated that the changes that will be necessary, according to the present testimony, to permit the machine to be voted under Section 203 first and second choice, will be furnished as part of the present obligation under the contract?

(The Court) I understand them to say that, Mr. Page. Now, let's have something I haven't heard, because I have heard that lots of times. If you recall, I drew that out by my own questions.

(Mr. Page) Well, I wanted to be sure that was in the record also.

(The Court) Well, it is in there, and it is in there two or three times.

(Mr. Page) Well, that's all I want to ask him, then, your Honor.

Questions by Mr. Jones:

Q. Mr. Griffen, didn't you tell the Board in Cleveland just a few days ago that your price in Baltimore was a hundred and thirty-two dollars per machine below the price you were offering out there, and the reason for the difference in prices was because here we didn't require the write-in facilities, whereas they did require the write-in facilities out there?

(Objected to; objection sustained; exception noted.)

Q. Is the difference in cost of eighty-two dollars which you have just mentioned recently arrived at? Is that your uniform difference?

(Objected to.)

(The Court) Sustained. He is selling a patentable

article, as I understand. There isn't any open market price on it.

(Mr. Jones) Now, Mr. Griffen, the machine over here on the left of the courtroom—on which the Plan B is set up, is that the fifty-bank machine?

(The Witness) It is a forty-column machine; or forty-bank machine.

Q. (By Mr. Jones) Forty-bank machine, and that machine was never before the purchasing board? A. No.

(The Court) Well, as far as the Court can see, it is the identical article, with the exception of a few small ligaments, so to speak, that was before the Board.

(Mr. Jones) Yes. Now, I want to ask him:

Q. The purchasing board in giving the ballot specifications, types of ballots to be set up, specified that there should be four candidates for Governor on one ballot and three candidates for Governor on another ballot, isn't that true?

(The Court) Well, have you got the specifications?

(Witness does not answer.)

(Mr. Jones) Your Honor, the specifications—they are not in the specifications literally—and I will show you how they are in there, your Honor. In the specifications it says you shall set up such ballots as shall be furnished by the Board of Supervisors of Election, and the Board of Supervisors specified the ballot, and that called for the replica of the ballots in the last primary election of 1934 on one machine; and that called for four Republican candidates for Governor, with provisions for first and second choice, in conformity with the provisions of Section 203 of the Election Laws of Maryland, on another machine. Now, that's correct, isn't it, Mr. Griffen?

(The Witness) If you are reading from the specifications, I think that's right.

(Mr. Jones) Yes.

Q. Now, have you got set up on any of these various machines that you have brought here, the first and sec-

ond choice arrangement as shown by the Shoup machine, which you term the Plan B, where there are four candidates for Governor? Do you understand the question? A. I think, counsellor, you refer to the two types of ballots that were on different sized machines—isn't that true? We were required to put one ballot on the one machine, and another ballot on another. Is that what you are getting at? I think these two ballots are identical, aren't they?

(Mr. Jones) I am asking you whether you have got any machine here set up with four candidates for Governor where first and second choice voting is permissible.

(Mr. Allen) Plan A or B?

(Mr. Jones) Plan B.

(The Witness) Your question was whether or not we had a machine with four candidates for Governor?

A. Yes, sir.

(Mr. Jones) Yes, that's right.

(Mr. Jones) Equipped for Plan B? That's what I asked you.

A. Well, it is on Plan A over here (indicating)—let me look again, counsellor. (Leaving stand again and examining machine) I find one over here, counsellor, with nine candidates for Governor.

Q. With nine candidates for Governor. How is it set up, what plan? A. For Plan B.

Q. Did it take you that long to find that out? (No answer.)

Q. Well, now, isn't it true—can you demonstrate that nine candidates for Governor on the Plan B? A. Yes, sir.

Q. Well, would you be good enough to show the Court that proceeding with nine candidates, and particularly how you can take off the first choice vote automatically when you take off the second choice vote?

(Mr. Allen) Do you want him to work the six and three, is that what you want him to do?

(Mr. Jones) Yes, that's what I want him to do.

(Mr. Allen) All right.

(Mr. Jones) But, I want this witness to do it. He says he can do it, he gave the Court to understand that he has got Plan B set up for six candidates—and when you said nine candidates you mean six candidates in one party and *nine* in the other?

A. That's right.

(Mr. Allen) Now, let him show the Court.

(The Court) What is it you want him to show me? I was talking to the Clerk.

(Mr. Jones) I want him to show the Court particularly how he can vote Plan B legally with his six candidates as he says he has that set up, and particularly how, when he votes for a first choice and then a second choice, if he wants to take off his first choice whether or not that will automatically take off the second choice.

(The Court) Well, that has been demonstrated.

(Mr. Jones) Only on the three candidates, your Honor, and my purpose is this: According to my advice, as the number of candidates increases, the complication and the difficulty of working this thing out also increases, and if it can be demonstrated I don't see why we can't have it demonstrated in a moment.

(The Court) I will sustain an objection to it.

(Mr. Due) We object.

(Mr. Allen) Here it is, your Honor. There is no objection to it, if he wants it. We can do it.

(The Court) Well, the demonstration doesn't give me anything. It is all beside the question.

(Mr. Allen) Well, I thought that would shorten it.

(Mr. Jones) Let me ask you this, Mr. Griffen:

Q. Isn't it true that the mechanical difficulties in arranging class B increase as the number of candidates increases?

(The Court) Now, Mr. Jones, that goes back to the question whether the Legislative and the public policy of having voting machines was sound or unsound. The question before me is not whether these things are good, bad or indifferent, but solely and only whether they are lawful, and whether the Board has acted within its rights in selecting a particular type of machine in making this contract.

(Mr. Allen) Your Honor, may I make this statement at this moment? There is in the hall, if your Honor please, the machine that you looked at during the recess, with the paper roll for the write-in counters on top, and that machine has on it under Plan B the set-up for voting for four candidates for Governor, United States Senator, and all the way down the line——

(The Court) Don't you see, Mr. Allen, if the machine complies with the Constitution and the law, I haven't any more to do with the wisdom or unwisdom of what the Board has done than the Dionne quintuplets; that is beyond my power. The Board may have acted foolishly, but I don't think anybody has suggested that they acted but to the best of their ability. They may have picked the wrong machine, but that isn't the question that's before me, that's a matter in the discretion of the Board, and in the absence of any suggestion of fraud on the part of anybody in the case, that question is not before me either.

(Mr. Jones) Well, we note an exception to your Honor's ruling. Now, I don't want to extend this discussion unduly, but this Act says that these machines that are purchased by this Board shall be used at all general, special and primary elections to be held in the City of Baltimore. That means that this machine that is purchased must be so equipped that it can accommodate three candidates for second choice, or four candidates for second choice, or six candidates for second choice——

(The Court) Maybe fifty.

(Mr. Jones) Up to the capacity of the machine. Now, your Honor, one of the most important features——

(The Court) Well, now, I am going to ask you where that allegation of illegality is in your Bill of Complaint.

(Mr. Jones) Yes, sir——

(The Court) You say it voted first and second choice with one operation; and it only had eight lines and it ought to have nine—although that was not borne out by the testimony.

(Mr. Jones) Yes, your Honor, we say in our allegation that this plan can not be so arranged and re-equipped as to conduct a legal election.

(The Court) Have you ever heard of a legal primary election where they have more than three candidates for Governor in any one party?

(Mr. Jones) Yes, sir, in our next primary we may have more than four candidates. Now, although this company told the purchasing board that additional equipment would be required, they never once, at any time, brought that additional equipment before the Board, and it never has been brought out before the Board.

(Mr. Allen) Now, I can't let go unchallenged that statement——

(The Court) I am not going to let it go, either, because it doesn't make any difference to me, it is just a waste of time.

Now, Mr. Jones, won't you do me the favor of cutting out these criticisms of this other concern, as I will make them cut out criticisms of your concern, and get right down to the single, narrow point in issue here. There isn't any judge on earth that is less moved by injecting color into a case than I am; I just re-act against it and it doesn't get anybody anywhere.

Now, what I want to know is, wherein this machine does not comply with the law, and reasonably substantially, with the specifications.

(Mr. Jones) And that's exactly what I am trying to bring out to your Honor, and I don't want to drag it out

too long, whether or not a legal primary election with legal second choice can be had on this machine.

(Argument by Mr. Jones to the Court then followed, not reported by request.)

(The Court) Your point is, you ought to have an indefinite number of places for an indefinite number of candidates for an indefinite number of State-wide offices?

(Mr. Jones) I don't go that far, your Honor, I don't go that far.

(The Court) Well, where do you draw the line? The Board contemplated three candidates.

(Mr. Jones) The Board called for three on one machine and then called for four on the other machine, and I am asking this Court to permit us to have demonstrated something we never had the opportunity to have demonstrated before the Board, and by this witness who knows and can do it—and he says he can do it. We are just trying to find out the fact whether it can be done, and we think this witness can do it.

(The Court) Well, you object?

(Mr. Allen) Yes, sir.

(The Court) Objection sustained. Go ahead with the case.

(Mr. Jones) Exception noted. Does your honor want to hear the allegations of the Bill? Merely the substance of it?

(The Court) No, sir.

(Mr. Jones) Well, then, that's all with this witness.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Griffen, I want to ask you, have you that little compensator? A. Yes (producing article referred to.)

Q. Now, what equipment do you have to put Plan A on the machine?

(The Court) We have already been into that, Mr. Allen.

(Mr. Allen) Well, then, I want to put these two pins in evidence, and this compensator.

(The Court) I don't know what a compensator is.

(Mr. Allen) It is just a little piece of metal, your Honor, of the size of a penknife blade; and two little pins with little hooks on the end, about an inch and a half long.

(The Court) Well, do you think it would mean anything to the Court of Appeals if they saw those articles?

(Mr. Allen) It shows the simplicity of it under Plan A.

(The Court) Well, I think it is wholly ineffective, but if you want to put them in, put them in.

(Articles referred to then admitted in evidence and enclosed in envelope marked "defendant's Exhibit D").

(Exhibit omitted. To be produced in Court.)

(Mr. Allen) Now, do you have the sample of equipment to put the type of offices between the nine rows so that——

(The Court) Mr. Allen, I am satisfied that the machine that was offered before the Board is susceptible of having nine rows of candidates.

(Mr. Allen) Do you want to put that in the record?

(The Court) It is already in the record. I say I am satisfied it is perfectly feasible to have nine rows of candidates on the machine which was exhibited before the Election Supervisors.

(Mr. Allen) Very good, sir.

(The Court) By utilizing that space between the rows instead of the row itself. It is perfectly obvious to me there are nine rows on that machine.

(Mr. Allen) Well, your Honor, we want to have that in evidence.

(The Court) I see it; now, if you want to have it in evidence, put it in evidence.

(Strip and holder then admitted in evidence and marked "Defendant's Exhibit E".)

(Exhibit omitted: To be produced in Court.)

Q. (By Mr. Allen) I understand the sample machine that is here would not have to be substantially altered to put in the entrails, or the mechanism and equipment for write-in voting? A. No, sir.

(The Court) It has to be raised two inches, has to have a new kind of case, and has to have machinery put in there, and the total cost would be eighty-two dollars.

(The Witness) Yes, sir.

(Mr. Jones) Per machine.

(The Witness) Yes, sir.

(Mr. Allen) Now, if your Honor please, could we put in evidence that paper roll equipment, which is the write-in equipment as shown on the machine out in the hall?

(The Court) I don't know that it is informative at all. You can't take all of these machines down to the Court of Appeals.

(Mr. Allen) By agreement we can.

(The Court) Well, it is in the shape of a roll of paper, like any other roll of paper.

(Mr. Allen) Well, it is the mechanism in there I have particular reference to.

(The Court) Well, I am not going to wait until that mechanism is taken down.

(Mr. Allen) Well, then, for that purpose, can you consider that the machine in the hall is in evidence?

(The Court) It is agreeable to me.

(Mr. Page) I object to it, except for demonstration purposes. It has nothing to do with the contract, and it isn't offered for that purpose.

(Mr. Allen) It isn't offered for that purpose.

(The Court) Well, the machine isn't indicative of anything that the election supervisors saw. The sample is indicative or illustrative of how the write-in mechanism works, and for that reason I don't see any use of producing an identical roll of paper here or in the Court of Appeals.

(Mr. Allen) Yes, sir.

Q. Now, Mr. Griffen, the fifty machines that Baltimore City bought in 1928 from your company, are they the same type of machine as this, sir? A. Fundamentally, yes.

Q. And do those fifty machines have the paper roll equipment in them? A. Yes, sir.

Q. And is that the same type paper roll equipment that is on this machine out in the hall? A. Yes, sir.

(Mr. Due) If your Honor please, I will offer in evidence the machine which is No. 30332 with Plan B on it.

(Mr. Page) Subject to the same limitations which have been expressed by your Honor, we have no objections.

(Mr. Straus) Well, we object to it.

(Objection overruled; exception noted.)

RE-DIRECT EXAMINATION.

By Mr. Jones:

Q. Now, these fifty machines that your counsel just asked you about, that you sold the City in 1928, what price did you exact for those machines?

(Objected to; objection sustained; exception noted.)

(Mr. Jones) We offer to prove that the price at that time was $1,239.00 per machine.

(The Court) I don't care what it was, that has nothing to do with this case. There has been quite a change in conditions since 1928, financial and otherwise.

Q. (By Mr. Jones) Mr. Griffen, do you have in use any

place in the United States any machine which provides for voting for first and second choice in the manner shown by Plan B?

(Mr. Due) I object.

(The Court) Sustained.

(Mr. Jones) Exception. We offer to show, your Honor, that the second choice voting as it prevails in Maryland, doesn't prevail in any other jurisdiction in the United States where voting machines are in use, and we also want to show that this so-called Plan B is something new, and it has been devised subsequent to the time that the bids were opened in this case.

(The Court) Very good. Do you object to the tender?

(Mr. Allen) Yes, sir, we object to the tender.

(The Court) Sustained.

(Mr. Jones) (Exception noted) That's all.

(Mr. Allen) Now, if your Honor please, affirmatively, by this witness, can I bring out this line of testimony: I want to ask you whether or not the Automatic Voting Machine Corporation offered to demonstrate Plan B before the Voting Machine Board on at least two occasions of their meetings before the contract was awarded?

(Mr. Straus) We object.

(The Court) Sustained.

(Mr. Allen) Exception. And I would like to make that offer to prove that by this witness, your Honor.

(The Court) Very good. Do you object to the tender?

(Mr. Straus) Yes, we object.

(The Court) Objection to the tender is sustained.

(Mr. Allen) Exception noted. That's all, Mr. Griffen.

(Testimony of witness concluded.)

LINDSAY C. SPENCER (recalled),

a witness heretofore sworn, was recalled by the plaintiff Daly, examined and testified as follows:

RE-DIRECT EXAMINATION.

By Mr. Jones:

Q. Now, Mr. Spencer, will you please tell the Court the date on which the call for bids was published by the Voting Machine Board? A. July 23.

Q. And do you remember what day of the week that was? A. It was Friday.

Q. And on what day was the opinion of the Attorney General received? A. I can't remember on what day it was received, but it bears date of July 24.

Q. And it was, therefore, afterward that the opinion of the Attorney General was rendered, and that's the opinion that advised the Board that the—— A. That the write-in's were illegal.

RECROSS EXAMINATION.

By Mr. Due:

Q. Mr. Spencer, your Board had opinions from the Attorney General only six months before, hadn't you, in October, 1936, that write-in's were illegal? A. Yes.

(Testimony of witness concluded.)

Thereupon—

BERNARD M. WEISS,

a witness of lawful age, produced on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Jones:

Q. Now, state your full name, Mr. Weiss? A. Bernard M. Weiss.

Q. And where do you live, sir? A. Philadelphia.

Q. Mr. Weiss, what is your occupation? A. President of the Shoup Voting Machine Corporation.

Q. And you have been President how long? A. Five years, approximately.

Q. And your company filed a bid with the Voting Machine Board in this case? A. That's correct.

Q. Now, Mr. Weiss, I want to ask you, in the first place, about how long it would take to supply the nine hundred and ten machines that are involved in this purchase?

(Objected to.)

(The Court) Well, you mean if he were picked to supply them? I take it he knows nothing about the facilities of the Automatic plant. You want to know how long it would take him to provide nine hundred and ten Shoup machines?

(Mr. Jones) Yes, sir.

(Mr. Allen) We object.

(The Court) Overruled and exception.

A. About four and a half months.

Q. Now, Mr. Weiss, in making your bid to the purchasing board, state to the Court whether you included provisions and facilities for write-in of personal choice voting?

(Objected to.)

A. We did.

(By Mr. Jones) Mr. Weiss, did you include provision for the personal choice or write-in voting?

Q. (By Mr. Jones) May I ask also whether or not your bid included second choice under the plan known as Plan B and described here as Plan B? A. Yes, sir.

(Mr. Allen) We object.

(The Court) Objection sustained.

Q. (By Mr. Jones) Did your bid include nine rows?

(Objected to.)

A. Yes.

Q. For voting in primary elections?

(Objected to.)

A. Yes, sir.

(The Court) Well, he said it did, and the objection came a little late. The Board passed on all that, gentlemen.

Q. Had you known that personal choice voting was not required, and that the Board would permit one of the nine rows to be used for an index, and that Plan A, as shown on the Automatic machine, would have been accepted by the Board as in compliance with the law, what, if any difference, would there have been in your bid?

(Objected to.)

(The Court) Objection sustained.

(Mr. Jones) Exception noted.

Q. What experience have you had in the building and construction of voting machines?

(Objected to.)

A. About five years, and the expenditure of half a million dollars developing what we consider is the greatest machine in the world.

Q. Are you familiar with the mechanism of the Automatic voting machine? A. Yes, sir.

Q. And you are, of course, familiar with the mechanism of the Shoup voting machine made by you? A. Yes, sir.

Q. Are you able to express an opinion as to whether or not the Shoup plan of Plan B for voting first and second choice can be properly accomplished on the Automatic machine?

(Objected to.)

A. I am.

(The Court) I will let him say no. I have just seen it accomplished. If you want him to say no, it can not be accomplished, it is all right with me. Go ahead and let him answer the question.

(The Witness) I beg your pardon. In my opinion, the machine as displayed in the courtroom, as called for by the specifications and in the Act, will not properly give you legal second choice voting as interpreted by the Attorney General's ruling.

(Mr. Allen) We move to strike that out.

(The Court) Motion granted.

Q. Are you able to tell the Court why, in your opinion, the Automatic machine will not accommodate first and second choice voting under Plan B?

(Objected to.)

(The Court) Overruled; go ahead.

(Exception noted.)

Q. For the simple reason that they use a method of endeavoring to comply with the clause for the accommodation of first and second choice voting by means of pull straps. In our endeavor to develop a second choice voting—and we spent an enormous amount of money and time on it, and, incidentally, the very gentleman that called it to our attention was the gentleman his Honor spoke of, namely, General Brown—we exhausted every conceivable method by means of pull straps and we found it was absolutely impracticable, that while you can accommodate it up to three candidates, possibly four, the moment you get to five you get a building up of straps that are utterly and absolutely impossible, and we are absolutely stymied on the proposition because the so-called Plan A isn't choice voting at all, it is group voting; it is the same as if you had nine candidates, you vote for one, but owing to the construction of our machine——

(Mr. Jones) No, not your machine, now; I am asking you why it can not be done on the Automatic.

(The Court) Listen, is that your answer to the question?

(The Witness) To be perfectly candid, your Honor, I don't know just where I was leading to.

(Previous answer then repeated by the reporter.)

(The Witness) Now, in order to bring out that point clearly, you have the square of the number of candidates running in the number of straps necessary, and you must have the little inter-locks that were displayed here. Take the fifty-candidate machine that the specifications called for; a ballot was set up on the fifty-candidate machine that called for four candidates——

(The Court) You say "fifty-candidate" machine?

(The Witness) That's right, the fifty-row machine. That was what the specifications called for. And they called for four state offices, one where there were three nominees in each party, and one state officer where there were four nominees in each party, and you would get, in connection with the straps needed—you would have, one, two, three, four times nine would be thirty-six straps, multiplied by the Republican party, there would be seventy-two straps called for, with an additional inter-lock called for, for each strap used——

(The Court) Now, let me interrupt you a minute. You presented all of this to the Board, didn't you?

(The Witness) We never had an opportunity.

(The Court) Well, you had a hearing before the Board, didn't you?

(The Witness) No, sir.

(The Witness) I should say seventy-two straps would be needed. That is, on the actual sample machine called for under the specifications. Now, four square is sixteen, sixteen times two, thirty-two, thirty-two plus seventy-two, one hundred and four straps required, your Honor, on that sample machine, and those straps are manufactured to a thousandth of an inch, and with an additional inter-lock called for for every State office; and where will you stop? You stop, obviously, when it reaches the capacity of the machine. In other words, irrespective of what particular office it might be, whether it was a Congressman, a delegate-at-large or anything, you can

only go to the capacity of the machine. But the machine, insofar as we calculated and figured in our bid, must be capable of placing on that machine any combination of circumstances that might possibly arise, up to the capacity of the machine.

(The Court) Well, supose you had fifty people running for Governor, how could you arrange for that on any machine?

(The Witness) You couldn't accommodate it; you would go past the capacity of the machine. But, if you had twelve, you can do it, on our machine, your Honor. That's the very point.

(The Court) Well, on any machine there is a point beyond which you can not go?

(The Witness) When you have used up your counters, yes.

(The Court) I say, there's a point beyond which you can not go.

(The Witness) Yes, sir, when you have used up all your counters then you have finished the capacity of the machine.

(The Court) Now, Mr. Weiss, it hasn't anything to do with the case, but have you ever had in your experience a case to arise where there were candidates in excess of the capacity of the machine?

(The Witness) Yes, sir. In Philadelphia. But what they do there depends entirely upon the local laws. In Philadelphia, as an illustration, where both our machines and the Automatic are in use, they use supplemental paper ballots. Recently that situation became very serious and the result was that they put through restraining laws, restricting who should get on the ballot.

(The Court) Well, is it possible, when you have a tremendously long ballot, to have two machines in the same booth and vote on both?

(The Witness) Yes, sir. There are some places that I know of where that is called for, where they use one machine up to a given point, and then you go over to the

other machine; and that would mean that you have to vote on both machines.

(The Court) Now, Mr. Weiss, I am very much oblighed to you. Anything else, Mr. Jones?

Q. (By Mr. Jones) May I ask you how much time and expense was involved in the developing of the legal second choice Plan B by your company?

(Objected to.)

(Mr. Allen) I might also move that Mr. Weiss's complete answer be stricken out.

(The Court) Well, there is so much in it I don't remember it all. I know part of it was not responsive and part of it was. I will let it all stay in.

(Exception noted.)

(Mr. Allen) Could I ask Mr. Weiss one question?

CROSS EXAMINATION.

By Mr. Allen:

Q. Do I understand you to say that Plan A is very simple on the Automatic machine? A. It is very simple on any machine.

Q. Plan A is? A. It involves no additional equipment.

(Mr. Allen) That's all I want to ask you.

(The Witness) Plan A involves absolutely no additional equipment whatever, and that is applicable to both machines; it is merely a question of—in other words, if you have three candidates, you have three spaces down and there are nine counters allocated, and you do the same thing for any office.

Q. So Plan A is very simple? A. It wouldn't have involved one dollar additional if we had bid with Plan A, but we bid with Plan B and it costs eighty-four dollars to put that equipment on that machine, and not $1.94.

(Mr. Allen) That's all, that's all.

RE-DIRECT EXAMINATION.

By Mr. Straus:

Q. Mr. Allen has asked you about the reproduction of Plan A—or Plan B——

(The Witness) He asked as to A.

Q. —— on the sample machine of the Automatic company.

(The Witness) Then I misunderstood the question.

(Mr. Allen) I didn't ask him that.

(Mr. Straus) Oh, yes, sir, and it was confusing to me.

(Mr. Allen) Well, then, you put some confusion in it yourself.

(Mr. Straus) May I have the question and answer repeated, your Honor?

(Question referred to and the answer thereto repeated by the reporter.)

Q. (By Mr. Jones) Well, when you say "very simple," do you mean with reference to the printing of the ballot, or the layout incidental to the ballot, or do you mean with respect to the mechanism necessary?

(The Witness) Mr. Jones, Mr. Allen said Plan A.

(Mr. Allen) Well, you answered the question I asked you.

(The Court) Mr. Weiss knows what he is talking about. He knows more about voting machines than all of us put together.

(The Witness) I hope.

(Mr. Jones) What I wanted to find out, your Honor——

(The Court) Mr. Weiss, can you tell Mr. Jones what you meant by the "very simple?"

(The Witness) Do you mind if I try to clear it up in

my own phraseology? Plan A, as I understand it, is the plan called illegal by the Attorney General——

(The Court) Now, assume it was legal, according to the Attorney General, because the legality or illegality of it is something you are not competent to pass on; but you are competent to pass on the mechanics of it. Now, from the mechanical aspects, simply and solely, I want you to tell Mr. Jones what you meant by "simple?"

(The Witness) It involves absolutely no additional equipment whatsoever, other than simple equipment on all machines.

(The Court) And that is absolutely what you told us before. Is that plain to you?

(Mr. Jones) The trouble is, Mr. Allen left out "mechanically."

(The Court) Well, just give me a yes or no answer. If it isn't understandable, to you, I will get Mr. Weiss to say it over again.

(Mr. Jones) Well, your Honor, Mr. Allen didn't put in the word "mechanically"——

(The Court) Listen, Mr. Weiss, will you tell Mr. Jones all over again, starting at the beginning, what you meant by the word "simple?"

(The Witness) Plan A, mechanically, calls for no additional equipment. Insofar as the face of the machine is concerned it involves nothing more or less than the printing. The Plan A arrangement, insofar as the element of being simple is concerned—and I imagine this is what Mr. Jones is getting at, but I didn't imply that in the question Mr. Allen asked—is anything but simple, and terribly confusing to the voter. I was answering the mechanical and not the other phase of it. Does that satisfy you?

(Mr. Jones) That's exactly what I had in mind.

(Mr. Due) And we move to strike that out; he said it was confusing to the voter.

(The Court) I will strike out the statement about its being confusing to the voter.

(Mr. Jones) Well, then, I will ask that your Honor strike out his answer to Mr. Allen's question in which he says it is very simple.

(The Court) Mr. Jones, now I am going to stop. If you have got any point to make or objection, make it and quit talking and I will rule on it. After you have had your witness answer your own question to explain his answer to Mr. Allen's question, then you want his answer to Mr. Allen's question stricken out, and that is entirely out of order.

(Mr. Jones) That's all.

Questions by Mr. Page:

Q. Mr. Weiss, you heard the testimony of Mr. Griffen of the Automatic Voting Machine Corporation with regard to the cost of supplying the additional equipment necessary if there were more than three candidates in primary voting, where you had to have a first and second choice; and you recall that his testimony was that it would only cost him $1.94 for such equipment, whether there were only three or more than three. Will you state to us your opinion of the cost of adding such equipment as is necessary to meet Plan B in the Automatic machine as described by Mr. Griffen?

(Objected to.)

(The Court) Well, I haven't any objection to his telling it over again. He says it would cost him eighty-four dollars. Did you catch his answer? He said that work would cost eighty-four dollars.

(Mr. Page) I didn't catch his answer, your Honor.

(The Court) Very good. That's what he said.

Q. (By Mr. Page) It would cost eighty-four dollars to make that equipment in the Automatic machine?

(Mr. Allen) In the Shoup machine.

(Mr. Page) Now, I am asking him whether it would be the same price, additional or less, to add that type of equipment which has been described here, to the Automatic machine, and I want his opinion on that.

(Mr. Allen) Oh, we object to that, his opinion of what it would cost on our machine.

(The Court) Well, unless he knows what the Automatic prices are—do you know anything at all about the Automatic factory and what its cost prices are?

(The Witness) I do, your Honor, I can tell you definitely——

(The Court) Listen, do you know? Yes or no.

(The Witness) Yes, I do.

(The Court) Now, just tell me, man to man, do you feel competent to estimate what it cost the Automatic to change the Plan A over to B Plan?

(The Witness) That was a misstatement of facts to this Court.

(The Court) Strike out his answer.

(The Witness) That's my own opinion, sir.

(The Court) That isn't what I asked you.

(The Witness) I beg your pardon, I didn't get your qestion.

(The Court) I asked you whether you are competent to judge what it costs the Automatic to change one of its machines, forty-candidate machine, from A plan to B plan.

(Mr. Allen) Your Honor, may I object to that, for this reason——

(The Court) No, no, don't give the reason, just object.

(Mr. Allen) Yes, sir. I object.

(The Court) Objection overruled.

(Exception noted.)

(The Court) Just answer the question, yes or no.

(The Witness) I would like to hear the question again.

(Question repeated by the reporter.)

A. Yes, sir.

(The Court) All right, now, does anybody want to ask him what that cost is?

(Mr. Page) I would like to ask you, what in your opinion, it would cost the Automatic to make that change.

(Objected to; objection overruled; exception noted.)

(The Witness) For them? For them to give the necessary——

(The Court) Listen——

(The Witness) Your Honor, I want to try to be——

(The Court) Listen, you are going to get in trouble by slipping outside of the record. Now, you are asked to name a figure; if you can't all right; if you can, give it to us.

(The Witness) According to the specifications——

(Objected to.)

(The Court) Strike that out. Repeat the question.

(Question repeated by the reporter.)

(The Witness) Approximately thirty-five dollars.

(The Court) How much?

(The Witness) Approximately thirty-five dollars.

(Mr. Allen) I move to strike out that answer.

(Motion overruled; exception noted.)

Q. (By Mr. Page) Is your estimate made with regard to the six candidates, or how many candidates? A. It is made with regard to what would have been called for on either the forty- or fifty-bank machine as called for on the specifications.

RE-CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Weiss, have you a factory of your own? A. Yes, sir.

Q. Where is it? A. Parker Manufacturing Division of the Republic Steel Company, of Canton, Ohio, is our factory.

Q. Do you own it? A. We don't own it.

Q. Then your company owns no factory? A. We have it. It is ours under contract, a twenty-year lease.

Q. Do you mind answering my question, whether your company owns the factory? A. We don't own it, your Honor, but it is our factory.

(The Court) You mean you operate your manufactures on these premises?

(The Witness) We are under a twenty-year lease with the Republic Steel Corporation, your Honor, and it is as much our factory——

(The Court) I understand you own and operate your business, setting up your factory on leased premises?

(The Witness) Correct.

(The Court) All right.

Questions by Mr. Due:

Q. Do you own the factory, Mr. Weiss?

(The Court) He just said he didn't.

(The Witness) I just answered that question, your Honor.

(The Court) Do you mean the equipment? He has never said he owned the land.

(Mr. Due) I don't think he owns the equipment, either, your Honor.

(The Witness) Well ask the question.

Q. You own the equipment? A. We do.

Q. Do you operate it yourself? A. Under lease.

Q. What do you mean by under lease? A. Did the Ingersoll Watch Company ever own plant to manufacture and biuld watches. They did not.

(The Court) Strike that out. Repeat the question.

(The Court) Listen, does your concern, the Shoup concern, hold title in its own name to the machinery and equipment used in the manufacture of these Shoup voting machines?

(The Witness) Yes, sir, we own all our own dies, tools, jacks, blue prints, patterns, and so forth.

(The Court) All right, anything else?

(Mr. Due) And are they made by your own employees, are the machines made by your own employees?

A. We make them under our lease with the Republic Steel Company.

(Mr. Due) I don't understand that.

(The Witness) It is only you don't understand English. The Judge asked me the question——

(Mr. Due) I will ask you again: Do your own employees make these machines?

A. Our own employees?

(Mr. Due) Yes, Shoup Company employees.

A. No, sir——

(Mr. Due) All right, that's all I want to ask you.

(Mr. Straus) Well, let him explain it.

(The Witness) I will gladly do so——

(Mr. Due) And the only opportunity you have had to see this device for Plan B voting is what you see here?

A. No, sir, we manufacture with our own equipment, everything shown on this machine Plan B, was manufactured with our own equipment.

(Mr. Due) I asked you if you had ever seen this equip-

ment on this machine of the Automatic company with the Plan B? Did you ever see that before today?

A. We did not and we didn't have to.

Q. And your estimate is based on what little you see there today? A. No, sir, that is not correct.

Q. Well, how can you estimate the cost of changing the Automatic machine if you had never seen it? A. Because there is only one way in the world that they could do it, sir, and that is the way they have done it, and that's the way we tried to do it, with the same identical principles, and I pointed out where you find out you couldn't carry on to the capacity of the machine any more so than you can with that machine.

Q. And this thirty-five dollars is based not on what you see but on what you figure they would have to have? A. On the combination of the two.

Q. Now, how long has the Shoup company been in existence? A. Approximately five years.

Q. And you have machines where? A. We have machines in actual use in the entire state of Rhode Island, the only state-wide installation in the United States.

(Mr. Due) That's right.

A. (Continuing) Five hundred in Phiadelphia. Twenty-three in Teaneck, New Jersey; fiifteen in Nashville, Tennessee; they have been used in Milwaukee, Wisconsin, they have been used in Chillicothe; and we hope, very shortly, may be used in Baltimore, we don't know.

Q. Actually, they are now in use in four places, is that right? A. That's correct.

(Mr. Jones) Your Honor, I would like to offer a part of the proceedings before the Board.

(The Court) All right, go ahead; although I don't know what the point of it is, reading a record taken before the Board.

(Mr. Jones) Well, I will be glad to state——

(The Court) Whose testimony do you want in there?

(Mr. Allen) There wasn't any testimony under oath, it was just a very informal hearing.

(The Court) All right, you object to it?

(Mr. Allen) Yes, sir.

(The Court) You couldn't even produce it for the purpose of contradicting a witness because you haven't laid any foundation for it. Objection sustained.

(Mr. Jones) What is the objection?

(The Court) The objection is to your producing any unidentified transcript of an informal discussion not under oath had before the Board, in view of the fact that everything that the Board is alleged to have done is properly introduced in evidence in this case. You offer it and have it marked for identification, Mr. Allen will object and the objection will be sustained, and you can get the Court of Appeals to pass on the question.

(Mr. Jones) Well, then, for the record we offer the transcript of proceedings before the Board in public session of August 26, 1937; and also the transcript of proceedings of the Board in executive session on August 26, 1937; and also the proceedings of the Board in executive session on September 8, 1937, when the contract was awarded.

(Mr. Due) If your Honor please, I offer the other one, August 24.

(The Court) If anybody wants to know what the Board did they will have to produce the secretary to the Board with the minutes to show all it did. The debates between the members of the Board and the witnesses in no sense, I think, are persuasive, controlling or admissible. If anybody wants to see what the Board actually did, and will produce the secretary to the Board with exact, authenticated documents showing what the Board did, I will be delighted to admit it all.

(Mr. Straus) It is in the form of a stenographic record, your Honor, what the Board did——

(The Court) General, I have made my statement as clear as I know how.

(Mr. Jones) Is Mr. McClean in court?

(No answer.)

(Mr. Jones.) Well, we will have to produce Mr. McLean to prove that.

(The Court) Very well, get Mr. McLean in. As a matter of fact, you both set out in your Answers and in your Bills of Complaint exactly what the Board did. But it is news to me that you can prove what the Board did by a stenographer's notes which are unidentified.

(Mr. Allen) Oh, we will, of course, admit that this represents an exact stenographic report of what took place. We won't require Mr. Straus to prove that that is so.

(The Court) Well, that being so I will admit, over your objection, such parts of the record as show what action the Board took. If you stand on your objection to admitting debates had in cross examination and cross talk between the Board and people present, I will sustain that. In other words, I don't think the debate and discussion have a thing on earth to do with this case. It is only what form the Board's final action took.

(Mr. Straus) Well, then, your Honor, we offer in evidence the stenographic record of the proceedings of the Board on August 26.

(The Court) Well, now, General, let me say, in place of putting in all of those records which you may offer, that the Court will admit the stenographer's transcript of any orders, resolutions or letters which the Board adopted or promulgated.

(Mr. Straus) May I ask the Court whether or not what the Court rules admissible will be permitted to include the deliberations of the Board, leading directly up to the action it took?

(The Court) Well, if Mr. —— if anybody on the other side objects I will sustain the objection. I don't think the debates are pertinent or germane in interpreting or aiding me in interpreting what the Board did. I think it is all interesting, the various things that the Board did, but I am not interested in Mayor Jackson's questions of the witnesses, or Mr. Chambers' questions, or anybody's else;

I only want to know what final action was taken, and if it is objected to I will rule out everything except the final action.

(Mr. Allen) Well, I do object to the balance of it.

(The Court) All right, I will sustain the objection to so much of those records that are now in as do not indicate the actual and final action taken by the Board at the various stages, and exception noted on behalf of Mr. Jones, Mr. Page and General Straus.

(Mr. Straus) Yes, sir. Now, we offer in evidence that limited part of the proceedings of September 8 of the Voting Machine Board which embraces the action of the Board.

(The Court) Well, now, General, to save a little time, isn't that already set up in the pleadings and exhibits?

(Mr. Straus) I think in substance it is, but I think we ought to prove it; and I may say to the Court the resolution begins definitely——

(The Court) General, let me make this statement to you: That every bit of that Attorney General's correspondence, Attorney General's opinions, every resolution and action of the Board, are filed by one side or the other and, generally, by both sides, as exhibits in this case. Why not admit the exhibits in evidence? I imagine that will answer everybody's purposes.

(Mr. Straus) I think that answers the purpose, reserving, of course, our exception to your Honor's ruling excluding this transcript.

(The Court) I think that covers everything you and Mr. Jones want to get in except the debate.

(Mr. Jones) No, your Honor, I still haven't been permitted to tell why I wanted the other portions of the record in.

(The Court) Listen, I am not going to let in anything except what I have told you I was going to let in, and you must abide by that ruling.

(Mr. Jones) Well, I say to the Court that upon my professional reputation I think it is relevant to the issue

in this case, and something that ought to go in. I want to show that this Board proceeded on the theory, until the Attorney General's ruling came along——

(The Court) Now, I thought you wanted to do something as far fetched as that, which confirms my resolution that you can't do it.

(Mr. Jones) Well, might I show it?

(The Court) Very good, you mark anything you want to get in and offer it, and if there is an objection I will sustain the objection and grant you an exception.

(Mr. Jones) Well, the portion I want to offer is from the middle of page 29 to page 30 of the record of the proceedings of August 26, 1937.

The following is a transcript of a portion of said testimony:

(Mr. Marshall) I think this is true. We are dealing with samples submitted to correspond with specifications; the bids have been opened and there should be no change in the samples at this time; I believe that is the general rule in competitive bidding, that there should be no change in samples after bids have been opened. We, therefore, have to deal with this question upon the basis of the samples submitted in response to the specifications put out.

(Mr. Jones) That is my point, Mr. Marshall; that is exactly what I am trying to find out, and he will not answer. He did tell us it was a complicated system and required considerable equipment to change it.

(Mr. Hamilton) I don't think I said that; I said we required some time——

(Mr. Jones) May we not have, for the record, a statement from the witness who knows what additional equipment in addition to that which was in the sample submitted, with his bid, will have to be installed in order to accomplish it.

(Mr. Marshall) I think the question would be this: Is any additional equipment necessary to make the change in your Exhibit B?

(Mr. Hamilton) Yes, sir, there would be.

(The Court) That doesn't contain any orders of the Board?

(Mr. Allen) Is that an executive or open meeting?

(Mr. Jones) That is an open session of the Board. This is the statement of the City Solicitor as to what the Board would require.

(The Court) Do you object to that?

(Mr. Allen) Yes, sir.

(The Court) Sustained.

(Mr. Jones) Exception. That is from the middle of page 29 to the middle of page 30. Now, we want to offer the proceedings on page 9, beginning with Mr. McLean on page 9, down to the last paragraph on page 10, of the proceedings in executive session on August 26, 1937.

The following is a transcript of a portion of said testimony and reading as follows:

(Mr. McClean) That's right. I move you, sir, that we request from the Attorney General an opinion whether a legal ballot in the State of Maryland can be printed and voted on either or both machines.

(Mr. Chambers) Second the motion. That's either or both machines that have been submitted to us as samples, under the specifications?

(Mr. Gans) We are not passing on the specifications, as I understand it, and if the machines can be changed——

(Mr. Marshall) No, you are basing your opinion on these machines, as submitted.

(Mr. Gans) Isn't that part of the thing, in other words, if they can change it so the objection can be removed——

(Mr. Marshall) But they have not changed it. You are not going to consider subsequent changes. These are the machines they submitted under the specifications. Can we vote a legal ballot on those machines? That's all we want to know—that's all the Supervisors of Election

want to know. It does not involve any questions of what could be done, or what could not be done, but what can be done with these machines.

(Mayor Jackson) As submitted or exhibited.

(Mr. Marshall) We do not have to consider what they could do; if they can't do it on these. What we are considering is what we can do on these we are buying.

(The Court) Any objection to that?

(Mr. Allen) Yes, sir.

(The Court) Sustained. Exception noted.

(Mr. Allen) Your Honor, could I say this——

(Mr. Jones) That's where he left it to the Attorney General, your Honor.

(The Court) Oh, you say that was a motion? I admitted all motions which were put and carried.

(Mr. Jones) This is a motion.

(The Court) I told you I excluded the debate and admitted all motions which were put and carried, and those motions are all in the pleadings.

(Mr. Jones) That's right.

(The Court) And if that is a motion that was put and carried I will admit it.

(Mr. Jones) Well, may I read this?

(The Court) It is already in here. I read it yesterday, it is in your exhibit, where they requested an opinion of the Attorney General.

(Mr. Jones) The proceedings and what they said about it?

(The Court) yes. At least, the resolution.

(Mr. Jones) Yes. Well, I may read this, your Honor?

(The Court) Let me see it, Mr. Jones.

(Stenographic record handed to the Court by Mr. Jones.)

(Mr. Due) What page is that?

(Mr. Jones) Pages 9 and 10.

(The Court) Well, I will admit this insofar as it states Mr. McLean offered a motion to request of the Attorney General an opinion on whether a legal ballot of the State of Maryland could be furnished on these voting machines, and that motion was duly seconded and carried. Now, I say that it is wholly superfluous on Mr. Jones's part to re-offer that, because it is already in the case, and I read it yesterday.

(Mr. Jones) But I am offering the rest of it.

(The Court) Well, that's all you are going to get in. If you want to offer any more of it I sustain the objection.

(Mr. Jones) We want an exception to the exclusion of the remainder of it.

(The Court) Very good.

(Mr. Jones) I am remembering it, your Honor.

(The Court) Well, what is it, then?

(Mr. Jones) I am trying to have the record show what we are offering and your Honor is ruling against us.

(The Court) I am not ruling against you on any resolutions which were adopted; and in spite of that ruling you offered that resolution.

(Mr. Jones) Oh, I offered more than that, and you ruled it out. Now, I would like to offer pages 26 to 32——

(The Court) Let me see what it is.

(Mr. Allen) Which date is that?

(Mr. Jones) September 8, executive session (handing transcript to the Court).

(Mr. Allen) We object to a deleted portion of the proceedings, segregated in such a manner.

(The Court) Objection sustained.

(Mr. Jones) Exception noted.

(Mr. Straus) Your Honor, may I bring something to your attention?

(The Court) Well, let's get through with Mr. Jones first.

(Mr. Jones) Your Honor, that's all I want to offer.

(Mr. Straus) I accepted the Court's suggestion, I think it is a proper solution of the matter, the admission of all resolutions and acts by the admission of all exhibits. I find, however, that the resolution which the Board passed on September 8 does not accompany our Bill as an exhibit, but is in the text of the Bill. I take it that the Court would treat that as an exhibit?

(The Court) Very good, I will treat it as an exhibit.

(Mr. Straus) Thank you.

(The Court) But I believe it is in the pleadings in one or the other cases, General. It is duplicated in your Bill in another exhibit.

(Mr. Due) Now, to prevent small isolated passages being offered, I will offer in evidence all the testimony at the meetings of August 24, and 26, and September 8.

Thereupon the Voting Machine Board offered to prove the following from the stenographic transcript of the meetings of the Board in question:

That the Voting Machine Board held open hearings on August 24, 1937 and August 26, 1937, at which counsel and officials of both the Automatic Voting Machine Corporation and the Shoup Voting Machine Corporation were present and offered testimony.

That said Board held executive sessions on August 26, 1937 and September 8, 1937, stenographic transcripts of which were made available to counsel for both the Automatic Voting Machine Corporation and the Shoup Voting Machine Corporation.

That at the meeting of August 24, 1937, Mr. Weiss, President of the Shoup Voting Machine Corporation, testified as follows:

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

we have proven that conclusion. We are on record, 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."

At the meeting of August 26, 1937, Mr. S. C. Hamilton, of the Automatic Corporation testified as follows:

(Mayor Jackson) And now you say you can set up the machines on the B plan?

(Mr. Hamilton) You can have first and second, but you do it with two levers there and one on the other.

(Mayor Jackson) And you set up the machines either way, under the A or B plan, whether you vote first or second, that's either the pressing of one or two levers?

(Mr. Hamilton) Yes, sir.

(Mayor Jackson) That's something new; everybody admits that.

(Mr. Jones) I beg your pardon; he said the other day he could do it.

(Mayor Jackson) But he did not submit anything. I didn't ask him if he made the statement, I asked if he submitted something different.

(Mr. Jones) Now, Mr. Hamilton, how long would it take you to rebuild your machine, so as to accommodate this set-up which you just now submitted to the members of the Board?

(Mr. Marshall) He has to furnish us with that machine, or default on his contract, if we order that machine.

(Mr. Jones) That's it, and I say you can get the opinion from the Attorney General before you buy the machine, if you buy it at all.

(Mayor Jackson) We haven't bought it yet.

(Mr. Jones) I know you haven't, and I don't think you can, legally. I asked how long would it take you to rebuild your machine?

(Mr. Hamilton) According to this plan you have here?

(Mr. Jones) Yes.

(Mr. Hamilton) Why, 15 minutes.

(Mr. Weiss) For how many candidates?

(Mr. Hamilton) Just as many.

(Mr. Weiss) Will you give this—can you give this——

(Mr. Hamilton) I made a statement we would do that.

Thereupon Mr. Jones offered the following additional proceedings:

(Mr. Marshall) Don't let us get into that, don't go all over that.

(Mr. Weiss) They asked me all that, Mr. Marshall.

(Mr. Marshall) You were here for five hours.

(Mr. Jones) Was the equipment in your machine when you brought it down here and submitted it?

(Mr. Hamilton) I wish the Board would ask me what they want of me; I made the statement that that illustrates what we can do, and we give a bond that we can do it.

(Mr. Jones) I asked you whether or not the equipment was in the machines which you submitted under the specifications?

(Mr. Hamilton) I don't care to answer—may I amend that by saying—as Mr. Weiss said the other day, let the Board ask it.

(Mr. Chambers) Let him go ahead if he wants to amend the statement—go ahead if you want to make a statement.

(Mr. Hamilton) I don't want to make any further statement.

(Mr. Jones) Did you get the last question and answer, so I can proceed?

(Mayor Jackson) I didn't have any question.

(Mr. Jones) You were talking among yourselves, and I was waiting.

(Mayor Jackson) Do you want the last question and answer read?

(Question and answer was then repeated by the stenographer.)

(Mr. Jones) Well, I would like a member of the Board to ask him that question.

(Mayor Jackson) Well, a member of the Board didn't ask him about this; it seems to be a contention among the two machine people.

(Mr. Allen) The other day I asked him (Mr. Weiss) to do it, to put five and five on the machine——

(Mayor Jackson) And he said he would do it, but he wouldn't show you how.

(Mr. Jones) We propose to show that the machine submitted is illegal and the only plan proposed at the hearing the other day—they say they have to change the machine and equipment, and I want to know the extent of the equipment, and whether or not it does not involve new equipment.

(Mayor Jackson) I don't know whether Mr. Salomon has the record with him or not, but Mr. Hamilton said he would set it up for pressing two levers, but could not give a demonstration. That's the reason I asked him if he submitted to you some printed form he did not have the other day, because he had two.

(Mr. Jones) That isn't it. The question is, does he have today the additional equipment in the machine to do what he says he can do?

(Mayor Jackson) I will ask Mr. Hamilton that question, in order to clarify the situation, if it is possible. As I understood the other day, the other members can disagree with me if I am wrong, I understood you had a machine set up where you press one lever for first choice, or you press one lever for first and second, or you only have to press one lever for either first or second?

(Mr. Hamilton) Yes, sir.

(Mayor Jackson) And you come here today and submit a diagram, after making the statement the other day

that you could set up the machine whereby you could vote first and second choice by pressing one lever and you give a diagram of that, too——

(Mr. Hamilton) Two levers today.

(Mayor Jackson) I mean two levers, I beg your pardon. Is that a fact?

(Mr. Hamilton) That's correct.

(Mayor Jackson) In other words, you give a diagram today of the statement you made the other day?

(Mr. Hamilton) That's right.

(Mr. Due) The date of the meeting is August 24, and August 26, and executive session, August 26, and meeting of September 8.

(Mr. Allen) We object to them.

(The Court) Well, it is the same matter that Mr. Jones has been offering, and I make the same ruling. Any reference to any resolution that was adopted, will be admitted, and all other parts will be excluded.

(Mr. Due) Exception noted.

(The Court) Anything else, gentlemen?

(Mr. Page) Is Mr. Hamilton in court?

(Mr. Jones) What was the ruling on those?

(The Court) The same as on your offer: Some is in and some is out. All right, take the stand, Mr. Hamilton.

(Mr. Straus) One moment, your Honor. I think we have another witness that we summoned.

(The Court) Well, I asked you if you had any more witnesses. Now, Mr. Hamilton has been offered and now he will be sworn and will testify.

Thereupon—

SAMUEL C. HAMILTON,

a witness of lawful age, produced on behalf of the plaintiff Norris, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Page:

Q. State your full name, please? A. Samuel C. Hamilton.

Q. And where do you live? A. Springer, New Mexico.

Q. What is your occupation, Mr. Hamilton. A. Voting machines. Ranching.

Q. And you work for the Automatic Voting Machine Corporation, is that correct? A. Yes.

Q. And what is your position in that corporation? A. Agent.

Q. And you appeared as an expert before the Board at its open session on the dates mentioned? A. I did.

Q. As their authorized representative? A. Yes.

Q. Did you or not make a statement—which, incidentally, I am offering as an admission of the corporation, may it please the Court—before The Voting Machine Board on August 24, 1937, which reads as follows——

(Mr. Allen) What page?

(Mr. Page) That is on page 108. "In connection with that I would like to say a word about the first and second choice voting: I agree that the method on the Shoup machine on first sight might be all right. We prefer to have the method we use, for this reason: You can take the fifty-bank machine you have here and set it up for that purpose and without regard to our machine or the Shoup machine, if you arrange it the other way you will have to provide a lot of mechanism. If the court held up a ballot until late, as they often do, and you have had the experience and know that that all can happen, it is a very serious thing just before election to have all this extra paraphernalia on that, and I think if you will examine what Mr. Shoup has on there, you will find that if you are responsible for running those elections you would much prefer to have this arrangement." Did you make that statement, Mr. Hamilton.

A. Yes.

(Mr. Allen) Now, read on three more lines.

(Mr. Page) All right, you want me to read three more lines?

(Mr. Allen) Yes.

(Mr. Page) "Let me say now, if you prefer to use the other device exactly as we have it, we will build it for you." Is that what you want?

(Mr. Allen) "Exactly as they have it," it should be.

(Mr. Page) Is that what you want in?

(Mr. Allen) Yes.

(Mr. Page) All right. Now, you made that statement before the Board?

A. Yes.

(Mr. Allen) "But we advise against it," that is in there, too.

(Mr. Page) Well, do you want me to keep on reading?

(Mr. Allen) Well, just the five lines, that's all.

(Mr. Page) Well, let us go right straight through; "We will build it for you but we advise against it and our advice has been good in Baltimore, I think, as everywhere else." Is that as far as you wish me to read?

(Mr. Allen) Yes.

(The Witness) May I see what follows?

(Mr. Page hands transcript to witness.)

(The Witness) Yes.

Q. Now, Mr. Hamilton, you were referring, when you talked about that, when you made this statement, to the Plan B arrangement of your own machine, were you not? A. Yes.

Q. And when you spoke of the additional mechanism that would be necessary, in that statement, you were talk-

ing about the additional mechanism that would be necessary for your corporation to add to your machine in order to adapt it for Plan B? A. Not only our machine. Any machine.

Q. Well, your statement applied to your machine? I will put it that way. A. It would. May I explain a little further?

(Mr. Allen) Yes, indeed.

(The Witness) At that time I handed each member of The Voting Machine Board, and Mr. Jones, a copy of a diagram showing what my information was of the arrangement of the Shoup machine with respect to Plan B, and as we would put it on the Automatic machine, and offered to put it on.

Q. And by saying "put it" you meant not the addition that would be necessary for the Shoup Machine, but that would be necessary for your own machine? A. Yes.

(Mr. Page) Yes. I am entirely clear now and I have no further questions.

CROSS EXAMINATION.

By Mr. Allen:

Q. You mean, your remark in the open meetings of the Board——

(Mr. Jones) Wait a minute. Aren't you mistaken about that being at the original meeting? Wasn't it at the second meeting, two days later, in the office of the Board of Supervisors?

(The Witness) Yes, yes, I was wrong. It was at the second meeting.

(Mr. Jones) Yes, so that at the first meeting you didn't give any diagram?

(The Witness) No. That's right, that's right. I was mistaken about that.

(Mr. Jones) Yes. That's all.

(Mr. Allen) By the way, Mr. Hamilton, I might ask you this: How many years have you been in the voting machine business? A. Off and on, about forty years.

Q. Were you the agent of the Automatic Voting Machine Company that sold the fifty Automatic machines to Baltimore City in 1928? A. No.

Q. You were not? Have you been familiar with the machines in Baltimore during recent years? A. Yes.

Q. Mr. Hamilton, I think it was Mr. Jones made the statement here that first and second choice voting never existed anywhere in the United States——

(Mr. Jones) No, I didn't make that statement. The Court ruled against me on that.

(The Court) I don't care whether I did or not. I struck it out.

(Mr. Allen) I want to ask you, Mr. Hamilton, have you ever had any occasion in your experience with voting machines to have first and second choice voting in primary elections in any other State in the United States? A. Yes.

Q. And where and when was that? A. In Wisconsin, in about 1912.

Q. What plan did you use in Wisconsin in 1912 for second and first choice voting?

(The Court) Any objection to that?

(Mr. Jones) No, sir, no objection.

A. The Plan A.

Q. Did they repeal the first and second choice voting in Wisconsin? A. Yes.

(Mr. Allen) As a matter of fact, I believe about 1915? I believe there is no dispute about that.

(No answer.)

(Mr. Allen) That's all.

RE-DIRECT EXAMINATION.

By Mr. Jones:

Q. Just one question: Has Plan B ever been used any place in voting machines before the bids were opened up here? A. Not that I know of.

Q. And did your company ever have occasion to develop Plan B—or the mechanism necessary for Plan B—until the bids were opened up here? A. Not the Plan B have they used, but the mechanism, which is of the same nature that is used in it.

Q. Well, you don't mean the identical mechanism? A. No, not exactly the same, but the same general mechanism.

Q. Well, as I understand it, you never developed the identical mechanism to accommodate Plan B, as shown on the Shoup machine, until after the bids were opened up here and you saw how the Shoup Company had arranged the ballot? A. Oh, yes, we had developed it, oh, perhaps a year and a half ago, perhaps longer than that, I don't know exactly, and we had the device. Years ago, when the first and second choice matter was discussed at our factory, we built an inter-lock very much like the ones we have here, practically the same, but we never had occasion to use it, because the machines were never used in the primary election here, due to the fact that they had to be tied up, I believe, for four months after the primary, and, therefore, they could not be used at a primary and general election, and the city desired to use them at the general election.

Q. Well, what was the occasion for developing equipment to accommodate Plan B? A. So that if it should become necessary to use it, we would have that available. But, in developing it, we came to the conclusion that Plan A was so much more simple, that it was easier for the election board to prepare the machines for election, and also that we believed it was simpler for the voter really to turn down the one pointer than to turn down two.

Q. What was it suggested the necessity of it a year and a half ago? A. Baltimore, and Maryland; first and second choice.

Q. Yes. How many straps are required to accommodate six candidates under the first and second choice?

(Witness ponders.)

(Mr. Allen) It starts three times three?

(Mr. Straus) Just a minute, let the witness answer.

(The Court) Do you know, Mr. Hamilton?

(The Witness) Wait a minute, I am trying to figure it out (figuring on piece of paper), eighteen.

(Mr. Page) How many?

(The Witness) Eighteen.

(Mr. Jones) Shouldn't it be thirty-six, Mr. Hamilton?

(The Witness) For three candidates?

(Mr. Jones) No, for six candidates.

A. For three candidates——

(Mr. Jones) No, for six candidates.

(Mr. Page) He can't hear you.

(Mr. Jones) Pardon me. How many straps does it take to accommodate six candidates?

A. Well, for three candidates it would be nine——

(Mr. Jones) That's right, and for six candidates it would take how many?

A. Well, it would be eighteen.

Q. It would be thirty-six, wouldn't it? A. It would be eighteen.

Q. If it is three times three makes nine, wouldn't it be six times six for six candidates?

(The Witness) Well, we will look on the machine.

(The Court) It increases the square, Mr. Hamilton.

(The Witness) I beg your pardon?

(The Court) I say, it increases the square.

(The Witness) Perhaps it would be thirty-six.

(Mr. Jones) I see. Well, what I want to know is whether you can accommodate the thirty-six straps in the one channel, as shown over here?

A. Well, we have six candidates over there. We will show it to you.

Q. Well, can you do it? A. Yes.

(Mr. Jones) We again ask your Honor that we be shown that.

(The Court) What's that?

(Mr. Jones) I want to ask that the witness show us.

(The Court) Well, the witness is not equipped to do it now, he hasn't any tools or anything.

(Mr. Jones) He says he can do it right here.

(The Court) Listen, if he says he can do it, I am going to take his word for it until somebody says he can't. You can not use this courtroom for a workshop, gentlemen.

(Mr. Jones) Then your Honor will not permit him to do it?

(The Court) Mr. Jones, I said you couldn't do it, the objection is sustained, if there is any objection, I don't know whether there is one or not, and if there is none I will interpose one myself and give you an exception.

(Mr. Jones) That's all I want to ask him.

(The Court) That's all. Step down, Mr. Hamilton.

(Mr. Due) Mr. Hamilton, have you ever seen the inside of this Shoup machine with its Plan B equipment? A. No.

(Mr. Due) That's all.

(Mr. Allen) Mr. Hamilton, about this Plan B equipment that you considered for the Maryland situation and then felt that Plan A was so much better: Did you have some arrangement with the general principle involved in the Chicago accumulative voting? A. A mechanism of the same general nature, yes.

Q. And how many years ago was that? A. 1911.

(Mr. Straus) We move to strike that out. There is no analogy between that law and the Maryland law. No analogy has been shown between the law in Chicago at that time and the requirements of the Maryland law.

(The Court) There was no objection to the question. It was inadmissible but I heard no objection, but if you move to strike out his answer I will grant the motion.

(Mr. Straus) Yes, sir, I do.

(The Court) Motion granted. Exception noted. Anything else, gentlemen?

(Mr. Due) I haven't any more questions at this time.

(Testimony of witness concluded.)

(The Court) Now, gentlemen, any other testimony?

Thereupon—

RANSOM F. SHOUP,

a witness of lawful age, produced on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Straus:

Q. What is your full name, sir? A. Ransom F. Shoup.

Q. And what is your business, Mr. Shoup? A. Chief Engineer of the Shoup Voting Machine Company.

Q. How long have you been an engineer of apparatus or machinery for the construction of voting machines? A. Since I graduated from college in 1925. I think I have been raised on voting machines, since I was a child, but I have been actively employed on voting machines, working on them and building them, since 1925.

Q. And your profession is that of an engineer along that line and in that field? A. Yes, sir, I am chief engineer.

Q. Now, did you see the demonstration to his Honor and others which took place today of the machine in the hall, in the corridor of the courthouse, just beyond the courtroom door? A. Yes, sir, I did.

Q. When you saw that demonstration did you observe anything with reference to whether or not afforded second choice voting? A. Yes, sir, I did.

Q. Tell the Court what you observed in the course of that demonstration in that respect? A. I observed it was possible to record a second choice vote without recording a first choice vote for any candidate.

Q. Will you say whether or not what you observed there in the respect you have just mentioned, is applicable to or observable to you upon the machine, this Plan B machine over there (indicating)? A. I didn't have as full an opportunity, but I believe it would be the same as the one in the hall; but the one in the hall I did have an opportunity to examine.

Q. Did you see the demonstration both at the front and the rear of the Plan B machine which was given to his Honor today? A. Yes, sir, I did.

Q. Based upon that observation, you express the opinion which you have just stated? A. On the one in the hall, I saw that it would be possible to record second choice vote without recording a vote for any candidate for first choice for the office that you voted the second choice in. On this machine (indicating) I didn't have the opportunity to notice that, but I am sure you could also record a second choice vote without recording a first choice vote. In other words, I feel certain that if the Court, or if you would, examine the counters in back of the machine and noting the numbers shown thereby, and then allow a voter to close the curtain and vote the levers that you would give him, and then re-examine the counters, you would find the votes only registered for second choice candidates without votes being registered for first choice candidates for those offices.

(The Court) Well, does the machine permit the undoing of that situation so as to make a vote for a first choice and second choice?

(The Witness) It is possible, the way the machine is constructed, to vote a first choice and a second choice, but I also observed it is possible to record a vote for second choice only, without a vote recording for any first choice for that office.

Q. (By Mr. Straus) Did you observe the strap and channel arrangement as exhibited at the rear of this voting machine called the B voting machine, on that machine (indicating)? A. Yes, I did observe the mechanism.

Q. Will you say whether or not, in your opinion, and from your experience, it is possible to construct upon that machine a mechanism of straps and channels which would enable first and second choice voting to be had for primary election? A. What I observed is, they have this mechanism with straps and inter-locks—and, of course, the number of straps and inter-locks greatly varies with the number of candidates running for a particular office—and what I observed of the mechanism already in the machine is that that mechanism properly recording, it is possible to make it improperly record, so that a second choice candidate will get a vote without any vote being recorded for a first choice candidate for that office; and with that type of mechanism, from my experience, it is impossible to make it fool-proof, or to make it impossible, if some group wanted to beat the mechanism, or, in other words, to make the machine give false results.

(Mr. Straus) Now, I wish you would answer the particular question I asked you. I want you to state your opinion to the Court as to the possibility of that machine, the machine to our left, to so arrange the straps and the channels, that it may serve to permit voting for first and second choice, in a case where there are as many as six candidates for a state office.

(Mr. Allen) I object. I have been rather patient with this line of testimony.

(The Court) Overruled. Go ahead.

(Mr. Allen) Exception noted.

A. You couldn't get legal first and second choice voting with six candidates running for a state-wide office. Does that answer the question?

(Mr. Allen) I object and move to strike out the answer.

(The Court) Motion granted.

(Mr. Straus) We want the mechanical features of it, Mr. Shoup.

A. Well, if there are six candidates running for a state-wide office in both parties, it is impossible to make such a set-up on the machine.

Q. You mean it is a mechanical impossibility, is that what you mean? A. That's right.

(Mr. Due) On just this machine or any machine?

(Mr. Straus) He said according to your strap and channel arrangement.

(Mr. Due) All right.

(Mr. Straus) Which Mr. Weiss distinguished from the arrangement of their machine.

Q. You may explain to the Court the difference between the mechanism or the equipment of your machine to serve in primary elections for first and second choice, and the mechanism or equipment of this Automatic machine marked B here. What's the difference?

(Mr. Allen) I object.

(The Court) Sustained. Now, let's hold it down to his telling us what is wrong, if anything, with this machine.

(The Witness) In our observation, in working a machine with pull straps and indorsing inter-locks, such as shown on the inside of the machine, it is impossible to make it so that you are forced to leave a first choice on when a second choice is left on. It is impossible.

(The Court) I don't follow you on that. Would you mind telling me that over again?

(The Witness) I say, with my experience with voting machines, that with indorsing inter-locks and straps, it is impossible to make it so that a vote will have to stay on a first choice candidate if it is left on a second choice candidate. In other words, it is possible, with straps and inter-

locks, to record a vote only for a second choice without recording a vote for a first choice for a state-wide office.

(The Court) Well, you said that a while ago about the machine out in the hall?

(The Witness) Yes, sir.

(The Court) Well, how could it be accomplished, Mr. Shoup?

(The Witness) By un-voting the first choice handle: Pressing it up while you hold the second choice handle down with your finger.

(The Court) Well, could that be managed with the straps and the channels and the inter-locks as mentioned or provided upon the B machine of the Automatic?

(The Witness) On the B machine arrangement that I saw in the hall, I personally, with my own hand, voted a first and second choice, and then held the second choice down and pushed the first choice up and held it there, so that I know that merely by pulling the curtain lever across it would record only for the second choice candidate.

(The Court) Well, is that exactly fair? That is like putting a plug in a telephone and then complaining because it doesn't work. No voter would do that; it is a practical world and we are trying to find a machine which would accommodate voters and not an adverse expert.

(The Witness) You will find, if you start to manipulate your handles with that particular mechanism, you can get it out of adjustment.

(The Court) You can, but would you? Take a voter like myself, would he likely record a second choice without recording his first choice?

(The Witness) Well, if a few votes would possibly swing an election one way or the other——

(The Court) Well, would anybody, unless they knew of this method of wiping out the first choice and only recording the second choice which you practiced, would that likely occur, unless you designedly made it occur?

(The Witness) Yes, sir, for this reason: That with voting machines persons do not follow instructions on how to operate them. The human mind of all people is how to beat a machine. Therefore, you have to make voting machines fool-proof before you can allow people to manipulate them. Therefore, you have a different proposition with a voting machine than any other machine, because the election officers and the attendance officers all have in mind how to beat it so that they can tell their friends how smart they are, so that, therefore, if there is a way to beat the machine it is sure to be found out and be told to voters and practiced and demonstrated.

(The Court) All right, gentlemen, I guess this is a good place to adjourn, until tomorrow morning at ten o'clock.

The Court met, pursuant to adjournment, at ten o'clock A. M., October 5, 1937.

By Mr. Straus:

Q. Mr. Shoup, Section 224-E of the Voting Machine law has this provision: It declares that the voting machine shall preclude each voter from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once. Now, I ask you to tell the Court whether the mechanism displayed and exhibited by the Automatic Voting Machine Corporation in its B machine which is to our left and upon which the demonstration yesterday was made in your presence, whether the mechanism so displayed to accommodate Plan B will preclude a voter from voting for more persons for any office than he is entitled to vote for and from voting for any candidate for the same office more than once?

(Mr. Allen) I object.

(The Court) Objection overruled.

(Mr. Allen) Exception.

(The Court) Is your point that the point is not raised by the pleadings?

(Mr. Due) That's right.

(The Court) Go ahead, gentlemen.

(Mr. Due) Exception noted.

A. It will not.

Q. (By Mr. Straus) Now, I am going to ask you to describe or demonstrate to the Court on the machine set up for Plan B how and why it doesn't. A. Well, in the construction of the machine——

(Mr. Allen) We object to that.

(The Court) Well, just to preserve your rights?

(Mr. Allen) Yes, sir.

(The Court) Objection overruled.

(Exception noted.)

A. In the construction of the machine, inasmuch as you can unvote the first choice, that in turn enables you to vote for a different first choice. Therefore, you could vote for the same man twice in one instance; in the other instance you can vote——

(The Court) Hold on. You vote for him once, and then you unvote for him and then you vote for another one. I take it the machine was designated to do that very thing, so that if you made a mistake you could correct your mistake. I do not understand by that you vote for the same man twice; if you vote for him once you have got to unvote for him before you can vote for another one.

(The Witness) Not the way the machine is operated at present. In other words, your Honor, you could vote for a candidate, we will say "A," for first choice——

(The Court) Well, in the demonstration I saw—I forget who put that on—it showed that very plainly: that if you voted once you could unvote and then vote again for another man for the same office; but unless you lifted the lever up the second lever wouldn't come down. In other words, you couldn't vote the second time for another candidate for that office until you had unvoted the first candidate you had voted for.

(Mr. Straus) Now, Mr. Shoup, show the Court, in reply to that, if you can and will, show the Court what

reason there is for the answer that you gave, that this Plan B machine will not accomplish those things provided for in the Section 224-E of the Voting Machine Law I referred to.

(The Witness) You see, a voter could go up to the machine and go in to vote. He then will operate certain levers to vote, and in doing that he will vote a first choice and a second choice. We will assume he voted for Candidate B for second choice. We will then unvote Candidate A, his first choice candidate, hold B in place, and vote for B as his first choice candidate in the next row below. Therefore, you will have Candidate B his first choice in one row, and Candidate B his second choice in a different row, which in turn will enable you to get two votes for B.

(The Court) Doesn't it take an Edison or a Houdini to do that?

(The Witness) No, sir.

(Mr. Straus) Will you show the Court how you can do it? Will you demonstrate that over there?

(The Witness) Yes, sir (leaving the stand and going to Plan B machine).

(Mr. Straus) Will your Honor permit him to show the Court?

(The Court) Go ahead.

(The Witness) Well, they will have to unlock the machine, so that I, as a voter, can go in to vote.

(Mr. Allen) We, of course, have the same objection and exception, your Honor.

(The Court) Certainly. Now, gentlemen, I am not going to have a scene like we had out there yesterday in the corridor. I want counsel, and the representative of the Automatic Company and the witness to be around the machine and nobody else.

(The Witness) Your Honor, would it be possible to ask them to unlock the machine with the vote six on it, because this is only vote three.

(Mr. Griffen) His point is this, your Honor——

(Mr. Straus) No, we don't want that. We just want the demonstration.

(The Court) No, you go ahead, Mr. Shoup.

(The Witness) Well, they don't have six on this machine. (Witness demonstrates on machine). In other words, here I have the second choice down without the first. Here's the second choice, and now you find that recorded for Hill, without recording the vote for Niles.

(The Court) Exactly as I thought, it would take a Houdini to do it (returning to the Bench). I saw what he did, he did what no voter would ever attempt to do.

(Mr. Jones) Well, your Honor, can we have the other demonstration to see whether he can vote for the same candidate for second choice?

(The Court) I don't know. I don't want it. I don't think there is any slot machine or adding machine or cash register that can't be manipulated, if you get a man sufficiently expert to do it so that it won't work.

(Mr. Straus) In view of the peremptory language of the statute, your Honor, that the machine shall do these things, doesn't your Honor think if it doesn't, it doesn't comply with the statute?

(The Court) Well, you always have to give every statute a reasonable interpretation. I doubt if any machine can be made to resist all sorts of freak assaults.

(Mr. Straus) I would like to ask you this question, Mr. Shoup: His Honor apparently has in mind that what you have just demonstrated might be done on any machine because of the imperfectness of any human mechanism. What about the Shoup machine? Or, let me ask you this, without reference to any machine: Is it possible to construct and produce a machine upon which you have just demonstrated to the Court may not be done by voters?

A. Yes, sir.

Q. Now, do you know——

(Mr. Allen) I intended to introduce an objection to that.

(The Court) I assumed you would introduce an objection and the objection is overruled and exception noted.

(Mr. Straus) Now, you say "Yes." Will you tell the Court of any machine which, to your knowledge, does as the statute says is required: Preclude any such operation as you have just indicated, whereby a man might, in the way you have shown the Court, record a vote for the same person twice on the machine?

(Mr. Allen) We object.

(The Court) Overruled.

(Exception noted.)

(Mr. Straus) Now, what machine do you know of?

A. Why, with the Shoup mechanism we employ——

Q. And who do you mean by "we?" A. On the Shoup machine, that is impossible to occur. In other words, there are several types of mechanism that can be employed to handle Plan B ballot, and there are even several types that have been employed by ourselves in developing it, and, aparently, by the Jamestown company.

Q. You retain in mind, Mr. Shoup, do you not, the language of sub-paragraph E of Section 224-F, which I have read to you, as to what shall be precluded, i. e., each voter shall be precluded from voting for more persons than he is entitled to vote for, and from voting for any candidate for the same office more than once? A. Yes, sir.

Q. Now, having that in mind, I desire to ask you this question definitely: Will you state to his Honor from your experience and knowledge with respect to voting machines whether or not it is actually possible to construct a machine which will preclude each voter from doing the things which Section E just read to you prohibits?

(Objected to.)

A. Very simple——

(The Court) Objection sustained.

(Mr. Straus) Is it because it is repetition, your Honor?

(The Court) I have sustained the objection.

(Mr. Page) Exception noted.

(Mr. Straus) Will your Honor permit the record to show the demonstration which the witness gave your Honor?

(The Court) Do what?

(Mr. Straus) Have the record show the demonstration which the Witness gave your Honor?

(The Court) I don't see how our very efficient and capable stenographer can take down pot hooks and hangers which will demonstrate what this gentleman did to the machine. The witness stated what the effect of his act was, and that is as far as the stenographic record will go.

(Mr. Straus) Will your Honor let the witness state what he did?

(The Court) He has already stated it. May I ask for information? Were there any bidders except the Automatic and the Shoup companies?

(Mr. Allen) They were the only two, your Honor.

(Mr. Straus) Your Honor, that's all we want to ask the witness.

(The Court) Very good. Witness with you, gentlemen.

(Mr. Page) Before I waive my right to examine, I want to speak to General Straus.

(Mr. Page then confers with Mr. Straus.)

(Mr. Page) That's all.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Shoup, what you have just been talking about relates to Plan B, doesn't it? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And what you have been talking about does not relate to Plan A that is on that sample machine? A. It relates to Plan B, the way you have it set up.

Q. I asked you a simple question: If what you talked about related to Plan A? A. No. sir.

Q. All right. Do you agree with Mr. Weiss that mechanically Plan A is a very simple device? A. Plan A doesn't entail mechanisms that Plan B does entail.

Q. Well, do you think that mechanically Plan A is more simple than Plan B? A. Plan A doesn't take any additional mechanical equipment; while Plan B does.

(Mr. Allen) Yes. That's all, thank you.

(Mr. Due) I have just one question:

Q. You said, Mr. Shoup, I think, in effect, that it is human to try to beat the machine, and the implication was that the average person would go in and try to beat the machine, is that right? A. That's correct.

Q. That's your experience is it? A. Yes.

Q. And you don't find that the average man wants to go in and register his vote, he is looking to beat the machine, is that right?

(Objected to; objection sustained.)

(The Court) I would have entertained a motion to strike out Mr. Shoup's observation of human nature which may or may not be at variance with the observation of the rest of us, but there was no motion made.

(Mr. Due) That's all.

(Testimony of witness concluded.)

(Mr. Straus) Your Honor, we had a photograph made the exact size of the face of the Automatic machine which shows the Plan A; we thought it might be a convenience to the Court.

(The Court) Well, if you want to offer it, offer it, and if there is no objection it will be admitted. It isn't necessary to explain the purpose.

(Mr. Allen) Let's see it.

(Photograph exhibited to counsel for defendants.)

(Mr. Allen) That's perfectly all right.

(Mr. Straus) It isn't the whole machine, it is just that part that has to do with this personal choice mechanism.

(Mr. Allen) That's all right.

Photograph referred to then marked "Plaintiff's Exhibit No. 5".)

(Mr. Straus) Your Honor, yesterday, saw also a photograph of the manner in which the Shoup company accommodated personal choice, that is, the write-in choice. I realize that isn't before you, but if your Honor wants that photograph I will be gland to offer it.

(The Court) Well, maybe the other side won't object. I don't know.

(Photograph exhibited to counsel for defendants.)

(Mr. Due) Is this the Shoup machine?

(Mr. Straus) During court yesterday the Court asked me how we accommodated personal choice on that machine, and I showed him that photograph at the time, and I am perfectly willing to offer it if you don't object to it.

(Mr. Allen) Your Honor, we have this photograph and I——

(The Court) Do you object? Objection sustained.

(Mr. Allen) Yes, sir.

(Mr. Straus) All right, we don't press it. We rest.

DEFENDANTS' CASE.

Thereupon—

SAMUEL C. HAMILTON (recalled),

a witness heretofore produced and sworn on behalf of plaintiffs, was recalled by the defendants, examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Hamilton, you testified yesterday that in 1912 this Plan A was voted in a primary election in Wisconsin. I want to ask you if you have copies of the Wisconsin ballot on the machine of 1912 voting Plan A?

(The Court) May I ask you, Mr. Allen, what is the point of that?

(Mr. Allen) I want to offer the copies in evidence, your Honor.

(The Court) Well, why?

(Mr. Allen) Just to show it has been done in other jurisdictions.

(The Court) Do you object?

(Mr. Straus)Yes, sir.

(The Court) Objection sustained.

(Mr. Allen) May we note an exception, your Honor?

(The Court) Certainly. Mr. Allen, I want to be just as hospitable to your case as I can, but for the life of me I can't see how what was done in Wisconsin affects this case. The oral testimony is in that they have followed this plan at various times and places, and that's all we are interested in, and the question before me is does Plan A conform to the Maryland election law? It might conform to the Wisconsin election law and not the Maryland election law.

(Mr. Allen) Yes, sir.

(The Court) At the risk of being tedious, and I hope I can make myself clear, I will state again what my understanding is of the points in this case:

This Voting Machine Board was clothed with discretion, and the Court has no right to interfere with the exercise of those discretionary powers by this Board. There has been no fraud and there has been no charge or suggestion of fraud; there has been no collusion, and there

has been no charge or suggestion of collusion, and no arbitrary conduct. Affirmatively it appears that the Board has done everything that is reasonable to inform itself and has given hospitable hearings to anybody who asked for such hearings, and has conducted itself with fairness, honesty, integrity and diligence. So much for that. Now, that gets us down to this: If, however, the Board has failed to follow a method which the law requires, for instance, if the law requires that the contract be let by the purchasing agent, why that is a matter for me to consider. If the Board has, in its discretion, acted wisely or unwisely, doesn't make any difference to me in this particular case. Personally, I think they did their best.

The next question to determine is whether the machine which the Board decided on, if Plan B is adopted, is such departure from the specifications and the specimens as to bring this case within the ruling in the Konig vs. Baltimore case.

The next question is this: Does the apparatus give the voter the chance to vote a first and second choice for state-wide offices where the nominations have to be made by convention, that right of choice which the Maryland statute says he must have?

The last point, and, to my mind the most important point of all, is whether or not under the Constitution and Bill of Rights there must be a write-in privilege or opportunity afforded the voters in general elections; not in primaries, but in general elections.

Now, when I have satisfied myself on those points I am then able to decide the case, to my own satisfaction at least; and they are the only points which, it seems to me, are entitled to any extended consideration.

(Mr. Allen) Your Honor, just for the record, I have some photographs here of the write-in equipment I would like to just put in the record.

(The Court) As I understand, to put in the write-in equipment, amounts to some rather serious changes, amounting to eighty some dollars a machine, which the successful bidder, the Automatic Voting Machine Company, will not absorb.

(Mr. Jones) We object to the photographs, because they did not buy it.

(Objection overruled; exception noted.)

(Mr. Straus) I wonder if your Honor will look at those pictures first?

(Photographs referred to handed up to the Court.)

(The Court) General, to be frank with you, so far as I am concerned, and so far as the Court of Appeals is concerned, these don't amount to anything.

(Photographs referred to then admitted in evidence and marked "Defendants' Exhibits F, G and H," respectively.)

(Photographs omitted but may be produced in Court.)

(Mr. Allen) Now, if your Honor please, I would like to introduce in evidence all exhibits which the defendant Automatic Voting Machine Corporation filed with the Answer in the Norris suit.

(The Court) You had better take the Answer and indicate to General Straus and Mr. Jones what exhibits they are. I think most of them are in.

(Mr. Straus) I rather think there would be no objection, but I would rather see them.

(The Court) Well, I can tell you they are various resolutions of the Board and correspondence with the Attorney General, and it is admitted that Mrs. Daly is a taxpayer, so that I think most of that is superfluous. And then you put in excerpts from your Bill of Complaint which incorporated a resolution of the Board?

(Mr. Straus) Yes, sir. Nothing occurs to me to object to there, but I just thought that in order to be clear on it I would like to have them named. Could you name them right off?

(Mr. Allen) Yes.

(The Court) Well, they have got the contract, they have got the bond, they have got the specifications, and my recollection is there is no exhibit which is not pertinent to the case. The only question is the formal proof.

(Mr. Allen) I want to offer in evidence Automatic Exhibit A, which was filed with the Answer in the Hattie B. Daly suit, which consists of four diagrams of forms of Plan A.

(Diagrams referred to then marked "Defendants' Exhibit I".)

(Mr. Allen) Then I offer in evidence two forms of Plan B as shown in Automatic Exhibit Plan B, filed with the Answer in the Hattie B. Daly suit.

(Defendants' Exhibit Plans A and B to be printed under separate cover.)

(Mr. Straus) I don't think it makes much difference but Mr. Jones makes an objection to it, and I concur.

(The Court) Well, if you have a witness to identify it I will overrule the objection.

(Mr. Allen) Well, Mr. Hamilton, this Plan B in two different forms which was filed as Automatic Exhibit Plan B——

A. Yes, sir.

Q. —— does that represent the form of Plan B as demonstrated on the machine? A. Yes.

(Mr. Allen) Now, I offer it in evidence.

(Mr. Straus) We object.

(Objection overruled; exception noted.)

(Diagram referred to then marked in evidence Defendant's Exhibit J.)

(Mr. Allen) General Straus, it just occurred to me, you asked me if these were the same forms as presented to the Attorney General. These are Plan A that I referred to, which is simply the same thing in different forms of arrangement.

(Mr. Straus) I didn't mean presented to the Attorney General by the Board of Supervisors in securing his opinion, I meant during the hearing in the Attorney General's office you produced a number of photographs I think. I want to know whether these are the same.

(Mr. Allen) No, these are similar to them, but it represents Plan A.

(The Court) Well, it doesn't make any difference whether it mentioned Goldsborough, Smith and Nice, or Brown, Samuelson and some other person; the principle is the same.

(Mr. Allen) That's it. It is the same form.

(Mr. Straus) I know it is the form, but it isn't what we had given the Attorney General and which was under consideration by him.

(The Court) Well, now, gentlemen, let us proceed. The exhibit is in. Have you any others, Mr. Allen?

(Mr. Allen) There was an Answer in the Norris suit which shows Plan B, which I presume to be consistent, we ought to put in (searching for paper in question). I won't have to put this in because it is in the stipulation, it is the Plan B as shown on the Answer in the Norris suit, and there is no use repeating it needlessly.

Now, if your Honor please, Mr. Page and General Straus and Mr. Jones brought up in their Bill of Complaint some question about the size type and the necessity of putting the name Republican, Republican, Republican, after every name on a Republican primary ballot; and the necessity of putting the word Democrat after the name of every person who is a candidate for nomination on the Democratic primary ballot; and you will find, sir, in the Automatic Company's answer in the Hattie B. Daly suit that we have alleged that—I wrote to the twenty-three county boards of supervisors——

(The Court) Listen, is there anything you want to prove by Mr. Hamilton?

(Mr. Allen) Yes, sir.

(The Court) All right, go ahead.

Q. (By Mr. Allen) Mr. Hamilton, Mr. Shoup was just on the stand a while ago——

(The Court) I don't want to cut you off, but the character of the print on this ballot is obvious from the Bench

to the Court, so I don't think you need to prove something which is demonstrated ocularly to the Court.

(Mr. Allen) You mean it is all right ocularly, your Honor.

(The Court) I can sit here and read the print on that board now.

(Mr. Allen) Well, then, is their complaint abandoned?

(The Court) No, they don't abandon anything. It is just simply wasting time to prove something that I say is demonstrated ocularly to the Court.

(Mr. Allen) Yes, sir.

Q. Mr. Hamilton, Mr. Shoup was talking about acting like a Houdini or clairvoyant in voting under Plan B. Will you tell his Honor your idea of the vote under Plan B?

(Mr. Straus) We object. First, I object to the character of the question.

(The Court) Well, Mr. Hamilton, you heard Mr. Shoup's testimony. Now, you have a right to rebut it, contradict it, and say he is mistaken and tell why, if you want to.

(Mr. Allen) Yes, sir, I will adopt that question. Go ahead, Mr. Hamilton.

A. Plan B as shown on the machine, and the Plan A, are both designed to give the voter the opportunity of voting first and second choice. In Mr. Shoup's demonstration on that machine, he endeavored to show—and did not show——

(Mr. Straus) We object, your Honor, to what he did not show.

(The Court) Well "endeavored to show," what?

(The Witness) That he could vote the second choice and the first choice for the same candidate. What he did do was to, through force, hold down the second choice and partially pull up the first choice, thereby voting on a second choice counter. On the paper ballot there is

nothing physical to prevent the voter from voting second choice only, but the election officers count that as a first choice vote. The machine endeavors to prevent the voter from making that mistake, so that he has to turn back the second choice pointer before he can vote another first choice. If he turns back the first choice it automatically turns back the second choice with it. With the necessary force, on any machine, you can so mutilate the machine that the voter can cut himself out of a first choice vote. In fact, on any machine, with the necessary force, you can do almost anything. Does that answer the question?

(Mr. Straus) I move that the last part be stricken out, if the Court please.

(The Court) All right. If I noticed Mr. Shoup correctly, while he manipulated one lever he applied considerable force to keep the other from moving, he put his thumb or digits underneath of it so that it wouldn't go down.

(Mr. Allen) Yes, sir, that's right. Mr. Shoup didn't—

(The Court) Just let me finish that: He had to throw the machine out of its normal use by using both of his hands at the same time.

(Mr. Allen) Yes, sir. And, Mr. Hamilton, one hand is necessary to turn the overhead lever at the same time, isn't it?

(Mr. Jones) Oh, no. I object to that.

A. Yes, sir.

Q. (By Mr. Allen) And also, Mr. Shoup did not hold up first choice vote and hold down second choice vote and then, at the same time, with all his act of a Houdini even, he didn't then pull up the first choice of the same man who was the second choice, did he?

(Mr. Straus) We object.

(The Court) All right. I saw what he did.

(Mr. Allen) Well, he didn't do it?

(The Court) Well, I saw what he did; maybe the record may not exactly disclose it. I quite agree with

anybody that there is no machine that, with a certain amount or the requisite amount of force used by a skillful person, may not be made to work inaccurately.

(Mr. Allen) Yes, sir.

Q. Well, Mr. Shoup did do that? That latter part which I just stated to you?

(Mr. Page) I object to that.

(The Witness) May I add——

(Mr. Straus) I object to his adding anything.

(The Court) Well, if you haven't already told us what you observed Mr. Shoup do, you may continue and finish your answer.

(The Witness) Well, when a voter goes into a voting machine and wishes to operate it, he doesn't go in to prevent himself voting what he ought to vote——

(The Court) Strike that out. That is just falling into the same error that the witnesses for the plaintiff fell into.

(The Witness) But he does do this: The incentive that he has——

(Mr. Straus) Well, the Court has just ruled that out.

(The Court) The objection is still sound, I think.

(The Witness) I just wish to point out only that the voter——

(The Court) Now, we recognize your supremacy as an expert mechanic, but we do not concede your supremacy in interpreting voting human nature. Anything else, Mr. Allen?

(Mr. Allen) Witness with you, gentlemen.

CROSS EXAMINATION.

By Mr. Page:

Q. Mr. Hamilton, you mentioned in your answer a few minutes ago that it was possible to mutilate the machine

in voting it incorrectly. You have just seen a demonstration by Mr. Shoup, and I take it that is what you were speaking about. Did you intend to say that the machine had been mutilated by his operation? A. No.

Q. In other words, there was no injury to any part of the machine in that operation, was there? A. No.

(The Court) I would say what he meant to say was this: That Mr. Shoup by strategic application of his thumb retarded the movement of one lever while he operated the other with his right hand.

(Mr. Page) Is that what you intended to say, Mr. Hamilton? A. Yes, sir.

Q. Was there any noise that you noticed that was made by Mr. Shoup while he was demonstrating that operation which could have been detected outside of the machine? A. No.

Q. Did you notice that Mr. Shoup operated the machine when he demonstrated this vote without the assistance of any other person? A. Yes.

Q. And was able to do it without any tools and without any help, except by the use of his own hands? A. But he could have had tools in with him and have done the same thing.

(Mr. Page) Now, I move to strike out that answer as not responsive.

(The Court) Motion granted.

(Mr. Page) Now, will you answer the question as I put it, Mr. Hamilton?

(The Witness) Repeat the question, please.

(Question repeated by the reporter.)

(Mr. Page) Did you notice that he was able to make his demonstration without the use of any tools, and without any outside help, and without the use of anything except his own hands? A. Yes.

(Mr. Page) That's all.

Questions by Mr. Jones:

Q. Just one question: Mr. Hamilton, you noticed the demonstration, and as a result of your observation of the demonstration, there is no doubt that Mr. Shoup did record on the machine a vote for second choice with no vote for first choice? A. (After a pause) I don't know.

Q. Well, you saw the operation, didn't you? A. I should say yes.

Q. Well, isn't it true that he did record a vote for second choice and no vote for first choice, if the mechanism of your machine operated as it was supposed to operate, with the levers in the positions in which they were? A. He may not have pushed that first choice pointer up enough to not register on the first choice counter.

Q. Well, you saw it, what would be your opinion as to whether it was up far enough to prevent the first choice counter from counting? A. I should say that it did.

Q. That it did record a second choice vote with no vote for first choice? A. I should say so.

(Mr. Jones) That's all.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. Did Mr. Shoup have to employ any unusual amount of strength in doing that, out of the ordinary? A. I think so.

(Mr. Allen) That's all.

(Mr. Page) And, Mr. Hamilton, I want to add this, which has perhaps demonstrated itself already; that the vote for second choice which has just been mentioned could in no way be identified by a counter so as to accomplish the purpose of the law in having a second choice ballot counted for first choice, could it? A. That is so.

(Mr. Page) Yes, I just wanted to clarify that.

(The Witness) Yes.

(Mr. Page) That's all the questions I have.

(Mr. Allen) That's all, Mr. Hamilton.

(Testimony of witness concluded.)

(The Court) Now, is that all your testimony?

(Mr. Allen) Well, it may not be, your Honor——

(Mr. Straus) I want to ask the Court's permission, inasmuch as there has been some question as to the amount of force used, and whether Mr. Shoup used one hand or both hands, it seems to me, may it please the Court, we ought to be allowed to recall him and let him state briefly just what he did.

(The Court) Do you object?

(Mr. Allen) I will be glad to have General Straus go up there personally to this machine, your Honor——

(The Court) Listen, that is not the point. Do you object or not? General Straus has asked permission to have Mr. Shoup put back on the stand to re-examine him on a matter which he has already been examined on.

(Mr. Due) I object to that.

(The Court) Objection sustained.

(Mr. Straus) Exception noted. May I formulate, briefly, a proffer of proof in that connection, your Honor?

(The Court) Very good, General, but I prefer you wouldn't. We have already wasted a great deal of time in unnecessary talk—not you, because you haven't been guilty in any sense of it.

(Mr. Straus) Very well, your Honor, I won't.

(The Court) Go ahead, Mr. Allen. Anything else?

(Mr. Allen) Your Honor please, I would like to put in evidence the fact that the following seven counties, through their respective boards of supervisors of election, namely, Cecil County, Frederick County, Harford County, Kent County, Queen Anne's County, Somerset County, and Howard County, on the primary ballot of 1934 of the Republican party, had the word "Republican" up at the top of the group of nominees, but did not

repeat the word "Republican" after each name on the primary ballot; and the same with the Democratic ballot.

(The Court) Do you object to that?

(Mr. Jones) We object to it.

(The Court) Objection sustained. There can't possibly be any application in that to this case.

(Mr. Allen) Exception noted. That is the case of the Automatic Voting Machine Corporation, your Honor.

(Mr. Evans) That is the case of the Mayor and City Council and Mr. Graham.

(The Court) Any rebuttal?

(Mr. Straus) No rebuttal.

(Argument to the Court then followed, until adjournment at five oclock P. M.)

OPINION.

(Filed 11th October, 1937.)

The Court is asked by the complainants in both the above entitled causes to declare null and void a contract dated September 8, 1937, made by and between the Automatic Voting Machine Corporation and a special State Board created by law. The contract covered the sale and purchase for use in the City of Baltimore of 910 voting machines for the gross price of $752,524.50.

Mr. Norris, represented by Mr. Charles G. Page, is acting in behalf of a civic improvement group. Mrs. Daly, represented by General Straus and Mr. Willis R. Jones, is (with perfect propriety) acting for an unsuccessful bidder.

It is perhaps better to treat the two cases heard together though not consolidated, chronologically. This opinion must necessarily be hurriedly prepared, for chaos will result if the disputed questions are not settled quickly and in time to permit some manufacturer to complete and deliver sufficient voting machines to serve at the pri-

mary elections next year, since no election can be held in Baltimore other than by voting machines. The time yet remaining to complete the manufacture of the machines and train the election officials in their use is all too brief at best.

The General Assembly by Chapter 94, Acts of 1937, directed the Board of Supervisors of Elections of Baltimore in all future elections to use the voting machines (50) heretofore purchased by the City; and to hold all elections in the City after January 1, 1938, with the aid of voting machines. The former paper ballot method of voting was abolished in Baltimore. The Act is constitutional. (Norris vs. Mayor and City Council, 192 Atlantic Reporter, 531, decided May 26, 1937).

The Act also created a special and temporary Board composed of members for the time being of the Board of Estimates and the Board of Election Supervisors of Baltimore. That Voting Machine Board was charged with the power, duty and discretion to buy a sufficient number of voting machines for use in all polling places throughout the City of Baltimore in all primary, general and special elections held, or to be held, in the City after January 1, 1938, at the cost of the City. The Board was apparently created for a single purpose, viz. to select and buy one stock or outfit of voting machines; and save for specifications set out in the Act, was given plenary power during its short and unique existence in its discretion to frame specifications, to select the type and make of such voting machines, to employ engineers or other skilled persons to advise and aid it in the exercise of the powers and duties conferred.

The Board went about its duties with great energy, intelligence and care; gave earnest and thorough consideration to the complexities of its problem, got good mechanical, professional and legal advice, freely gave ear to suggestions, complaints and claims of competing concerns and the public. Withal it acted with prudence and unquestioned integrity.

As soon as the validity of Chapter 94, Acts of 1937, was settled late in May by the Court of Appeals the Board prepared elaborate printed "Notice of Letting Specifications Proposals, Contract and Bond for Furnishing and

Delivering Voting Machines and doing Other Work''; and advertised to the effect that sealed bids would be received for 910 voting machines, of Type A Size 1 and Type A Size 2 until noon, August 11, 1937. The Board reserved the right to reject any and all bids; to waive technical defects; to make such award as it might deem best for the public interest.

Bidders were required before the bids were opened to set up a sample of each size of Type A machine in the Election Supervisors' office, to be taken by all parties concerned to be ''representative'' in all respects of the machines and equipment to be delivered by the successful bidder. There is no specification that the sample machine be identical with the machine bought.

The bids were publicly opened. It developed two bids were submitted. The Shoup Voting Machine Corporation, a compartively new-comer in the voting machine industry with a compartively small patronage (though doubtless a competent and reliable concern) bid $1,047.00 each on Type A Size 1 Machine, or a total of $952,770.00. The Automatic Voting Machine Corporation, the largest, oldest, most experienced and most patronized concern in the industry, bid $826.95 each on Type A Size 1 Machine, or a total of $752,524.50.

A spirited rivalry developed for the business. Flaws were picked with, and criticisms directed at, the Automatic's product. More hearings were had by or on behalf of the Board and further investigations made. After full consideration the Board awarded the contract to the Automatic Voting Machine Corporation on September 8, 1937. A contract between the successful bidder and the Board was executed the same day.

It is that contract which Mr. Norris, harboring no partizan feeling, would have subjected to a judicial test; and that Mrs. Daly would earnestly desire be declared void, and the defendants enjoined perpetually from carrying out.

Concluding (as we must, if guided by the proof) that the Board in awarding the contract to the Automatic Corporation exercised its wide discretionary power without collusion or fraud, merely used its honest, reasoned judg-

ment, the Board's conclusions, whether wise or unwise, are not reviewable by the Court, (Fuller vs. Elderkin, 160 Md. 660) unless in some way the Board acted contrary to law.

Therefore, the Court will notice only those allegations in the pleadings or offered in proof tending to show, (1) Either that the Board contracted for a voting machine which (a) can not be used in conformity with the election laws, or (b) which does not afford a voter his right to vote as guaranteed by Section Seven of the Bill of Rights and Article One, Section One of the Constitution; or (2) That the Board was subject in buying the machines to the State's Central Purchasing Bureau, or accepted a bid which was void under the doctrine expressed in Konig vs. Baltimore, 126 Md. 606.

It would seem that most of the objections urged by the plaintiffs are easily corrected. The Court regards but two as serious. Every objection is based upon technical grounds.

Taking up the lesser complaints first and in order:—

No. 1. That in the primary elections where three candidates or more are competing for the same party nomination to a state wide office, the machine ballot carries the name of each of said candidates more than once; a violation it is urged of Art. 33, Sec. 203, Code of Public General Laws. If that be a fault, it is a fault common to all existing makes of voting machines. Therefore if plaintiff's proposition is sound, this dilemma exists; either endure the alleged violation of Sec. 203 or forego the next primary election if three democratic candidates, for example, are competing for the Gubernatorial nomination, or by extra session of the General Assembly amend Art. 33, Sec. 203. Fortunately it is not sound, for Chapter 94, Acts of 1937 "repeals all laws or portions of laws inconsistent with or in conflict" therewith. It is scarcely necessary to suggest that the General Assembly had no intent to wreck the scheme of the voting machine law on such a slight snag; and it must be concluded that Art. 23, Sec. 203 was repealed or modified pro tanto. 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 can not occur on a voting machine set-up. That is all the Legislature sought to accomplish, and voting machines accomplished that precise result.

No. 2. That the voting machine does not have, as the specifications required, nine rows of levers etc., counting from top to bottom. That complaint results from some inexplicable confusion; for the machine does in fact have nine rows.

No. 3. 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 uses.

No. 4. That the machine does not afford enough space to accommodate "plain, clear type so as to be clearly readable by persons with normal vision, etc., etc." (See 224 G., Ch. 94, Acts of 1937), and that the ballot labels are improper, the designation of parties etc. are improperly placed, likewise the residence of the candidates; that the directions to voters are inadequate; that the form and arrangement of the ballot on the machine can not be set up "as nearly as may be" to conform to the paper ballot

law, contrary to the voting machine act (see paragraphs C, D, E, F, G, of Mrs. Daly's Bill of Complaint). 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.

No. 5. Mr. Page, on behalf of Mr. Norris, by amendment to his original bill, took the position (in which neither counsel for Mrs. Daly nor for the defendants concur) that the Voting Machine Board by virtue of the fact that it is a State Board could lawfully make no purchase in excess of $500.00 without the aproval of the State's Central Purchasing Bureau. Approval was neither asked nor given; wherefore the assertion is made that the instant contract is illegal; is in violation of Art. 78 of the Code of Public General Laws, enacted by Chapter 184, Acts of 1920.

With great respect to the fine learning and legal judgment had by Mr. Page, it will perhaps be sufficient to say that after reading the Voting Machine Law, Chapter 94, Acts of 1937, it is impossible to conclude that the Legislature to any extent whatever intended to subject the Board to the control of, or to divide its responsibility with, the Central Purchasing Bureau.

That disposes of the lesser questions in the case; all excessively technical; none of practical importance in fact as understood in the light of the proof.

Two questions remain which have given the Court concern; and to which the Court has devoted the fullest examination and the closest thought possible in the limited time to be had.

First: Under the paper ballot law where three or more persons are candidates for nomination in the same party primary, voters entitled to vote in such primary have the right to indicate their first and second choice.

To make that first and second choice physically known the paper ballot primary election law requires that opposite each of such candidates' names on the primary ballot shall be printed two squares properly indicated as appropriate to be marked with a cross mark, if for first choice in the first choice square or block; if for second choice in the second choice square or block. Therefore, if a voter prefers candidate A for first choice he puts his cross mark in the first choice block opposite A's name; and regarding candidate B next in order of desirability he puts a cross mark in the second choice block opposite B's name. He may vote his first choice and stop. If however he votes in the second choice block, making no first choice, his vote is counted as a first choice for that candidate, since the voter has made but one choice, and it is assumed he has no second choice. Therefore, to make a first and a second choice in such primary the voter must act twice. (See Sec. 203, Art. 33 Code of Public General Laws, Acts of 1912, Ch. 2, Sec. 160 K.) Sec. 224 F (d) of Chapter 94 Acts of 1937 requires the Board in selecting a voting machine, to provide machines which permit voting in "substantial compliance with the provisions of Sec. 203" of Art. 33. The Automatic machine set up and exhibited in the Supervisor's office before the bids were opened was rigged to show what is referred to throughout as "Plan A." That plan was set up so that a voter participating in a three or more candidate primary might depress one lever and vote his first choice; however having done that the machine locked and he could not by depressing a second lever indicate his second choice; nor vote a second choice ballot only. However, he may by depressing but one lever vote both his first and second choice by the single operation. It is alleged solely by virtue of the fact that he does not depress two levers to indicate his first choice then his second choice that "Plan A" is not in "substantial compliance" with Sec. 203 of Art. 33; that to vote his first choice and his second choice by one flip of one gadget is group voting. And so the Attorney General has ruled.

What practical difference it makes, what evil is to be avoided by requiring a plan which involves two motions rather than one is most difficult to understand. "Plan B", which all agree is legal, may be used on the same

machine by attaching thereto and connecting a few wafer-thin, tiny metal squares and a few strips of flexible metal, the size about of ordinary red tape ribbon; the needed appliances to change from Plan A to Plan B set-up weigh in all perhaps less than one pound. The cost of that addition is under two dollars per machine. It is conceded that under the contract the Board may require the Automatic Company to furnish machines set up to accommodate "Plan B" at the original bid figure; and the Automatic Company is glad to comply.

The difference between Plan A and Plan B to restate it for the sake of clarity is that under Plan B the voter, so to speak, rings twice to make his first and second choices; and under Plan A rings but once to make both.

If the Board requests "Plan B" the complaint then is threatened that the addition of this trifling amount of metal, which can be attached or detached in a few minutes to an apparatus approximately the size of an upright piano, though higher, and which weighs 700 or 800 pounds, costs $826.95, at an additional burden of expense to the manufacturer of $2.00, with no cost to the city, is 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. It is clearly an untenable position. The quarrel is with the Board, should it get more than it bargained for; if it should. In the Court's opinion, a machine adapted to either Plan A or Plan B, is an instrument of which the specimen was "representative" and well nigh identical "in all respects", and in so far as that complaint is concerned free from objections.

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 can not make a mistake. The ultimate object of Sec. 203 of Art. 33 is as fully, fairly and accurately accomplished thereby as is possible in paper ballot voting. Cautious as this Court is when any disagreement with the opinion of the Attorney General may result it must in candor be said that the Plan A is in substantial

compliance with said Section 203, and is legal, if the term "substantial" is given the meaning ascribed to it in Carr vs. Hyattsville, 115 Md. 545.

The next and last point arises solely in connection with elections which the Constitution itself requires, as distinguished from primary elections, and municipal elections other than in Baltimore City. Hanna vs. Young, 84 Md. 181; Smith vs. Stephan, 66 Md. 381.

Art. 7 of the Declaration of Rights provides "that * * * 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".

Art. 1 Sec. 1 of the Constitution provides that "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" etc.

The voting machine selected by the Board is so arranged that a voter has the option of voting for the candidates whose names are printed on the voting machine ballot by the election officials else be disfranchised at that election. For that reason it is charged with vigor that the contract to buy such machines is illegal, because a voter's free right to vote for whom he wills, whether nominated by some party or not, is assured to him under the Bill of Rights and the Constitution, and he is wholly denied that right if this particular type of machine be used, since no facility is offered whereby he can "write in" the name of the individual he wants.

Prior to the adoption of the Australian Ballot law about 1890 unofficial ballots were used, and voters freely wrote in names thereon or "scratched" the names of any candidates printed thereon. When the Australian Ballot law was enacted it was accepted as a matter of course that some provision must be made for a voter to vote his choice, even if not a regular nominee or other candidate who had taken steps to get his name printed on the official ballot as an independent or otherwise. From 1900 on for many years the Court was personally informed of the informally stated views of eminent lawyers to the effect that a ballot law which failed to provide blank lines or spaces in which to write in the name or names of any

person they might choose, freakishly, foolishly or otherwise, was void and unconstitutional. Nor was such a write in considered a "distinguishing mark"; or if so the Constitution permitted it, and the ensuing fraud or corruption, if any resulted therefrom, had to be endured.

Strangely enough the "write in" privilege though long invited by suggestive blank lines on ballots was seldom used. The Court has seen thousands of voted ballots examined in contested election cases and recalls no instance of the "write in" of a candidates name. However if the right exists under the Constitution it must be respected whether prized or neglected. Long acquiescence in an unconstitutional act does not operate as an estoppel and thereby make an unconstitutional law in effect constitutional. Somerset Co. vs. Pocomoke Bridge Co., 109 Md. at p. 7.

For over thirty years every official ballot at elections carried appropriately placed lines or blank spaces to gratify the "write in" right. Finally in 1924 the "write in" lines were eliminated by Statute from official ballots; and no inquiry, complaint or test touching the matter has come to the official attention of any Maryland Court. Therefore, notwithstanding the Constitution was adopted seventy years ago, the question appearing here was never raised, and there is no Maryland precedent in point. Even an examination of the Record of the Proceedings of the Constitutional Convention of 1867 unearths no clue to the intent of that Body in the premises.

Two Attorney Generals have given a total of three opinions in effect that it is not necessary to the validity of a ballot law that provision for a "write in" be inserted; and on the contrary to do so is illegal.

"Write in" equipment can be applied to the type of voting machine purchased; but at an additional cost of $82.00 each, and substantial mechanical alterations. It is perfectly natural in view of the acquiescence since 1924 in ballot laws denying the right of "write in", and the opinions referred to by two Attorney Generals that the facility was not required that neither party to this contract expected or agreed that the more expensive article with the "write in" appurtenances be supplies.

Probably no one will deny that if the voting machine purchased in fact denies a voter his constitutional rights the Board acted illegally in adopting it. Nor will anyone deny that the Legislature may pass valid statutes setting up reasonable regulations for elections, establish the form of ballots and rules of evidence etc., Southerland vs. Norris 74 Md. 328; Taylor vs. Bleakley, 55 Kansas 1; State vs. Superior Court, 60 Washington 370; Hope vs. Williams 98 Md. 59, provided a voter's constitutional right is not destroyed or its exercise made so inconvenient that it is impossible to enjoy it.

In the latter connection the defendants urge upon the Court's attention the provisions of law whereby a candidate (or his backers) may secure the printing of his name on the ballot by petition signed by qualified voters to the number of 500, 750, 1500 or 2000 according to the geographical unit involved as being sufficiently reasonable by way of statutory regulation as to gratify the constitutional requirement for "write in" facilities, if that right exists at all. Treating questions in inverse order of importance, the Court can not so hold. Manifestly it is a burdensome, costly and tedious job (see Cohn vs. Isensee (Colorado), 188 Pacific, 279) to get even 500 signatures, when the details of the election law are to be complied with. Nor has any precedent come to the Court's attention where the right to get names on the printed ballot by petition was held to be so simple and reasonable as to gratify the constitutional requirement, except in one. In that case the number of signers required was fifteen. McKenzie vs. Boykin, 71 Southern, 382. Further comment would seem unnecessary.

The Court's investigation greatly aided by the competent, helpful counsel in these cases, discloses that many states recognize by Statute the "write in requirement" and respect it. In many the Constitutional requirement is assumed by the Courts to be necessary, though the point was not directly in issue. In others the Courts demand recognition of the right. In one, contrary to the decisions and the obiter of the many, its Court upheld a Statute which flatly denied the right.

Turning to the precedents, quoting briefly for purposes of illustration from a few selected at random and merely noting the balance we find:—

In the People exrel. Goring vs. The President etc., 144 N. Y. 616, decided in 1895, the Court held that under a Statute which declared that "the name of any person for whom the voter desires to vote for any office named on the official ballot may be written on the official ballot" by the voter, and if the election officials fail to print on the official ballot the name of an office to be filled, the voter may write in the name of the office and of the person he wishes to vote for to fill the position. Quoting from page 620 of the opinion the Court said "The 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".

In People vs. Shaw, 133 N. Y. decided in 1892, wherein a similar question arose the Court said at p. 497:—

"The first objection that the relators, having failed to receive a proper nomination by a political party" * * * "is wholly unsound. The plan contained in Secs. 2 and 3 of the Ballot Reform Act was a provision for the printing of an official ballot at the public expense" * * * "But that it was in no wise intended to prevent the voter to vote for any candidate whom he may choose is evident from the further provisions of the law that "the voter may write or paste upon his ballot the name of any person for whom he desires to vote for any office". Indeed, to hold otherwise would be to disfranchise, or to disqualify, the citizen as a voter or candidate, and, in my opinion to affect the law quite unnecessarily with the taint of unconstitutionality in such respects."

In Littlejohn vs. The People, 52 Colorado 217, decided in 1911, the Court held that under the Colorado Constitution every qualified voter has an equal right to cast a ballot for the person of his selection, and nothing can lawfully prevent the exercise of that right. Hence, it declared unconstitutional an act which provided that no person other than those whose names appear upon the official ballot shall be voted for. The Constitutional provisions construed provided that every duly qualified elector "shall be entitled to vote at all elections" and "That all elections shall be free and open; and that no power,

civil or military, shall at any time interfere to prevent the free exercise of suffrage''. At page 223, the Court said:

''That means that every qualified elector shall have an equal right to cast a ballot for the person of his own selection, and that no act shall be done by any power, civil or military, to prevent it'' * * * ''while it can not be questioned that the legislature has power to prescribe reasonable restrictions under which the right to vote may be exercised'' * * * ''such restrictions must be in the nature of regulations, and can not extend to the denial of the franchise itself.''

In Independence Party Nomination, 208 Pa. State, 108, decided in 1904, the Court held that the Constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument, and each elector is entitled to express his individual will in his own way. His right can not be qualified, denied or restricted, and is only subject to such regulation as is necessary for the orderly and peaceable exercise of the same right in other electors. The requirement for the use of an official ballot is a questionable exercise of legislative power and even in the most favorable view treads closely on the border of a void interference with the individual elector. Every doubt, therefore, in the construction of the Statute must be resolved in favor of the elector. The Pennsylvania Constitution provides that ''all elections shall be free and equal''.

In State vs. Johnson, 87 Minn. 221, decided in 1902, the Court had before it for decision the matter of a primary election official ballot which offered no facility for a voter to write in the name of a person or to vote other than for persons whose names were printed on the ballot. The Court said at p. 223:—

''If the election of candidates to the position of nominees is an election within the meaning of Art. 7 of the Constitution, then the primary law above construed, is unconstitutional. It would in certain cases, deprive the voter of his privilege to exercise the elective franchise. Such an occasion might arise when no candidates appear for nomination, no provision being made for filling vacancies of for leaving blank lines on the ballot to enable the voter to write in the name of some person of his choice.''

The Minnesota Constitution provided that:—

"Every male person of the age of twenty-one" * * * "shall be entitled to vote at such election" * * * " for all officers that now are or hereafter may be elective by the people."

The Supreme Court of Miss. held in McKenzie vs. Boykin, decided in 1916, 71 Southern Reporter, that a voter might lawfully write in the name of a candidate on the official ballot in the event of the death of a candidate whose name was printed on the official ballot; and distinguished the case being decided from Mayor vs. State, 102 Miss. 663, and State vs. Ratliff, 66 Southern 538, where the Court held a voter had a right to write in the name of the candidate of his choice, when that person was not a party nominee. In the 66 Southern Reporter case the ballot considered was an official ballot. In the 102 Miss. case the ballot was unofficial. The distinction drawn in 71 Southern Reporter is unconvincing. In the 71 Southern Reporter case the Court held which is of interest here, that the Constitutional requirements were reasonably met by the provisions of the Statute whereby names of candidates not party nominees may be placed on the ballot by a petition signed by 15 qualified electors.

The Mississippi Courts at least subscribe to the validity of the doctrine that a voter may not by Statute be limited in voting to a choice of party nominees; and has a Constitutional right to vote for the persons of his choice whether nominated or not; and that the regulation cited voiding a vote for anyone not a nominee except for one whose name is placed by the election officials on the ballot upon the petition of 15 voters was reasonable and valid.

Without quoting further from opinions, all of the same general tenor, it may be said that in addition to the precedents cited above it has been held by Courts of several other States that Acts which impose the option upon a qualified voter of either voting for the candidates named on the official ballot, whom he does not want elected, or be disfranchised, have been held by direct decisions or by necessary inference to be bad. That is to say:—

Wisconsin (State vs. Runge, 42 L. R. A. at p. 243);

Illinois (Fletcher vs. Wall, 172 Ill. 426; Sanner vs. Patton, 155 Ill. 554; People vs. McCormick, 261 Ill. 413);

Iowa (Barr vs. Cardell, 155 N. W. 312);

California (Patterson vs. Hanley, 136 Cal. 265);

Colorado (Cohn vs. Isensee, 188 Pacific 279, cited above, and precisely in point);

Florida (State vs. Dillon; 32 Fla. p. 555; a leading case precisely in point);

Iowa (Voorhees vs. Arnold, 108 Iowa 77);

New York (Bradley vs. Shaw, 133 N. Y. 493);

Michigan (Outman vs. Fox, 114 Mich. 652);

Montana (Price vs. Lush, 10 Mont. 61);

Pennsylvania (DeWalt vs. Bartley, 15 L. R. A. 771);

Missouri (Bowers vs. Smith, 111 Mo. 46; State vs. Hosetter, 137 Mo. 636);

Mass. (Cole vs. Tucker, 164 Mass. 486; Capon vs. Foster, 12 Pick. 485);

North Dakota (Howser vs. Pepper, 8 N. Dak. 485).

Cooley in his book on "Constitutional Limitations" page 1350, holds that it is essential to the freedom of elections mentioned in the Constitution that every voter shall be permitted to choose from all eligible persons, and shall not be required to choose from classes; and (page 1359) that the voter can not be restricted to the candidates whose names are printed on the official ballot. He must be allowed to vote for whom he pleases. McCrary in his work on "Elections" page 700 takes the same view.

The only division or discord in the authorities supplied by text writers and the precedents established by the Courts yet found is furnished by the Supreme Court of Louisiana in Mize vs. McElroy, 44 La. Ann. 796, and by the Supreme Court of South Dakota, by a divided court. That Court flatly denied the right of an elector to vote for one whose name was not printed on the official ballot in the case of Chamberlain vs. Wood, 15 S. Dak. 216. The Court was controlled by Constitutional provisions

substantially similar to Maryland's. Chamberlain vs. Wood, 15 S. Dak. 216, is therefore in irreconvilable conflict with State vs. Dillon, 32 Fla. 555, and the great preponderance of authority cited.

Serious as the consequences may be, the Court can find but one course to follow in the light of the Maryland Declaration of Rights and the Maryland Constitution, supported and instructed as the Court is by a weight of authority which is overwhelming. Manifestly our present ballot law denies the constitutional right of a qualified voter to vote for whomsoever he pleases, and affirmatively restricts him to candidates named on the official ballot. The voting machines contracted for under the contract of September eighth, designed to follow the statute law makes it physically and mechanically impossible for a voter to vote other than for candidates whose names are printed on the voting machine ballot at any and every election provided for by the Constitution. The device is therefore illegal for use in such elections; hence the Board can not lawfully buy them.

The relief prayed by the plaintiffs must be granted, and the defendants perpetually enjoined from proceeding further to acquire such voting machines.

SAMUEL K. DENNIS,
Judge.

October 9th, 1937.

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(23)

DECREE.

(Filed 14th October, 1937.)

In the Circuit Court No. 2 of Baltimore City.

William S. Norris, Plaintiff,

vs.

Howard W. Jackson, et al., Defendant.

This case coming on to be heard on bill and answers, testimony having been taken in open court, argument of

counsel heard, and the papers and exhibits read and considered, it is hereby ADJUDGED, ORDERED and DECREED by the Circuit Court No. 2 of Baltimore City, this the 14th day of October, 1937, as follows:

1. The Court finds as a mixed matter of fact and law that the Board created by Chapter 94, Acts of 1937, is an independent, temporary State Board, clothed with wide discretionary power; and that in selecting and contracting to purchase 910 voting machines for use in the City of Baltimore said Board exercised its discretion and performed its functions in the premises without collusion or fraud; and that it affirmatively appears that said Board used its honest, reasoned judgment in the premises; and that said Board lawfully acted and bought voting machines although it did not purchase the same through or with the approval of the State Purchasing Bureau; and

2. The Court further finds as a mixed matter of law and fact that the voting machines, selected by said Board in all particulars substantially complies with all provisions of Article 33 of the Code of Public General Laws, titled "Elections", in so far as said Statutes are in force and effect unmodified or repealed by Chapter 94, Acts of 1937, and other Acts of 1937; and that said voting machines selected by said Bureau substantially comply with all the specifications established by said Chapter 94, Acts of 1937, and with all the specifications prepared and issued by said Board prior to the invitation issued by said Board to Manufacturers to submit bids for said machines; and further that voting machines identical in every particular therewith may lawfully be used at all primary elections held in Baltimore City after January 1, 1938, and:

3. 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; and

4. That the defendants pay all Court costs.

SAMUEL K. DENNIS,

Judge.

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(19)

DECREE.

(Filed 14th October, 1937.)

In the Circuit Court No. 2 of Baltimore City.

Hattie B. Daly, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

This cause coming on to be heard on bill and answers, testimony having been taken in open court, argument of counsel heard, and the papers and exhibits read and considered, it is hereby adjudged, ordered and decreed by the Circuit Court No. 2 of Baltimore City, this the 14th day of October, 1937, as follows:

1. The Court finds as a mixed matter of fact and law that the Board created by Chapter 94, Acts of 1937, is

an independent, temporary State Board, clothed with wide discretionary power; and that in selecting and contracting to purchase 910 voting machines for use in the City of Baltimore said Board exercised its discretion and performed its functions in the premises without collusion or fraud; and that it affirmatively appears that said Board lawfully acted and bought voting machines although it did not purchase the same through or with the approval of the State Purchasing Bureau; and

2. The Court further finds as a mixed matter of law and fact that the voting machines, selected by said Board in all particulars substantially complies with all provisions of Article 33 of the Code of Public General Laws, titled "Elections", in so far as said Statutes are in force and effect u*m*modified or repealed by Chapter 94, Acts of 1937, and other Acts of 1937; and that said voting machines selected by said Board substantially comply with all the specifications prepared and issued by said Board prior to the invitation issued by said Board to Manufacturers to submit bids for said machines; and further that voting machines identical in every particular therewith may lawfully be used at all primary elections held in Baltimore City after January 1, 1938, and:

3. That the contract entered into by and between said Board and the Automatic Voting Machine Corporation and dated September 8th, 1937, for 910 Voting Machine 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 the 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; and

4. That the defendants pay all Court costs.

SAMUEL K. DENNIS,

Judge.

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(24)

ORDER FOR APPEAL.

(Filed 15th October, 1937.)

William S. Norris, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter an appeal to the Court of Appeals of Maryland on behalf of Automatic Voting Machine Corporation, one of the Defendants, from the Decree entered in the above-entitled case on October 14th, 1937, and particularly from paragraph 3 of said Decree which declares the contract for voting machines null and void on the ground that the machines are so constructed as to deny to a qualified voter the alleged constitutional right of voting for any person of his choice whose name is not printed on the ballot in general State elections and in general municipal elections in Baltimore City, and which enjoins and restrains the Defendants from proceeding further under said contract of September 8th, 1937, and from buying or accepting delivery of any said voting machines referred to therein, and from spending or pledging any public funds therefor.

ARMSTRONG, MACHEN & ALLEN,

Solicitors for Automatic Voting Machine Corporation.

(25)

ORDER FOR APPEAL.

(Filed 15th October, 1937.)

William S. Norris, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter an appeal on behalf 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, of the defendants in the above entitled case, constituting the Voting Machine Board from the decree passed on the 14th day of October, 1937, to the Court of Appeals of Maryland.

PAUL F. DUE,

Solicitor for Appellants.

(Affidavit Annexed.)

ORDER FOR APPEAL.

(Filed 15th October, 1937.)

William S. Norris, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter on behalf of the Mayor and City Council of Baltimore, one of the defendants in the above entitled

case, from the decree passed on the 14th day of October, 1937, to the Court of Appeals of Maryland.

CHARLES C. G. EVANS,

Deputy City Solicitor,

Solicitor for Appellants.

I hereby authorize the taking of the within appeal.

HOWARD W. JACKSON,

Mayor of Baltimore City.

(Affidavit annexed.)

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(26)

ORDER FOR CROSS APPEAL.

(Filed 15th October, 1937.)

William S. Norris, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter a cross appeal on behalf of William S. Norris, plaintiff herein, from that portion of the order and decree of the Court passed in this cause on the 14th day of October, 1937, as follows:

A. From that portion of Paragraph 1 of the said order in which the Court finds "that said Board lawfully acted and bought voting machines although it did not purchase the same through or with the approval of the State Purchasing Bureau";

B. From the whole of Paragraph 2 of the said order, and each and every part thereof.

CHARLES S. PAGE,

Solicitor for Plaintiff.

(21)

ORDER FOR APPEAL.

(Filed 15th October, 1937.)

Hattie B. Daley, a Taxpayer of Baltimore City, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter an appeal on behalf 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, of the defendants in the above entitled case, constituting the Voting Machine Board from the decree passed on the 14th day of October 1937 to the Court of Appeals of Maryland.

PAUL F. DUE,

Solicitor for Appellant.

(Affidavit Annexed.)

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(20)

ORDER FOR APPEAL.

(Filed 15th October, 1937.)

Hattie B. Daly, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter an appeal to the Court of Appeals of Maryland on behalf of Automatic Voting Machine Cor-

poration, one of the defendants, from the Decree entered in the above-entitled case on October 14th, 1937, and particularly from paragraph 3 of said Decree which declares the contract for voting machines null and void on the ground that the machines are so constructed as to deny to a qualified voter the alleged constitutional right of voting for any person of his choice whose name is not printed on the ballot in general State elections and in general municipal elections in Baltimore City, and which enjoins and restrains the Defendants from proceeding further under said contract of September 8th, 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.

ARMSTRONG, MACHEN & ALLEN,

Solicitors for Automatic Voting

Machine Corporation.

ORDER FOR CROSS APPEAL.

(Filed 16th October, 1937.)

Hattie B. Daly, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter a cross appeal to the Court of Appeals of Maryland on behalf of Hattie B. Daly, plaintiff, in the above entitled case from Paragraphs 1 and 2 of the Decree, passed in this case on October 14, 1937.

ISAAC LOBE STRAUS,

WILLIAM R. JONES,

Attorneys for Plaintiff.

ORDER FOR APPEAL.

(Filed 16th October, 1937.)

Hattie B. Daly, a Taxpayer of Baltimore City, Plaintiff,

vs.

Howard W. Jackson, et al., Defendants.

Mr. Clerk:

Please enter an appeal on behalf of the Mayor and City Council of Baltimore and R. Walter Graham, Comptroller of Baltimore City, two of the defendants in the above entitled case, from the decree passed on the 14th day of October, 1937, to the Court of Appeals of Maryland.

CHARLES C. G. EVANS,

Deputy City Solicitor,

Solicitor for Appellants.

I hereby authorize the taking of the within appeal on behalf of the Mayor and City Council of Baltimore.

HOWARD W. JACKSON,

Mayor of Baltimore City.

(Affidavit annexed.)

Which said appeals being by the Court also granted it is thereupon Ordered by the Court here that a transcript of the record of proceedings in the case aforesaid, be transmitted to the Court of Appeals of Maryland under the rules thereof, and the same is transmitted accordingly.

Test:

JOHN PLEASANTS,

Clerk of the Circuit Court No. 2 of Baltimore City.

In Testimony Whereof that the aforegoing is a full and true transcript of the aforegoing papers taken from the record of proceedings in the Circuit Court No. 2 of Baltimore City in the cause therein mentioned.

(Seal) I hereto set my hand and affix the seal of the said Circuit Court No. 2 of Baltimore City on the 16th day of October, in the year of Our Lord Nineteen hundred and thirty-seven.

Test:

JOHN PLEASANTS,
Clerk of the Circuit Court No. 2 of Baltimore City.

Approved:

CHARLES C. G. EVANS,
Solicitor for Mayor and City Council of Baltimore and R. Walter Graham,

PAUL F. DUE,
Solicitor for Voting Machine Board,

ARTHUR W. MACHEN,
WENDELL D. ALLEN,
ARMSTRONG, MACHEN & ALLEN,
Solicitors for Automatic Voting Machine Corporation,

For Appellants and Cross-Appellees.

CHARLES G. PAGE,
For Appellee and Cross-Appellant Norris,

ISAAC LOBE STRAUS,
WILLIS R. JONES,
For Appellee and Cross-Appellant Daly.

Appellants' Costs $65.00.
Appellees' Costs, $40.00.

VOLUME OF EXHIBITS.

Record - Nos. 3 and 4

HOWARD W. JACKSON, ETC., ET AL.,
VS.
WILLIAM S. NORRIS.

CHARLES C. G. EVANS,
Solicitor for Mayor & City Council of Baltimore,

PAUL F. DUE,
Solicitor for Voting Machine Board,

ARTHUR W. MACHEN,
WENDELL D. ALLEN,
ARMSTRONG, MACHEN & ALLEN,
Solicitors for the Automatic Voting Machine Corporation,
For Appellants and Cross-Appellees.

CHARLES G. PAGE,
For Appellee and Cross-Appellant.

HOWARD W. JACKSON, ETC., ET AL.,
VS.
HATTIE B. DALY.

CHARLES C. G. EVANS,
Solicitor for Mayor & City Council of Baltimore and R. Walter Graham,

PAUL F. DUE,
Solicitor for Voting Machine Board,

ARTHUR W. MACHEN,
WENDELL D. ALLEN,
ARMSTRONG, MACHEN & ALLEN,
Solicitors for the Automatic Voting Machine Corporation,
For Appellants and Cross-Appellees.

ISAAC LOBE STRAUS,
WILLIS R. JONES,
For Appellee and Cross-Appellant.

IN THE

Court of Appeals

OF MARYLAND

APPEALS AND CROSS-APPEALS IN TWO CASES IN ONE RECORD FROM THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

APPEAL TO THE JANUARY TERM, 1938, OF THE COURT OF APPEALS OF MARYLAND

Filed October 16, 1937.

Press of
THE DAILY RECORD COMPANY
11-15 East Saratoga Street
Baltimore, Md.

DEFENDANT'S EXHIBIT F

DEFENDANT'S EXHIBIT G

DEFENDANT'S EXHIBIT H

Defendant's Exhibit I

Automatic
PLAN "A"

GOVERNOR

REPUBLICAN

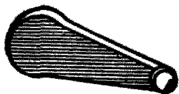
Turn down any one Pointer

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

Defendants' Exhibit I.

AUTOMATIC

PLAN "A"

GOVERNOR

DEMOCRAT

Turn down any one Pointer

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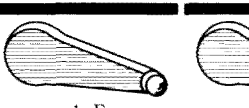


1 F	2 F	3 F	4 F

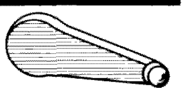
CHARLES H. CONLEY FREDERICK COUNTY

1st Choice Only	1st Choice with Howard W. JACKSON 2nd Choice	1st Choice with Herbert R. O'CONOR 2nd Choice	1st Choice with Lansdale SASSCER 2nd Choice

1 G	2 G	3 G	4 G

HOWARD W. JACKSON BALTIMORE CITY

1st Choice Only	1st Choice with Charles H. CONLEY 2nd Choice	1st Choice with Herbert R. O'CONOR 2nd Choice	1st Choice with Lansdale SASSCER 2nd Choice



1 H	2 H	3 H	4 H

HERBERT R. O'CONOR BALTIMORE CITY

1st Choice Only	1st Choice with Charles H. CONLEY 2nd Choice	1st Choice with Howard W. JACKSON 2nd Choice	1st Choice with Lansdale SASSCER 2nd Choice

1 I	2 I	3 I	4 I

LANSDALE SASSCER PRINCE GEORGE COUNTY

1st Choice Only	1st Choice with Charles H. CONLEY 2nd Choice	1st Choice with Howard W. JACKSON 2nd Choice	1st Choice with Herbert R. O'CONOR 2nd Choice

Defendant's Exhibit I.

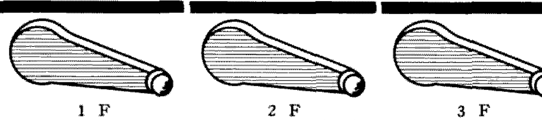
AUTOMATIC

PLAN "A"

GOVERNOR

Turn down any one Pointer

1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE	1st & 2nd CHOICE

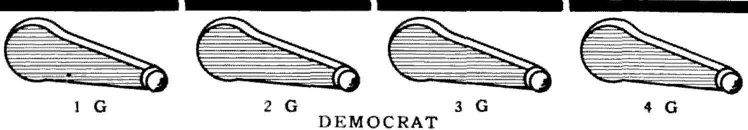


1 F	2 F	3 F	4 F

DEMOCRAT

CHARLES H. CONLEY FREDERICK COUNTY

1st Choice Only	1st Choice with Howard W. JACKSON 2nd Choice	1st Choice with Herbert R. O'CONOR 2nd Choice	1st Choice with Lansdale SASSCER 2nd Choice

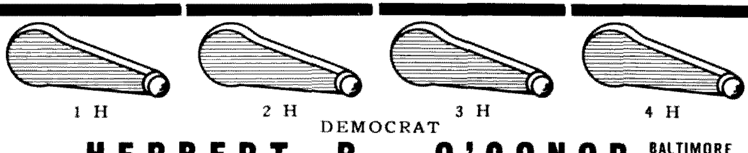


1 G	2 G	3 G	4 G

DEMOCRAT

HOWARD W. JACKSON BALTIMORE CITY

1st Choice Only	1st Choice with Charles H. CONLEY 2nd Choice	1st Choice with Herbert R. O'CONOR 2nd Choice	1st Choice with Lansdale SASSCER 2nd Choice

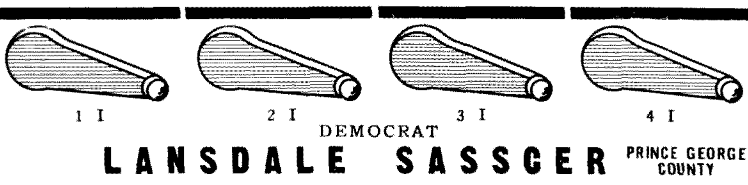


1 H	2 H	3 H	4 H

DEMOCRAT

HERBERT R. O'CONOR BALTIMORE CITY

1st Choice Only	1st Choice with Charles H. CONLEY 2nd Choice	1st Choice with Howard W. JACKSON 2nd Choice	1st Choice with Lansdale SASSCER 2nd Choice



1 I	2 I	3 I	4 I

DEMOCRAT

LANSDALE SASSCER PRINCE GEORGE COUNTY

1st Choice Only	1st Choice with Charles H. CONLEY 2nd Choice	1st Choice with Howard W. JACKSON 2nd Choice	1st Choice with Herbert R. O'CONOR 2nd Choice

Automatic Plan A. *Defendant's Exhibit I.*

OFFICES

REPUBLICAN

GOVERNOR
REPUBLICAN
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE	1st & 2nd CHOICE
JAMES R. GORDON (BALTIMORE CITY)	1 A 1st Choice Only	2 A 1st Choice with David L. MOORE 2nd Choice	3 A 1st Choice with George S. ROGERS 2nd Choice	4 A 1st Choice with Clyde B. WILSON 2nd Choice
DAVID L. MOORE (BALTIMORE CITY)	1 B 1st Choice Only	2 B 1st Choice with James R. GORDON 2nd Choice	3 B 1st Choice with George S. ROGERS 2nd Choice	4 B 1st Choice with Clyde B. WILSON 2nd Choice
GEORGE S. ROGERS (CARROLL COUNTY)	1 C 1st Choice Only	2 C 1st Choice with James R. GORDON 2nd Choice	3 C 1st Choice with David L. MOORE 2nd Choice	4 C 1st Choice with Clyde B. WILSON 2nd Choice
CLYDE B. WILSON (BALTIMORE COUNTY)	1 D 1st Choice Only	2 D 1st Choice with James R. GORDON 2nd Choice	3 D 1st Choice with David L. MOORE 2nd Choice	4 D 1st Choice with George S. ROGERS 2nd Choice

UNITED STATES SENATOR
REPUBLICAN
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
LOUIS J. BERRY (CECIL COUNTY)	5 A 1st Choice Only	6 A 1st Choice with Ford HUGHES 2nd Choice	7 A 1st Choice with Blanton MURRAY 2nd Choice
FORD HUGHES (BALTIMORE CITY)	5 B 1st Choice Only	6 B 1st Choice with Louis J. BERRY 2nd Choice	7 B 1st Choice with Blanton MURRAY 2nd Choice
BLANTON MURRAY (BALTIMORE CITY)	5 C 1st Choice Only	6 C 1st Choice with Louis J. BERRY 2nd Choice	7 C 1st Choice with Ford HUGHES 2nd Choice
	5 D	6 D	7 D

STATE COMPTROLLER
REPUBLICAN
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
ELLIS J. BOND (TALBOT COUNTY)	8 A 1st Choice Only	9 A 1st Choice with John G. DOWNS 2nd Choice	10 A 1st Choice with Lee B. MILLER 2nd Choice
JOHN G. DOWNS (BALTIMORE COUNTY)	8 B 1st Choice Only	9 B 1st Choice with Ellis J. BOND 2nd Choice	10 B 1st Choice with Lee B. MILLER 2nd Choice
LEE B. MILLER (BALTIMORE CITY)	8 C 1st Choice Only	9 C 1st Choice with Ellis J. BOND 2nd Choice	10 C 1st Choice with John G. DOWNS 2nd Choice
	8 D	9 D	10 D

ATTORNEY GENERAL
REPUBLICAN
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
HOWARD T. DUNN (BALTIMORE CITY)	11 A 1st Choice Only	12 A 1st Choice with James F. HAYES 2nd Choice	13 A 1st Choice with Earl S. POLLARD 2nd Choice
JAMES R. HAYES (BALTIMORE COUNTY)	11 B 1st Choice Only	12 B 1st Choice with Howard T. DUNN 2nd Choice	13 B 1st Choice with Earl S. POLLARD 2nd Choice
EARL S. POLLARD (BALTIMORE CITY)	11 C 1st Choice Only	12 C 1st Choice with Howard T. DUNN 2nd Choice	13 C 1st Choice with James F. HAYES 2nd Choice
	11 D	12 D	13 D

CLERK OF THE COURT OF APPEALS
REPUBLICAN
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
MICHAEL R. BREEN (BALTIMORE CITY)	14 A 1st Choice Only	15 A 1st Choice with Thomas SHELDON 2nd Choice	16 A 1st Choice with Edward J. VINCENT 2nd Choice
THOMAS SHELDON (BALTIMORE CITY)	14 B 1st Choice Only	15 B 1st Choice with Michael R. BREEN 2nd Choice	16 B 1st Choice with Edward J. VINCENT 2nd Choice
EDWARD J. VINCENT (BALTIMORE COUNTY)	14 C 1st Choice Only	15 C 1st Choice with Michael R. BREEN 2nd Choice	16 C 1st Choice with Thomas SHELDON 2nd Choice
	14 D	15 D	16 D

OFFICES

DEMOCRAT

GOVERNOR
DEMOCRAT
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE	1st & 2nd CHOICE
RUSSELL V. ALLAN (BALTIMORE CITY)	1 F 1st Choice Only	2 F 1st Choice with Henry K. L. SMITH 2nd Choice	3 F 1st Choice with Jasper W. TOWNE 2nd Choice	4 F 1st Choice with Stephen V. WALKER 2nd Choice
HENRY K. L. SMITH (BALTIMORE CITY)	1 G 1st Choice Only	2 G 1st Choice with Russell V. ALLAN 2nd Choice	3 G 1st Choice with Jasper W. TOWNE 2nd Choice	4 G 1st Choice with Stephen V. WALKER 2nd Choice
JASPER W. TOWNE (BALTIMORE COUNTY)	1 H 1st Choice Only	2 H 1st Choice with Russell V. ALLAN 2nd Choice	3 H 1st Choice with Henry K. L. SMITH 2nd Choice	4 H 1st Choice with Stephen V. WALKER 2nd Choice
STEPHEN V. WALKER (BALTIMORE CITY)	1 I 1st Choice Only	2 I 1st Choice with Russell V. ALLAN 2nd Choice	3 I 1st Choice with Henry K. L. SMITH 2nd Choice	4 I 1st Choice with Jasper W. TOWNE 2nd Choice

UNITED STATES SENATOR
DEMOCRAT
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
CHARLES S. HARRIS (BALTIMORE CITY)	5 F 1st Choice Only	6 F 1st Choice with Wallace V. KELLOGG 2nd Choice	7 F 1st Choice with Albert B. NORTON 2nd Choice
WALLACE V. KELLOGG (ARUNDEL COUNTY)	5 G 1st Choice Only	6 G 1st Choice with Charles S. HARRIS 2nd Choice	7 G 1st Choice with Albert B. NORTON 2nd Choice
ALBERT B. NORTON (BALTIMORE CITY)	5 H 1st Choice Only	6 H 1st Choice with Charles S. HARRIS 2nd Choice	7 H 1st Choice with Wallace V. KELLOGG 2nd Choice
	5 I	6 I	7 I

STATE COMPTROLLER
DEMOCRAT
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
PETER CALKINS (HOWARD COUNTY)	8 F 1st Choice Only	9 F 1st Choice with Samuel A. FARRAR 2nd Choice	10 F 1st Choice with Ralph J. LYONS 2nd Choice
SAMUEL A. FARRAR (BALTIMORE COUNTY)	8 G 1st Choice Only	9 G 1st Choice with Peter CALKINS 2nd Choice	10 G 1st Choice with Ralph J. LYONS 2nd Choice
RALPH J. LYONS (BALTIMORE CITY)	8 H 1st Choice Only	9 H 1st Choice with Peter CALKINS 2nd Choice	10 H 1st Choice with Samuel A. FARRAR 2nd Choice
	8 I	9 I	10 I

ATTORNEY GENERAL
DEMOCRAT
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
THOMAS B. CLARKE (BALTIMORE CITY)	11 F 1st Choice Only	12 F 1st Choice with Bert W. LOOMIS 2nd Choice	13 F 1st Choice with Garry K. WAGNER 2nd Choice
BERT W. LOOMIS (BALTIMORE COUNTY)	11 G 1st Choice Only	12 G 1st Choice with Thomas B. CLARKE 2nd Choice	13 G 1st Choice with Garry K. WAGNER 2nd Choice
GARRY K. WAGNER (BALTIMORE CITY)	11 H 1st Choice Only	12 H 1st Choice with Thomas B. CLARKE 2nd Choice	13 H 1st Choice with Bert W. LOOMIS 2nd Choice
	11 I	12 I	13 I

CLERK OF THE COURT OF APPEALS
DEMOCRAT
Turn down any one Pointer

	1st CHOICE ONLY	1st & 2nd CHOICE	1st & 2nd CHOICE
WATERS A. BOWEN (KENT COUNTY)	14 F 1st Choice Only	15 F 1st Choice with Wells DEANE 2nd Choice	16 F 1st Choice with Daniel L. ROBERTS 2nd Choice
WELLS DEANE (BALTIMORE CITY)	14 G 1st Choice Only	15 G 1st Choice with Waters A. BOWEN 2nd Choice	16 G 1st Choice with Daniel L. ROBERTS 2nd Choice
DANIEL L. ROBERTS (BALTIMORE COUNTY)	14 H 1st Choice Only	15 H 1st Choice with Waters A. BOWEN 2nd Choice	16 H 1st Choice with Wells DEANE 2nd Choice
	14 I	15 I	16 I

AUTOMATIC

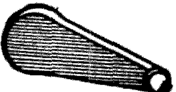
PLAN "B"

Defendants' Exhibit J

1	2	3

GOVERNOR

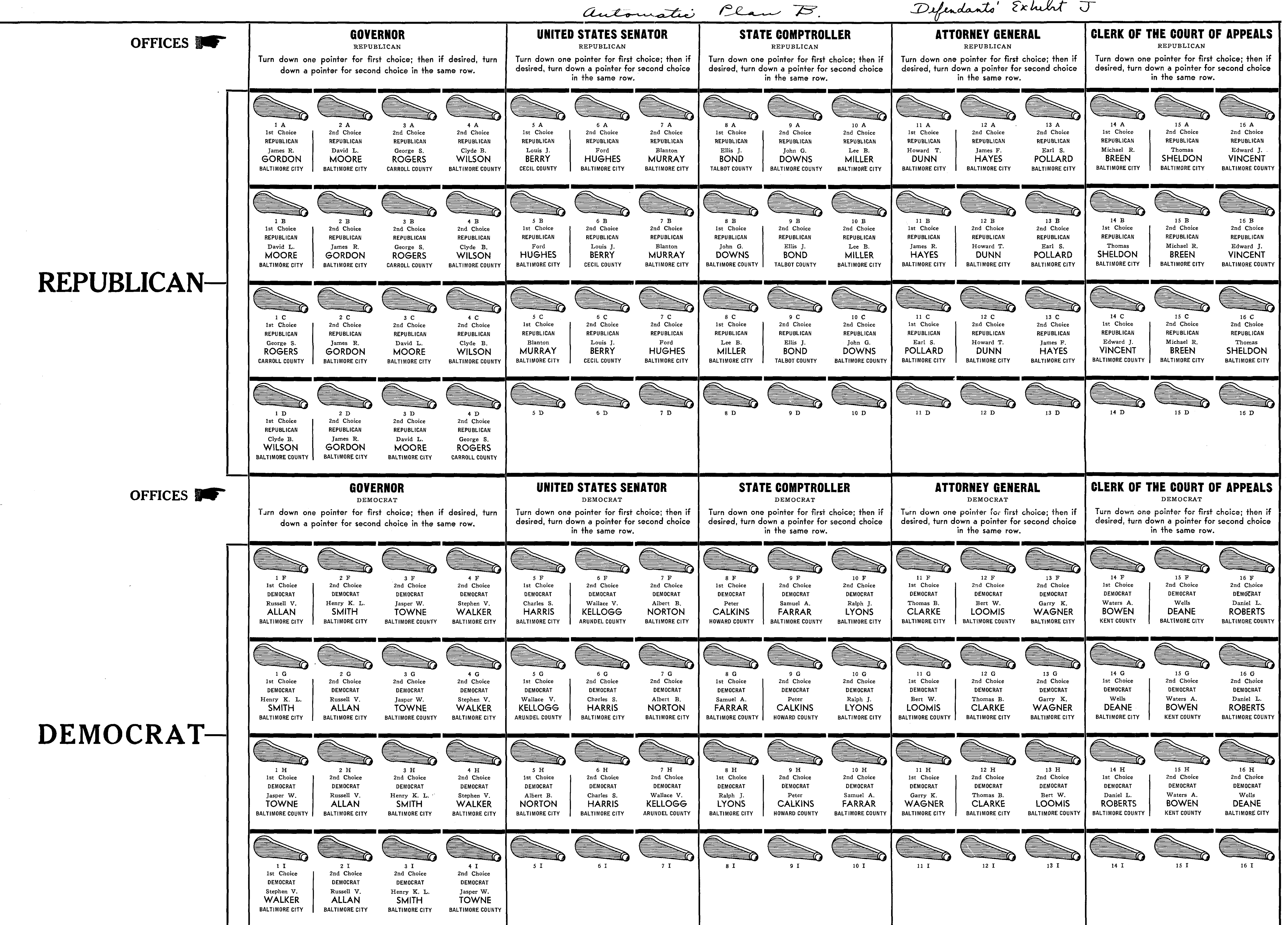
TURN DOWN ONE POINTER FOR FIRST CHOICE, THEN ONE POINTER FOR SECOND CHOICE IN THE SAME ROW.



1 F	2 F	3 F
REPUBLICAN	REPUBLICAN	REPUBLICAN
Phillips Lee	Harry W.	H. Webster
GOLDSBOROUGH	**NICE**	**SMITH**
Baltimore City	Baltimore City	Baltimore City
1st Choice	2nd Choice	2nd Choice

1 G	2 G	3 G
REPUBLICAN	REPUBLICAN	REPUBLICAN
Harry W.	H. Webster	Phillips Lee
NICE	**SMITH**	Goldsborough
Baltimore City	Baltimore City	Baltimore City
1st Choice	2nd Choice	2nd Choice

1 H	2 H	3 H
REPUBLICAN	REPUBLICAN	REPUBLICAN
H. Webster	Phillips Lee	Harry W.
SMITH	Goldsborough	**NICE**
Baltimore City	Baltimore City	Baltimore City
1st Choice	2nd Choice	2nd Choice



Automatic Plan B. *Defendants' Exhibit J*

OFFICES

REPUBLICAN

GOVERNOR
REPUBLICAN

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

1	2	3	4
1 A 1st Choice REPUBLICAN James R. GORDON BALTIMORE CITY	2 A 2nd Choice REPUBLICAN David L. MOORE BALTIMORE CITY	3 A 2nd Choice REPUBLICAN George S. ROGERS CARROLL COUNTY	4 A 2nd Choice REPUBLICAN Clyde B. WILSON BALTIMORE COUNTY
1 B 1st Choice REPUBLICAN David L. MOORE BALTIMORE CITY	2 B 2nd Choice REPUBLICAN James R. GORDON BALTIMORE CITY	3 B 2nd Choice REPUBLICAN George S. ROGERS CARROLL COUNTY	4 B 2nd Choice REPUBLICAN Clyde B. WILSON BALTIMORE COUNTY
1 C 1st Choice REPUBLICAN George S. ROGERS CARROLL COUNTY	2 C 2nd Choice REPUBLICAN James R. GORDON BALTIMORE CITY	3 C 2nd Choice REPUBLICAN David L. MOORE BALTIMORE CITY	4 C 2nd Choice REPUBLICAN Clyde B. WILSON BALTIMORE COUNTY
1 D 1st Choice REPUBLICAN Clyde B. WILSON BALTIMORE COUNTY	2 D 2nd Choice REPUBLICAN James R. GORDON BALTIMORE CITY	3 D 2nd Choice REPUBLICAN David L. MOORE BALTIMORE CITY	4 D 2nd Choice REPUBLICAN George S. ROGERS CARROLL COUNTY

UNITED STATES SENATOR
REPUBLICAN

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

5	6	7
5 A 1st Choice REPUBLICAN Louis J. BERRY CECIL COUNTY	6 A 2nd Choice REPUBLICAN Ford HUGHES BALTIMORE CITY	7 A 2nd Choice REPUBLICAN Blanton MURRAY BALTIMORE CITY
5 B 1st Choice REPUBLICAN Ford HUGHES BALTIMORE CITY	6 B 2nd Choice REPUBLICAN Louis J. BERRY CECIL COUNTY	7 B 2nd Choice REPUBLICAN Blanton MURRAY BALTIMORE CITY
5 C 1st Choice REPUBLICAN Blanton MURRAY BALTIMORE CITY	6 C 2nd Choice REPUBLICAN Louis J. BERRY CECIL COUNTY	7 C 2nd Choice REPUBLICAN Ford HUGHES BALTIMORE CITY
5 D	6 D	7 D

STATE COMPTROLLER
REPUBLICAN

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

8	9	10
8 A 1st Choice REPUBLICAN Ellis J. BOND TALBOT COUNTY	9 A 2nd Choice REPUBLICAN John G. DOWNS BALTIMORE COUNTY	10 A 2nd Choice REPUBLICAN Lee B. MILLER BALTIMORE CITY
8 B 1st Choice REPUBLICAN John G. DOWNS BALTIMORE COUNTY	9 B 2nd Choice REPUBLICAN Ellis J. BOND TALBOT COUNTY	10 B 2nd Choice REPUBLICAN Lee B. MILLER BALTIMORE CITY
8 C 1st Choice REPUBLICAN Lee B. MILLER BALTIMORE CITY	9 C 2nd Choice REPUBLICAN Ellis J. BOND TALBOT COUNTY	10 C 2nd Choice REPUBLICAN John G. DOWNS BALTIMORE COUNTY
8 D	9 D	10 D

ATTORNEY GENERAL
REPUBLICAN

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

11	12	13
11 A 1st Choice REPUBLICAN Howard T. DUNN BALTIMORE CITY	12 A 2nd Choice REPUBLICAN James F. HAYES BALTIMORE CITY	13 A 2nd Choice REPUBLICAN Earl S. POLLARD BALTIMORE CITY
11 B 1st Choice REPUBLICAN James R. HAYES BALTIMORE CITY	12 B 2nd Choice REPUBLICAN Howard T. DUNN BALTIMORE CITY	13 B 2nd Choice REPUBLICAN Earl S. POLLARD BALTIMORE CITY
11 C 1st Choice REPUBLICAN Earl S. POLLARD BALTIMORE CITY	12 C 2nd Choice REPUBLICAN Howard T. DUNN BALTIMORE CITY	13 C 2nd Choice REPUBLICAN James F. HAYES BALTIMORE CITY
11 D	12 D	13 D

CLERK OF THE COURT OF APPEALS
REPUBLICAN

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

14	15	16
14 A 1st Choice REPUBLICAN Michael R. BREEN BALTIMORE CITY	15 A 2nd Choice REPUBLICAN Thomas SHELDON BALTIMORE CITY	16 A 2nd Choice REPUBLICAN Edward J. VINCENT BALTIMORE COUNTY
14 B 1st Choice REPUBLICAN Thomas SHELDON BALTIMORE CITY	15 B 2nd Choice REPUBLICAN Michael R. BREEN BALTIMORE CITY	16 B 2nd Choice REPUBLICAN Edward J. VINCENT BALTIMORE COUNTY
14 C 1st Choice REPUBLICAN Edward J. VINCENT BALTIMORE COUNTY	15 C 2nd Choice REPUBLICAN Michael R. BREEN BALTIMORE CITY	16 C 2nd Choice REPUBLICAN Thomas SHELDON BALTIMORE CITY
14 D	15 D	16 D

OFFICES

DEMOCRAT

GOVERNOR
DEMOCRAT

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

1	2	3	4
1 F 1st Choice DEMOCRAT Russell V. ALLAN BALTIMORE CITY	2 F 2nd Choice DEMOCRAT Henry K. L. SMITH BALTIMORE CITY	3 F 2nd Choice DEMOCRAT Jasper W. TOWNE BALTIMORE COUNTY	4 F 2nd Choice DEMOCRAT Stephen V. WALKER BALTIMORE CITY
1 G 1st Choice DEMOCRAT Henry K. L. SMITH BALTIMORE CITY	2 G 2nd Choice DEMOCRAT Russell V. ALLAN BALTIMORE CITY	3 G 2nd Choice DEMOCRAT Jasper W. TOWNE BALTIMORE COUNTY	4 G 2nd Choice DEMOCRAT Stephen V. WALKER BALTIMORE CITY
1 H 1st Choice DEMOCRAT Jasper W. TOWNE BALTIMORE COUNTY	2 H 2nd Choice DEMOCRAT Russell V. ALLAN BALTIMORE CITY	3 H 2nd Choice DEMOCRAT Henry K. L. SMITH BALTIMORE CITY	4 H 2nd Choice DEMOCRAT Stephen V. WALKER BALTIMORE CITY
1 I 1st Choice DEMOCRAT Stephen V. WALKER BALTIMORE CITY	2 I 2nd Choice DEMOCRAT Russell V. ALLAN BALTIMORE CITY	3 I 2nd Choice DEMOCRAT Henry K. L. SMITH BALTIMORE CITY	4 I 2nd Choice DEMOCRAT Jasper W. TOWNE BALTIMORE COUNTY

UNITED STATES SENATOR
DEMOCRAT

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

5	6	7
5 F 1st Choice DEMOCRAT Charles S. HARRIS BALTIMORE CITY	6 F 2nd Choice DEMOCRAT Wallace V. KELLOGG ARUNDEL COUNTY	7 F 2nd Choice DEMOCRAT Albert B. NORTON BALTIMORE CITY
5 G 1st Choice DEMOCRAT Wallace V. KELLOGG ARUNDEL COUNTY	6 G 2nd Choice DEMOCRAT Charles S. HARRIS BALTIMORE CITY	7 G 2nd Choice DEMOCRAT Albert B. NORTON BALTIMORE CITY
5 H 1st Choice DEMOCRAT Albert B. NORTON BALTIMORE CITY	6 H 2nd Choice DEMOCRAT Charles S. HARRIS BALTIMORE CITY	7 H 2nd Choice DEMOCRAT Wallace V. KELLOGG ARUNDEL COUNTY
5 I	6 I	7 I

STATE COMPTROLLER
DEMOCRAT

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

8	9	10
8 F 1st Choice DEMOCRAT Peter CALKINS HOWARD COUNTY	9 F 2nd Choice DEMOCRAT Samuel A. FARRAR BALTIMORE COUNTY	10 F 2nd Choice DEMOCRAT Ralph J. LYONS BALTIMORE CITY
8 G 1st Choice DEMOCRAT Samuel A. FARRAR BALTIMORE COUNTY	9 G 2nd Choice DEMOCRAT Peter CALKINS HOWARD COUNTY	10 G 2nd Choice DEMOCRAT Ralph J. LYONS BALTIMORE CITY
8 H 1st Choice DEMOCRAT Ralph J. LYONS BALTIMORE CITY	9 H 2nd Choice DEMOCRAT Peter CALKINS HOWARD COUNTY	10 H 2nd Choice DEMOCRAT Samuel A. FARRAR BALTIMORE COUNTY
8 I	9 I	10 I

ATTORNEY GENERAL
DEMOCRAT

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

11	12	13
11 F 1st Choice DEMOCRAT Thomas B. CLARKE BALTIMORE CITY	12 F 2nd Choice DEMOCRAT Bert W. LOOMIS BALTIMORE COUNTY	13 F 2nd Choice DEMOCRAT Garry K. WAGNER BALTIMORE CITY
11 G 1st Choice DEMOCRAT Bert W. LOOMIS BALTIMORE COUNTY	12 G 2nd Choice DEMOCRAT Thomas B. CLARKE BALTIMORE CITY	13 G 2nd Choice DEMOCRAT Garry K. WAGNER BALTIMORE CITY
11 H 1st Choice DEMOCRAT Garry K. WAGNER BALTIMORE CITY	12 H 2nd Choice DEMOCRAT Thomas B. CLARKE BALTIMORE CITY	13 H 2nd Choice DEMOCRAT Bert W. LOOMIS BALTIMORE COUNTY
11 I	12 I	13 I

CLERK OF THE COURT OF APPEALS
DEMOCRAT

Turn down one pointer for first choice; then if desired, turn down a pointer for second choice in the same row.

14	15	16
14 F 1st Choice DEMOCRAT Waters A. BOWEN KENT COUNTY	15 F 2nd Choice DEMOCRAT Wells DEANE BALTIMORE CITY	16 F 2nd Choice DEMOCRAT Daniel L. ROBERTS BALTIMORE COUNTY
14 G 1st Choice DEMOCRAT Wells DEANE BALTIMORE CITY	15 G 2nd Choice DEMOCRAT Waters A. BOWEN KENT COUNTY	16 G 2nd Choice DEMOCRAT Daniel L. ROBERTS BALTIMORE COUNTY
14 H 1st Choice DEMOCRAT Daniel L. ROBERTS BALTIMORE COUNTY	15 H 2nd Choice DEMOCRAT Waters A. BOWEN KENT COUNTY	16 H 2nd Choice DEMOCRAT Wells DEANE BALTIMORE CITY
14 I	15 I	16 I

PLAINTIFFS EXHIBIT No.5

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.

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.

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 State-wide 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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BRIEF ON BEHALF OF AUTOMATIC VOTING MACHINE CORPORATION, ONE OF THE APPELLANTS.

ARTHUR W. MACHEN,
WENDELL D. ALLEN,
ARMSTRONG, MACHEN & ALLEN,
Solicitors for Automatic Voting Machine Corporation.

The Daily Record Co. Print, Baltimore.

HOWARD W. JACKSON, ET AL.,
Appellants,
vs.
WILLIAM S. NORRIS,
Appellee.

HOWARD W. JACKSON, ET AL.,
Appellants,
vs.
HATTIE B. DALY,
Appellee.

IN THE
Court of Appeals
OF MARYLAND.

JANUARY TERM, 1938.

GENERAL DOCKET
NOS. 3 AND 4.

BRIEF ON BEHALF OF AUTOMATIC VOTING MACHINE CORPORATION, ONE OF THE APPELLANTS.

NATURE OF THE CASE.

These two tax-payer suits consist of appeals and cross-appeals in each case from Decrees dated October 14th, 1937, of the Circuit Court No. 2 of Baltimore City, which perpetually enjoined the Voting Machine Board from proceeding further under its contract of September 8th, 1937, with the Automatic Voting Machine Corporation for the purchase of 910 voting machines for use in Baltimore City.

Each of the Defendants in each case entered appeals from that portion of each Decree which declares the contract of September 8th, 1937, null and void and which enjoins the Defendants from proceeding further under the contract. The two Complainants, Norris and Daly,

have each entered a cross-appeal from all portions of the Decree, except that portion annulling the contract and granting the injunction.

QUESTIONS.

I.

Did the Voting Machine Board abuse its discretionary power in entering into the contract of September 8, 1937, with the Automatic Voting Machine Corporation?

II.

Is the Voting Machine Board required to make purchases through or with the approval of the Central Purchasing Bureau of the State of Maryland?

III.

Are the provisions of the Charter of Baltimore City relating to competitive bidding applicable to the Voting Machine Board in regard to the purchase of voting machines?

IV.

Are both Plan A and Plan B on the automatic machine valid methods of voting in primary elections for first and second choice for candidates for nomination of a political party for State-wide offices?

V.

Is the size, form and arrangement of printing on Plan A and Plan B of the Automatic Company valid and legal for first and second choice voting in political party primaries in Maryland for the nomination of candidates for State-wide offices?

VI.

Does the sample automatic machine comply with the specifications prepared by the Voting Machine Board?

VII.

Does the Constitution of Maryland guarantee to a voter the privilege of writing-in upon a ballot a name which is not printed on the ballot?

VIII.

If the Constitution of Maryland does guarantee such write-in privilege to a voter, does this privilege extend only to general elections in the State of Maryland and to general municipal elections in Baltimore City, or does it extend also to primary elections?

IX.

If the Constitution of Maryland does guarantee the write-in privilege to voters, does the failure of the contract of September 8, 1937, to require the installation of write-in equipment in the voting machines contracted for invalidate the contract?

DECISION OF THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY.

The Trial Court held:

I. That the Voting Machine Board did not abuse its discretionary power in entering into the contract of September 8th, 1937, with the Automatic Company.

II. That the Voting Machine Board was not required to make purchases through or with the approval of the State Central Purchasing Bureau.

III. That (in effect) the competitive bidding provisions of the Charter of Baltimore City do not govern the Voting Machine Board.

IV. That both Plan A and Plan B on the Automatic machine are legal methods of first and second choice voting in state-wide primary elections, and that Plan A is the simpler and more convenient of the two methods.

V. That the size, form and arrangement of the printing of Plan A and Plan B on the Automatic machine are valid and legal.

VI. That the sample Automatic machine complies with the specifications prepared by the Voting Machine Board.

VII. That Art. 7 of the Declaration of Rights and Art. 1, Sec. 1 of the Constitution of Maryland guarantees to qualified voters the privilege of writing-in upon a ballot a name which is not printed upon the ballot.

VIII. That the write-in privilege guaranteed by the Constitution to a voter extends to general elections throughout Maryland and to general municipal elections in Baltimore City, but does not extend to primary elections.

IX. That the Automatic machines to be provided under the contract of September 8th, 1937, do not have the write-in voting equipment installed therein and that the use of said machines is unlawful and the contract null and void.

CONCLUSIONS SOUGHT TO BE MAINTAINED.

This Appellant contends that the findings and conclusions of the Trial Court were all correct, except that the privilege of write-in voting is not guaranteed to voters in general elections throughout Maryland and in munici-

pal elections in Baltimore City. The Appellant further contends that even if write-in voting is guaranteed by the Constitution, the contract should not have been set aside, but that the Voting Machine Board in its discretionary power should have been left free to have write-in equipment installed in the 910 machines covered by the contract.

STATEMENT OF FACTS.

The Voting Machine Board, created by Ch. 94 of the Acts of the General Assembly of Maryland, Regular Session 1937, consists of eight members, including the five members for the time being of the Board of Estimates of Baltimore City and the three members for the time being of the Board of Supervisors of Elections of Baltimore City. The Act directs the Voting Machine Board to purchase a sufficient number of voting machines for use in all polling places throughout the City at all primary, general, special and other elections held or to be held in Baltimore City after January 1st, 1938.

Baltimore City purchased fifty voting machines (of the 40 candidate type) from the Automatic Voting Machine Corporation in 1928 under the instalment plan (R. 132, 233), which have been used in all general elections since 1928 (R. 104, 204, 233), and which were not used in primary elections because, until the 1937 Act, all ballots had to be preserved for four months, which would run beyond the succeeding general election date (R. 104, 105, 233). The 1937 Act was upheld by this Court in the case of *Norris vs. Mayor and City Council of Baltimore*, 192 Atl. Rep. 531 (decided May 26th, 1937). Thereafter the Voting Machine Board invited bids for 910 machines on July 23rd, 1937 (R. 261). The Specifications Committee of the Voting Machine Board held conferences jointly

with representatives of both the Automatic Voting Machine Corporation and the Shoup Voting Machine Corporation, with a view to permit each Company to submit bids (R. 130, 131). On August 11th, 1937, the Board received and opened bids from the two named Companies (R. 7).

On the machine Type A, Size 1, 9 party 40 candidate type, the bids were as follows (R. 145):

Automatic Voting Machine Corporation, unit price $826.95, total $752,524.50.

Shoup Voting Machine Company, unit price $1,047.00, total $952,770.00.

The Automatic bid was $200,245.50 lower than the Shoup bid. The Shoup bid was $220.05 higher per machine, or 26.6% higher than the Automatic bid (R. 132).

The question of write-in voting equipment was discussed between the Voting Machine Board and representatives of both the Automatic Company and the Shoup Company prior to the submission of bids (R. 48, 49, 216, 217, 236). The Attorney General of Maryland on May 29th, 1926, had held that Ch. 581 of the Acts of 1924 made it illegal for a voter to write-in on a ballot the names of persons for whom he desires to vote (R. 220). On October 17th, 1936, the Attorney General ruled that under Ch. 120 of the Acts of 1931 the effect of writing in the name or names on a ballot would be to cause its rejection (R. 214). On July 24th, 1937, in response to a request for an opinion from the Supervisors of Election (R. 216), the Attorney General of Maryland again ruled that write-in voting is illegal in Maryland (R. 218).

The 50 Automatic machines purchased by Baltimore City in 1928 contain write-in equipment (R. 233, 259).

Those 50 machines are of the same type (40 candidate type) as the sample machine under the contract, with the exception that the machine under the contract does not have the write-in equipment installed therein (R. 132, 133, 259), but the write-in equipment can easily be installed, at a cost of $82.00 for each machine (R. 50, 135, 248, 249, 250, 258, 259). The sample Shoup machine submitted on August 11th, 1937, had about 65% of its write-in equipment installed, but Mr. Weiss, President of the Shoup Company, said that his write-in equipment went with his machine and would be furnished with the machine at the Shoup bid (of $1,047 per machine) (R. 232, 262).

After the bids were received by the Voting Machine Board and before the contract was let, the Board held public hearings on August 24th, 1937, and August 26th, 1937 (R. 283). The Board held executive sessions on August 26th, 1937, and September 8th, 1937 (R. 283).

The sample Automatic machine, in accordance with the request of the Board, had set up thereon the Democratic and Republican primary ballots of 1934. The Automatic Company set up the Republican primary ballot which included three candidates for the nomination of Governor under a form known as Plan A (R. 165—also Record Volume of Exhibits). The Automatic Company at the public hearing before the Board on August 26th, 1937, offered to change the form of Plan A for first and second choice voting to the form of first and second choice voting, known as Plan B (R. 166 and also Record Volume of Exhibits). On August 26th, 1937, the Board requested an opinion from the Attorney General as to the legality of Plan A and Plan B on the Automatic machine for first and second choice voting in state-wide primaries

where three or more candidates aspire to the nomination for a state-wide office (R. 152). The Attorney General, by his letter to the Board of September 8th, 1937, stated that in his opinion Plan B was legal, but that Plan A was illegal (R. 157). On September 8th, 1937, the Board entered into a contract with the Automatic Voting Machine Corporation for 910 Automatic machines, Type A, Size 1, nine party, 40-candidate type, at the price of $826.95 per machine (R. 201, 208, 209). A surety bond dated September 8th, 1937, was furnished to the Board by the Automatic Company with the Fidelity and Deposit Company of Maryland and the New Amsterdam Casualty Company as sureties thereon (R. 210-213).

The suit of William S. Norris was filed September 9th, 1937, but did not raise the point of write-in voting (R. 6-13). Amendments were filed to the Norris Bill of Complaint on October 2nd, 1937, which raised the question of write-in voting (R. 14-17). The suit of Hattie B. Daly was filed September 18th, 1937, which Bill of Complaint raised several points, including the question of write-in voting (R. 57-92). The Automatic Company has proceeded with the performance of the contract (R. 45). An emergency exists in which the machines must be built and delivered, deliveries to commence by March 1st, 1938 (R. 191).

The Voting Machine Board exercised unusual care in investigating the various types of machines, and, in the exercise of its discretion, selected the Automatic machine (R. 320). The contract between the Board and the Automatic Company was executed September 8th, 1937 (R. 208).

Plan A (R. 165 and Record Volume of Exhibits, and also on Sample Plan A machine in Court) represents a

method of first and second choice voting in state-wide party primaries when three or more persons are candidates for nomination to the same state-wide office in the same political party. Plan A permits a single first choice vote. It permits a first and second choice vote together with the operation of one lever. The separate first choice votes are recorded separately. The first choice votes and corresponding alternative second choice votes are recorded separately. The total first choice votes are obtained by adding the three counters (or more as the case may be) in connection with the name of each candidate. The alternative second choice votes connected with the first choice votes are definitely recorded to meet the requirements of Sec. 203 of Art. 33 of the Code. Plan A is mechanically very simple and flexible, requiring only a couple of small pins and flat pieces of metal called compensators (R. 257 produced in Court). Mr. Shoup and Mr. Weiss of the Shoup Corporation admitted that Plan A is the simplest and easiest method of first and second choice voting (R. 267, 268, 269). A predecessor of the Automatic Company used Plan A in first and second choice voting twenty-five years ago in Wisconsin, which State repealed the law providing for first and second choice voting in 1915 (R. 291).

Plan B (R. 166 and Record Volume of Exhibits and also on Plan B machine in Court) likewise accomplishes the purpose of Sec. 203 in first and second choice voting. Under Plan B one lever indicates the first choice vote and another lever indicates the alternative second choice vote. Plan B requires certain mechanism and straps to be attached to the machine (R. 240, 244, 245). This Plan B mechanism costs the Automatic Company less than $2.00 per machine, and will be furnished to the City free of cost (R. 244, 245). Mr. Shoup (R. 297-299) and Mr. Weiss of

the Shoup Company (R. 264, 265) criticised Plan B on the Automatic machine. Mr. Shoup, an engineer, using both hands with great force, and by his engineering knowledge, during the first trial day, October 4th, 1937, forced back and apparently unvoted the first choice and apparently permitted a single second choice vote to be registered alone on Plan B on the Automatic machine in the Court House Corridor (R. 297-299). On October 4th Mr. Shoup made no contention that he could vote a first choice and a second choice on Plan B simultaneously for the same person (R. 299, 300). The next day of the trial, October 5th, 1937, the witness Shoup stated that on the Plan B machine he could vote a first choice and a second choice in the same row, then by force unvote the first choice and keep the second choice voted, and then in another row vote first choice for the same person for whom he had voted for second choice in the other row (R. 302). The witness Shoup's demonstration failed to vote a first choice and second choice for the same person (R. 303). Judge Dennis in regard to the witness Shoup's abuse of Plan B said:

> "Doesn't it take an Edison or a Houdini to do that?" (R. 302).

and in his opinion said:

> "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 uses." (R. 323).

Mr. Hamilton (of the Automatic Company) denied that Mr. Shoup on Plan B was able, even with great force, to vote first choice and second choice in different rows for the same candidate (R. 313, 314, 315). Mr. Hamilton was not definitely sure that Mr. Shoup on Plan B was able to use sufficient force to hold back the first choice lever and register a single second choice vote (R. 317).

ARGUMENT.

I.

THE VOTING MACHINE BOARD DID NOT ABUSE ITS DISCRETIONARY POWER IN ENTERING INTO THE CONTRACT OF SEPTEMBER 8th, 1937, WITH THE AUTOMATIC VOTING MACHINE CORPORATION.

As referred to in the Statement of Facts, the Voting Machine Board used unusual care and diligence in selecting the best type of machine and in saving the City over $200,000.00.

Sec. 224A of Ch. 94 of the Acts of 1937 *authorizes and directs* the Voting Machine Board—

> "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 em-

> ploy engineers or other skilled persons to advise and aid said Board in the exercise of the powers and duties hereby conferred upon it. Such voting machines, when purchased, shall be delivered to the Supervisors of Election of Baltimore City, who shall have custody and control of the same for all the uses and purposes of this Act."

The bids were opened on August 11th, 1937 (R. 169). Public hearings were held on August 24th and August 26th, 1937 (R. 283). An opinion of the Attorney General was asked on August 26th, 1937, (R. 152) concerning Plan A and Plan B. An emergency existed, because the successful bidder had to start delivery of the machines by March 1st, 1938. The Board of Supervisors had prepared new election maps for Baltimore City; had changed the poll books to meet the rearrangement of precincts, and had changed the precinct lines and had reduced the number of precincts from 685 to 471 (R. 226). The necessity for prompt action did not deter the Board from the careful exercise of sound judgment. The Board in selecting the Automatic machine, chose the same machine which Baltimore City had purchased in 1928. The purchase of 910 Automatic machines saved the City over $200,000 (R. 145). The Board was familiar with the excellent factory and facilities of the Automatic Company which has 325 employees at Jamestown, New York (R. 205); it investigated thoroughly the relative merits of the Automatic machine and the Shoup machine (R. 320); it knew that the Automatic Company is the oldest and most experienced Voting Machine Company, having been in business thirty-nine years (R. 204); that the Automatic type of machine is used in over 3,500 cities, towns and villages of the United States (R. 41), including 120 cities (R. 204); that 90% of all voting machines in use in the

United States are of the Automatic type (R. 40); that over 20% of all votes of all kinds (both paper and machine votes) cast in the last Presidential election throughout the United States were voted on the Automatic machine (R. 123); that New York City alone uses over 4,500 Automatic machines; Philadelphia, 1,500; San Francisco, 1,300 (R. 204). Judge Dennis in his opinion says:

> "The Board went about its duties with great energy, intelligence and care; gave earnest and thorough consideration to the complexities of its problem, got good mechanical, professional and legal advice, freely gave ear to suggestions, complaints and claims of competing concerns and the public. Withal it acted with prudence and unquestioned integrity." (R. 320).

II.

THE VOTING MACHINE BOARD IS NOT REQUIRED TO MAKE PURCHASES THROUGH OR WITH THE APPROVAL OF THE CENTRAL PURCHASING BUREAU OF THE STATE OF MARYLAND.

Art. 78 of the Maryland Code (Acts of 1920, Ch. 184), provides for the creation and functioning of the Central Purchasing Bureau of the State of Maryland. Sec. 3 of said Article provides that:

> "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."

The special Voting Machine Board is not a "*State*" board or commission, but is a hybrid institution composed of five municipal officials and three state officials.

Sec. 4 of the Article provides that after an invoice has been approved by the Purchasing Bureau,

> "It shall be the authority for the Comptroller to pay the amount due on the invoice * * *."

Since, under the provisions of Ch. 94 of the Acts of 1937, the cost of voting machines shall, upon the requisition of the Voting Machine Board, be audited by the Comptroller of Baltimore City, who shall pay the same by warrant drawn upon the proper officers of said City (Sec. 224A), the Legislature clearly did not intend to subject the Voting Machine Board to the provisions of Art. 78 which deal with State purchases to be paid for by the State Comptroller.

Sec. 224A of Ch. 94 of the Acts of 1937 specifically directs the Voting Machine Board to purchase voting machines and to select in its discretion the type and make of voting machines. This again clearly indicates that the Legislature did not intend that the State Central Purchasing Bureau should have any jurisdiction in the matter.

III.

THE PROVISIONS OF THE CHARTER OF BALTIMORE CITY RELATING TO COMPETITIVE BIDDING ARE NOT APPLICABLE TO THE VOTING MACHINE BOARD IN REGARD TO THE PURCHASE OF VOTING MACHINES.

Sec. 14 of the Charter and Public Local Laws of Baltimore City (1927) provides as follows:

> "Hereafter, in contracting for any public work, or the purchase of any supplies or materials, involving an expenditure of five hundred dollars 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, unless

otherwise provided for in this Charter, advertisements for proposals for the same, shall be first published in two or more daily newspapers published in Baltimore City, twice or oftener, the first publication to be made not less than ten nor more than twenty days prior to the day set for opening the bids; and the contract for doing said work or furnishing said supplies or materials, shall be awarded by the board provided for in the next section of this Charter, and in the mode and manner as therein prescribed."

Sec. 15 of the City Charter provides that:

> "All bids made to the Mayor and City Council of Baltimore for supplies or work for any purpose whatever, unless otherwise provided in this Charter, shall be opened by a board, or a majority of them, consisting of the Mayor, who shall be president of the same, the Comptroller, City Register, City Solicitor, and the President of the City Council, which board, or a majority of them, shall, after opening said bids, award the contract to the lowest responsible bidder * * *."

This Section is obviously inapplicable to, and indeed inconsistent with the Voting Machine Act; for a majority of the Board set up in this Section might well be a minority of the Voting Machine Board.

See also Sec. 36C of the City Charter in regard to the Board of Estimates of Baltimore City approving contracts involving the expenditure of more than $500.00. See also Sec. 36 of the City Charter naming the Chief Engineer a member of the Board of Estimates.

The Voting Machine Board, created by an emergency act, Ch. 94 of the Acts of 1937, is not such a special commission or board as to come within the purview of Sec. 14

of the Charter. The Voting Machine Board consists of the five members for the time being of the Board of Estimates of Baltimore City and the three members for the time being of the Board of Supervisors of Elections of Baltimore City. The Supervisors of Election constitute a State body appointed by the Governor of Maryland. The meaning of the words "special commissions or boards" as used in Sec. 14 of the Charter, quoted supra, is shown by further reference to the Charter. Sec. 25 provides:

> "The Mayor shall have the sole power of appointment of all heads of departments, heads of sub-departments, municipal officers not embraced in a department, and all special commissioners or boards, except as otherwise provided in this Charter, subject to confirmation by a majority vote of all the members elected to the City Council * * *."

Reading Sec. 14 in connection with Sec. 25, it is clear that "the special commissions or boards" referred to in the former Section are those appointed by the Mayor, and confirmed by the City Council. In the present case, the Voting Machine Board was not appointed by the Mayor and so does not come within the purview of Sec. 14.

Moreover, the "special commissions and boards" referred to in Section 14 of the Charter are obviously purely *municipal* commissions and boards, and cannot include a compound board created by special act of the General Assembly, composed of five municipal officials and three State officials, and exercising as pointed out by this Court in the recent case of *Norris v. Mayor and City Council of Baltimore,* 192 Atl. 531, 538, important State functions affecting the people of the entire State.

The Legislature manifestly intended to give the Voting Machine Board wide discretion in the selection and pur-

chase of voting machines and clearly did not intend this body to be entirely under the control of the Board of Estimates.

Sec. 224A of Ch. 94 gives the Voting Machine Board authority and power—

> "* * * 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. Such voting machines, when purchased, shall be delivered to the Supervisors of Election of Baltimore City, who shall have custody and control of the same for all the uses and purposes of this Act."

Thus, by clear, definite and unmistakable language the Legislature has negatived any idea that the City authorities under the Charter of Baltimore City should have power in their discretion to select the type and make of voting machines. In addition, even assuming that Sec. 14 of the Charter was intended to apply to such a special commission or board as the Voting Machine Board, nevertheless the manifest intent of the Legislature as expressed in Ch. 94 to vest the sole power of selecting and purchasing the voting machines in the Voting Machine Board, would work a repeal of the inconsistent provisions contained in Sec. 14. See also repealing clause of Ch. 94.

Undoubtedly the Voting Machine Board acted wisely and prudently in asking for competitive bids, but the method used by the Voting Machine Board in obtaining bids was purely in the discretion of the Board.

A similar situation exists with the Police Commissioner of Baltimore City, and this Court held under somewhat different facts in the case of *Thrift vs. Ammidon,* 126 Md. 126, that the Board of Police Commissioners of Baltimore City were not subject to the provisions of Sec. 14 of the Baltimore City Charter.

See also *Mayor and City Council of Baltimore vs. Weatherby, et al.,* 52 Md. 442 (1879), (discussed more fully later in this brief in Argument VI), upholding a contract, and holding that the Board of School Commissioners, who had let the contract after voluntarily advertising for bids, were not bound by the terms of the Ordinance then in force requiring certain city officers to advertise for bids.

Therefore, the Voting Machine Board is not *bound* to buy machines by means of competitive bidding, but has unlimited discretion—unlimited, that is, except by the requirements of good faith. Consequently, the Voting Machine Board might, if it chose, buy all the machines by competitive bidding, or buy all by private treaty, or some by competitive bidding and some by private treaty. So the Board might buy *some* parts of the machines by competitive bidding and other parts by private treaty.

IV.

BOTH PLAN A AND PLAN B ON THE AUTOMATIC MACHINE ARE VALID METHODS OF VOTING IN PRIMARY ELECTIONS FOR FIRST AND SECOND CHOICE FOR CANDIDATES FOR NOMINATION OF A POLITICAL PARTY FOR STATE-WIDE OFFICES.

The Trial Court was correct in approving both Plan A and Plan B, and in finding that Plan A is the simpler and more convenient of the two methods (R. 326).

Each method relates to voting in state-wide primary elections under Sec. 203 of Art. 33 of the Code, in which three or more persons are candidates for the nomination for the same state-wide office by a political party. Candidates for the nomination for five state-wide offices come within this provision: Governor, United States Senator, Attorney General, Comptroller and Clerk of the Court of Appeals. For the past twenty-five years, since this Act went into effect in 1912, first and second choice voting has been necessary only three times in Maryland.

Ch. 94 of the 1937 Act provides:

> "Sec. 224-F(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).
>
> "Sec. 224-F(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).
>
> "Sec. 224-A. The Board of Supervisors of Election 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 * * *."
>
> "Sec. 224-A. * * * and except that said 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* * * *." (Italics ours.)

"Sec. 224-A. * * * 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. * * *" (Italics ours.)

"Sec. 224-G(g) 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." (Italics ours.)

The Supervisors of Election are *directed* in all future elections to use the 50 machines purchased by Baltimore City in 1928 (224-A). The 910 new Automatic machines are of the same type as these 50 machines.

The Legislature, in giving discretionary power to the Board in the use of machines, realized the necessity of such power so as to adapt the paper ballot law to the use of whatever machine might be purchased. Hence the Legislature requires only a *substantial compliance* with Sec. 203 (224-F(d)).

Both Plan A and Plan B substantially comply with Sec. 203. The Automatic Company recommends Plan A in preference to Plan B. The Trial Court found both plans to be legal, but found that Plan A is more simple and convenient than Plan B.

Neither of the competing Companies presented an arrangement complying literally with Sec. 203 which provides that in a primary in case there are more than two candidates for the nomination 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.

Both Plan A and Plan B permit a single first choice vote. Both Plans prevent a single second choice vote. Both Plans prevent the voter from marking the same candidate for first choice and also for second choice. The paper ballot law provides in Sec. 203—

> "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."

Neither the Automatic nor the Shoup Machine complies *literally* with this provision; but both comply *substantially* by making it impossible for the voter to make the mistake which the paper ballot law *corrects*: that is to say, both on Plan A and Plan B it is impossible for a voter to indicate the same person for both first and second choice, and *impossible* to cast a second-choice vote only.

First and second choice voting is alternative voting. The voter's second choice never comes into operation if his first choice receives the nomination. If the voter's second choice comes into operation at all, his first choice vote must first be wholly ineffective. Under Sec. 203 each alternative second choice must be linked with the voter's first choice. (See tabulation in Sec. 203). Both Plan A and Plan B substantially accomplish this purpose.

Plan B.

Under Plan B the voter designates his first choice by one lever, and then, if he desires, he designates his second choice by another lever in the same row. He must first vote for first choice. Having voted for first choice

under Plan B, then all other first choice levers are locked off as well as second choice levers in the remaining rows, but the voter may, after voting a first choice, then vote his alternative second choice in the same horizontal row with his first choice. It is essential that a second choice shall not stand alone. It must be linked to a first choice vote. Under Plan B the mechanism therefore is so arranged, that when a first choice and second choice are both voted, if the voter then unvotes his first choice the second choice automatically unvotes at the same time. Under Plan B the counting devices register the first choice votes and the corresponding alternative second choice votes to comply substantially with Sec. 203.

Plan A.

Under Plan A the same result is accomplished by the more simple method of using one lever only instead of two. Plan A *suits the construction of* the Automatic machine. Plan A does not suit the construction of the competing machine, because its voting levers are arranged vertically instead of horizontally and the location of its voting levers prevents the writing of the candidate's name for state-wide nomination in large, bold type across three spaces (or more as the case may be) as shown on Plan A. Under Plan A a voter may vote a single first choice if he desires, or he may vote his first choice and his alternative second choice together with one lever. In fact Sec. 203 requires each second choice to be linked definitely with each individual voter's first choice. Plan A accomplishes with one lever that which requires two levers under Plan B. The vote is not registered on the counters until the voter moves the large handle which operates the curtains. The Automatic machine permits a voter to change his mind. The voter may

pull down a lever, then change his mind, and may then unvote the lever by simply moving it back to the unvoted position, and then he may pull down any other lever he desires. Plan A definitely and accurately accomplishes the purposes of Sec. 203. The single first choice votes for a candidate are registered on a separate counter. If the voter has voted for first choice and also for an alternative second choice, then such first choice votes with the corresponding alternative second choice votes are registered together. The total first choice votes for each candidate for nomination is definite on each machine under Plan A by adding the three counters (or more as the case may be) registered with the name of such candidate for nomination. The corresponding second choice votes are likewise definitely registered to comply with Sec. 203. Thus under Plan A the vote in each precinct on each machine 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 consolidates the returns from each legislative district, pursuant to Sec. 203, and determines the respective first choice and second choice of the legislative district for the nomination for the particular office, which result is binding upon the delegates from such legislative district to the State convention of the particular political party.

The form of Plan A does not violate Sec. 224-F(i). The voting devices for separate candidates on the Automatic machine are arranged in separate parallel rows, *so that* in a primary election adacent 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. The Appellee has

erroneously characterized Plan A as group voting. The Appellee has confused this with straight party 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 or more as the case may be. Each person is a candidate for the nomination to a single office. No person is a candidate for second choice. Sec. 203 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. If his first choice vote is effective, then the alternative second choice never comes into play. This is alternative voting, not group voting. This is not voting for two nominations; it is voting for but one nomination. Plan A is merely a form for alternative voting. This is 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; each alternative second choice must be linked with the individual voter's first choice. Sec. 203 has joined the first and second choice together, and the Court should not put them asunder.

The whole argument of our opponents against Plan A is really based upon Section 224-F(i) of the Voting Machine Law, which provides that voting machines must "have voting devices for separate *candidates*". Now our opponents would interpolate after the word "candidates" the words "and for each choice", but those words are not found in the statute. Plan A provides in state-wide pri-

maries a separate voting device for each candidate. Take for instance the three-cornered Republican primary fight for the gubernatorial nomination in 1934. Under Plan A there is a separate voting device for each of the three candidates, Goldsborough, Nice, and Smith. The voter cannot vote for two of them by one operation, but must pull a separate lever. If, however, he wishes, in addition to voting for one of the three as his first choice for the nomination, he must indicate for whom he intends his second choice to be a substitute. A vote for a second choice, unless tied to some vote for first choice, would be meaningless. Accordingly, Plan A provides that if the voter wishes to vote, say, for Goldsborough for first choice and Nice for second choice, he must do so by pulling one lever. If he desires to vote for Goldsborough for first choice and Smith for second choice, he must likewise do so by pulling another lever.

Our opponents harp continuously upon the phrase "voting devices for separate candidates", but Plan A provides separate voting devices for separate candidates. As already stated, the statute does not say that the voting machines must have separate voting devices for each condidate and for each choice. No one is a candidate for second choice; he is a candidate for the nomination. The Act does indeed speak of "second choice candidates", but that is very different from saying "candidate for second choice". A man is a second choice candidate just as he may be a defeated candidate, but he cannot be a candidate for second choice, any more than he can be a candidate for defeat.

Substantial Compliance With Section 203.

What is *substantial* compliance? *Carr vs. Hyattsville*, 115 Md. 545, dealt with an act of the Legislature which

provided for a referendum by a special election in Hyattsville and specified that the ballots should have printed on them "For the Act to improve the streets" and "Against the Act to improve the Streets." The election was held in Hyattsville, but the words printed on the ballots were "For the road bill" and "Against the road bill." The majority of the ballots cast at the election favored the improvement of the streets. The Court upheld the election, holding that there was a *substantial* compliance, although not a literal compliance with the language used by the Legislature in the style of printing to be placed on the ballot. This Court said at page 550:

> "The plain purpose of the Legislature was that this act should become effective if approved by a majority of the voters of the special election, and the object of providing the form of ballot was to ascertain the will of the majority of the voters on the question of its approval, and since that majority did approve the act under the form of ballot used, which was *substantially,* but not *strictly,* in the words provided in the act, the will of the majority should not be set aside for any of the reasons stated in the bill."

Authorities are numerous to the effect that a *substantial* compliance merely requires that the ultimate object be attained, even though there may be a slight change in the prescribed form of attaining the object. Procedural matters may be deviated from, provided the substance is attained.

Martien vs. Porters, 219 Pac. 817 (822) (Mont. 1923)

Fitzgibbons vs. Galveston Electric Co., 136 S. W. 1186 (Tex. 1911)

St. Louis, M. & S. E. R. Co. vs. Houck, 97 S. W. 963, 120 Mo. App. 634 (1906).

The Automatic Company's agent, S. C. Hamilton, experienced in the voting machine business for about forty years, (R. 291) recommends Plan A as preferable. Russell F. Griffen, Vice-President of the Automatic Company, clearly described Plan A and Plan B (R. 240, et seq.). Even the competitors, Mr. Weiss, President of, and Mr. Shoup, Chief Engineer of, the Shoup Company, admit the simplicity of Plan A which requires no additional equipment (R. 267, 306). Mr. Shoup attacked the mechanism used in Plan B. By the use of force, two hands, and engineering skill, he apparently abused the machine with Plan B attachments into voting a single second choice (R. 299), although whether he was able to use sufficient force to do this is doubtful (R. 317). The mechanical attachments necessary to vote Plan B cost the City nothing (R. 241, 244). It requires about ten or fifteen minutes to attach the Plan B mechanism to each Machine (R. 246, 285). If required, the Automatic Company will likewise furnish Plan B attachments for the 50 Automatic machines purchased by Baltimore in 1928. Those 50 machines do not need any extra attachments for Plan A. The City will have 910 and 50 machines, a total of 960 uniform machines. The equipment to vote Plan A is well nigh nil (R. 257). Plan A, if used by the Supervisors of Election, can be set up on the machines in the least possible time. Between the date when candidates for nomination may withdraw, fifteen days before the primary (Sec. 58, Art. 33), and the day of the primary, the Board would not have the slightest delay in the use of Plan A. It would, of course, require more time to attach the Plan B mechanism than to set up the machines under Plan A.

The Legislature wisely gives the Supervisors of Election discretionary power to determine the form and arrangement of ballot labels *as nearly as may be* in accord-

ance with this sub-title (224-G(g)). The Supervisors of Election have duties not only ministerial in character, but ofttimes quasi-judicial in character. In *White vs. Laird,* 127 Md. 120, 123, the Court said:

> "There would seem to be no room to doubt that the Supervisors are called upon and required to exercise judgment and discretion in the discharge of their duties and act in at least what is called a *quasi*-judicial capacity. * * * Other references to statutes might be made to show that the duties of the Supervisors are far from being merely ministerial."

To the same effect is *Fitzgerald vs. Quinn,* 159 Md. 543.

"*As nearly as may be*" has been judicially construed.

In the case of *Mexican Central Rwy. Co. vs. Pinkney,* 149 U. S. 194, at p. 207, the Supreme Court of the United States says:

> "The words of this section 'as near as may be' were intended to qualify what would otherwise have been a mandatory provision, and have the effect to leave the Federal Courts some degree of discretion in conforming entirely to the state procedure. These words imply that in certain cases it would not be practicable, without injustice or inconvenience, to conform literally to the entire practice prescribed for its own courts by a state in which Federal courts might be sitting. This qualification is indicated in Railroad Co. v. Horst, 93 U. S. 291, 300, 301."

In the case of *Indianapolis and St. L. R. R. Co. vs. Horst,* 93 U. S. 291, the Court said at p. 300:

> "The conformity is required to be 'as near as may be,' not as near as may be *possible,* or as near as may be *practicable.* This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be effected the duty of construing and deciding,

and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

In *Potter vs. Robinson,* 40 N. J. L. 114, at 117, the Court said:

> "* * * This phrase, *as near as may be,* manifestly contemplates some deviation from the prescribed course. The extent of such deviation is not defined, and hence it is for the courts to give such effect to this new provision as in reason ought to flow from it. It should not be limited by the physical possibilities of the case, but should be made inclusive of whatever changes the spirit of the legislation requires. Under the guidance of the two rules of construction laid down by Vattel (Potter's Dwar, on Stat. 128) 'Every interpretation that leads to an absurdity ought to be rejected,' and 'The reason of the law, that is the motive which led to the making of it is one of the most certain means of establishing the true sense.' "

Plan A is a very flexible way of voting for first and second choice. The mechanism of Plan B requires the arrangement in squares, that is, three levers in each horizontal row with three levers in each vertical column as in Plan B Goldsborough, Nice and Smith;—or four horizontal with four vertical as in Plan B Gordon, Moore, Rogers and Wilson, and so on, five horizontal with five vertical, etc. Under Plan A, however, the mechanical principle is to vote one lever out of any group of levers, and the group does not have to be in a square. Thus under Plan A Goldsborough, Nice and Smith, for example, — Smith could be placed immediately to the right of Goldsborough, and

then the group of three candidates would occupy only two horizontal rows with six levers in the upper horizontal row and three levers in the lower horizontal row, out of which one lever may be voted. Also under Plan A Conley, Jackson, O'Conor and Sasscer, for example, O'Conor could be placed immediately to the right of Conley, and Sasscer could be placed immediately to the right of Jackson, and then this entire group of four candidates would occupy only two horizontal rows with eight levers in each of the two rows, out of which the voter can turn down any one lever. Thus, six primary Democrats—and six primary Republicans for Governor for example, under Plan A can be arranged on one machine so that the Democratic primary ballot occupies only three horizontal rows and the Republican ballot occupies only three horizontal rows, a total of six horizontal rows, which can be accommodated on a nine row machine. It is, of course, quite unlikely that such a large group of Democrats and Republicans would be running in primaries simultaneously, but this simply illustrates the great flexibility of Plan A.

V.

THE SIZE, FORM AND ARRANGEMENT OF PRINTING ON PLAN A AND PLAN B OF THE AUTOMATIC COMPANY IS VALID AND LEGAL FOR FIRST AND SECOND CHOICE VOTING IN POLITICAL PARTY PRIMARIES IN MARYLAND FOR THE NOMINATION OF CANDIDATES FOR STATE-WIDE OFFICES.

The law provides for adequate instruction to election officers and the public in the use of machines. Sec. 224-I(c)(2) requires in each polling place two diagrams or sample ballots and illustrated directions for voting on the machine. Section 224-I(c)(3) requires a mechanically operated model of a portion of the face of the

machine in the polling place at or outside of the guard rail. One such model goes with each machine (R. 199). Sec. 224-J provides for instructions to the judges of elections. There is a public exhibition of machines during the thirty days next preceding an election under Sec. 224-L(a). Sec. 224-L(c) authorizes the Board of Supervisors to publish advertisements in the newspapers of voting machine ballots and diagrams. The judges of election in the polling places shall instruct each voter on a mechanically operated model under Sec. 224-M(a). A voter, after entering, but before closing the voting machine booth, is entitled to receive certain further instructions as to voting on the machine, under Sec. 224-M(c).

The size of the print on the Automatic machine has given complete satisfaction to voters with normal vision in Baltimore for nine years, as well as in 3,500 other cities, towns and villages in the United States. The Appellee Daly, in conceding for argument that Plan A is valid, erroneously suggested, for example, that under Plan A for first and second choice voting the following data must be printed under a lever which may vote both for first and second choice, viz:

"REPUBLICAN

Phillips Lee
GOLDSBOROUGH
Baltimore City

For First Choice with

REPUBLICAN

Harry W.
Nice
Baltimore City

For Second Choice."

This suggestion may apply to other machines, but does not apply to the Automatic machine. The suggestion of course is ridiculous. Nothing in the Act prevents the Board of Supervisors of Election in its discretion from printing each candidate's name, Phillips Lee Goldsborough, for example, in large, bold type, over three spaces, or more as the case may be.

The Plan A printing of The Automatic Company *suits the construction* of (224-A) the Automatic machine. It may well be that the Automatic's form of printing does not suit the construction of other machines, whose voting levers, arranged in vertical columns, prevent the name Phillips Lee Goldsborough, for example, from being printed over three spaces, and necessitate the name being limited to one space, as in the Appellee's suggested form.

Also the word "Republican" need not appear in this space at all. The law is gratified by the word "Republican" appearing on the left margin of the entire space allotted to the Republican primary candidates. If that does not gratify the law, then certainly the law is gratified by having the word "Republican" or "Democrat", as the case may be, printed once above the group of candidates running for nomination for the same office. (See first and second samples of Plan A in Record Volume of Exhibits.)

On the third sample of Plan A Record Volume of Exhibits, the word "Democrat" appears once over the names each of Conley, Jackson, O'Conor and Sasscer where they appear in large, bold type. In argument in the lower Court counsel for the Appellee Daly contended that the party designation must be repeated, because a

Democrat may run in a Republican primary, and vice versa. The Appellee's error was in assuming that a Democrat runs as a Democrat in a Republican primary. The premise falls, because a registered Democrat runs as a Republican in a Republican primary. He is then a candidate for the *Republican* nomination. In the case of *German vs. Sauter,* 136 Md. 52, this Court held that the Election Supervisors of Baltimore County were obliged to place on a Republican primary ballot the name of a registered Democrat who aspired to be a Member of the Republican State Central Committee for the Second District of Baltimore County. Such primary candidate for nomination simply repudiates his own party. At page 55 thereof this Court said:

> "The wisdom or expediency of placing the name of an affiliated Democrat upon a Republican ballot to be voted for as a Republican, or the name of an affiliated Republican on a Democrat ballot to be voted for as a Democrat, is not to be considered by us in acting upon the question here presented. That was a matter for the consideration of the Legislature that passed the Act."

There is some reason in a *general* election for placing "Democrat" or "Republican" with the names of the candidates for office. On a *primary* ballot, however, when a Democrat votes, the Republican ballot is locked off, and vice versa. (Sec. 224-F(f)).

Sec. 224-A refers to *general* elections and not *primary* elections in providing that "the form and arrangement of ballot labels shall be in accordance with the provisions of Sec. 63 of Art. 33." Sec. 63 comes under the general elections portion of Art. 33. The primary elections portion of Art. 33 starts with Sec. 190 thereof. Sec. 224-A,

in providing that "the designation of the *party* or principle which *each candidate represents* shall appear just above the name of each such candidate" refers to *general* elections and not *primary* elections. Certainly a *candidate represents his party* only after he is nominated, and therefore a candidate represents his party only in a general election. A candidate for nomination in a primary hopes to represent his party in the general election.

Sec. 224-G(c) provides that:

> "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."

The above section covers *primary* elections in stating that a group of candidates seeking nomination shall contain the name of the political party. Both reason and the law dictate that "Democrat" or "Republican", as the case may be, need not appear over each name on a primary ballot.

Not only is the Board given discretionary power to arrange the ballot *as nearly as may be* in accordance with the sub-title (Sec. 224-G(g)), but also it is to be observed that the *primary* elections portion of Art. 33 merely requires that primary elections be conducted in the manner of general elections *as far as may be applicable* (Sec. 193), and again *in so far as the same are or may be applicable* (Sec. 200). Furthermore, Sec. 198 provides that primary ballots shall be prepared in the manner as provided by Art. 33 for general elections, *except as otherwise provided for in this sub-title.* Certainly Sec. 224-G(c) (above quoted) provides otherwise, and, in addition, there is the discretionary power vested in the Supervisors of Elections.

Also it is to be observed that in actual practice on paper ballots at least seven of the Counties of Maryland, Cecil, Frederick, Harford, Kent, Queen Anne's, Somerset and Howard, did not place the party designation after each name on the primary ballot of 1934, but simply placed the party designation once at the heading of the ballot (R. 125).

There is still further reason to believe that the Legislature intended Sec. 224-A of the 1937 Act to apply to *general* elections, because this Section is an amended form of Ch. 228 of the Acts of 1933. The 1933 Act merely required not over two machines per precinct, so as to avoid the necessity of having five machines in each precinct to comply with the paper ballot law calling for five booths in each precinct. See *Cotton vs. Supervisors,* 164 Md. 1. In 1933, when the original Sec. 224-A was passed, the machines were used only in *general* elections. It is conceded in this case that the 50 machines purchased by Baltimore City in 1928 have never been used in primary elections, and the statement in the case of *Cotton vs. Supervisors,* supra, p. 3, that the machines were used in the primary of 1931, is evidently an error of fact. Until the 1937 Act the ballots had to be preserved for four months after the primary, which would run past the general election date. (Sec. 86). The 1937 Act (Sec. 224-A) requires the machine to remain intact for 10 days after a primary, and under Sec. 224-R the machine shall remain locked for at least 30 days after a general or special election.

In regard to the place of residence of a primary candidate for the nomination of Governor, for example, the law is certainly gratified on Plan A by placing the residence once after each candidate's name in the place where

his name appears in large, bold type. It is needless repetition to repeat the place of residence after the name where it appears for second choice. Sec. 63, in prescribing the form and arrangement of ballots, provides that:

> "To the name of each candidate for State office or candidate for Congress shall be added the name of the county or city in which the candidate resides."

It is to be noted that Sec. 224-A of the 1937 Act directs the Board of Supervisors of Baltimore City in all future elections to use the 50 Automatic machines which Baltimore City purchased in 1928. Those 50 machines, however, are equipped for voting under Plan A. All that is required consists of a couple of pins and a couple of pieces of flat metal, called compensators, no larger than the blade of a penknife. The Plan B attachments can, of course, be installed also in the 50 machines, but even that will not be necessary, assuming that Plan A is legal.

VI.

THE SAMPLE AUTOMATIC MACHINE COMPLIES WITH THE SPECIFICATIONS PREPARED BY THE VOTING MACHINE BOARD.

The Appellees contend that the sample machine has only eight horizontal rows of voting levers instead of nine rows for voting for nine different political parties as required by Sec. 44 of the specifications. In fact the machine does have nine rows of 40 candidates each, making 360 voting levers and spaces for the names of candidates. The sample machine has set up thereon the Democratic and Republican *primary* ballots of 1934. When set up for a *general* election the party designations appear in the column to the left of and opposite the horizontal party rows, and the designation 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 offices for which the candidates respectively aspire. Thus there are nine political party rows and 40 voting devices in each of the nine rows. The 1934 primary 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 on the Automatic machine in a primary election, which is extremely unlikely, 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 the Automatic machine as to the various forms of its use is such that it will accommodate any ballot or ballots that may be required. No other type of machine considered by the Board has this extent of flexibility in accommodating on one machine primary ballots of one, two, three or more political parties.

(See the attachment for the Automatic machine to contain the designation of offices between any two horizontal rows of names.) (R. 257, 258. Sample in Court.)

While the Voting Machine Board acted wisely in voluntarily asking for competitive bids, it is nevertheless true

that the Board was under no legal compulsion to ask for competitive bids. The Legislature vested full and complete discretion in the Board to select the make and type of machine, and placed no restrictions or conditions as to how that discretion was to be exercised. Its actions are not subject to the control, advice or approval of the State Central Purchasing Bureau, and are not circumscribed by the competitive bidding provisions of the Charter of Baltimore City. The Board in paragraph 14 of the specifications (R. 176) reserved the right to reject any or all bids and/or to waive technical defects, as it may deem best for the public interests. The Board could have rejected all bids and could have gone into the open market to purchase machines. The Legislature saw fit to give the broadest discretionary power to the Board.

Nor has this Court been silent on this subject. In the case of *Mayor and City Council of Baltimore vs. Weatherby et al.*, 52 Md. 442 (1879), the Board of Commissioners of Public Schools of Baltimore City advertised for sealed proposals for furnishing supplies or heating apparatus for school houses. The award and contract was made by the School Board in the name of the Mayor and City Council of Baltimore with the high bidder Cunningham. There was no ordinance or resolution of the Mayor and City Council requiring the School Board to advertise for bids. However, by the terms of Ordinance No. 64 of 1873, when city officers shall advertise for sealed proposals for any public work or contract, *pursuant to existing ordinance or resolution,* it became the duty of such officer to lay the proposals received before the Mayor, who, with the Comptroller and Register, shall proceed to open them, and award, in all cases, to the low bidder of known capacity, responsibility, etc. The low bidder,

Weatherby, feeling aggrieved, sought in the Circuit Court of Baltimore City to have the contract declared illegal and its performance enjoined. The lower Court granted an injunction. In reversing the lower Court, this Court upheld the contract on the ground that Ordinance No. 64, requiring advertisements, etc., did not apply to these facts, since there was no existing ordinance or resolution requiring the School Board to advertise. At page 451 this Court said:

> "Moreover, the subject-matter of the transaction impeached was clearly within the power and control of the Mayor and City Council, (Act 1872, c. 377, sub-ch. 16); and if it were conceded, as contended by the complainants, that the ordinances in force at the time did not confer authority on the Commissioners of Public Schools to make the contract in question, (a proposition that we by no means decide,) still, the injunction should not have gone against the Mayor and City Council. The whole subject-matter being completely within their control, in the absence of any legislative formality required, it was perfectly competent to them to have authorized or sanctioned the contract, without a previous ordinance prescribing the formalities and the agency through and by which such contract could be made. This being clearly the power of the Mayor and City Council it ought not to be interfered with or its exercise restrained. *Fanning vs. Gregoire,* 16 How., 524, 533."

It is clear, therefore, since the 1937 Act vested broad discretionary purchasing power in the Board without prescribing the formalities by which a contract should be made, that the Board would be free, if it chose, to go beyond the limits of the specifications, which, in fact, the Board did not do.

Even when the procedure of a purchasing board is fixed by law, the Court will not interfere with acts of the Board, in the absence of fraud or collusion.

In the case of *Fuller Co. vs. Elderkin,* 160 Md. 660, at pages 668 and 669, this Court said:

> "It was said in *Maryland Pavement Co. v. Mahool, supra* (110 Md. 397): 'The subject has been frequently considered by this court, and all the cases hold that, when the awarding of a contract like the one here in question (paving contract) has been committed to a board, in the absence of fraud or collusion, its decision is final and conclusive and cannot be controlled by the courts.' 'The authorities are uniform in holding that, in determining who is the lowest responsible bidder, the municipal authorities have a wide discretion, will not be controlled by the courts except for arbitrary exercise, collusion, or fraud.' And in *Madison v. Harbor Board,* 76 Md. 395, 25 A. 337: 'The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is that the duties of officers intrusted with the letting of contracts for works of public improvements to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of courts by mandamus'—citing *Devin v. Belt,* 70 Md. 354, 17 A. 375. (See also *Baltimore, C. & P. B. Ry. Co. v. Latrobe,* 81 Md. 246, 31 A. 788; *Henkel v. Millard,* 97 Md. 30, 54 A. 657; *City of Baltimore v. Flack,* 104 Md. 107, 64 A. 702; 28 *Cyc.* 663; 20 *Encyclopedia of Law,* 1169). And it was further said: 'It is of much more importance that a public contract, like the one in question, should be promptly awarded, and speedily executed with due regard to economy, than that any particular bidder should get the contract (Com. ex rel. *Snyder v. Mitchell,* 82 Pa.

343); and therefore it has been held by the great weight of authority that the public work shall not be delayed by appeals to the courts of dissatisfied and disappointed bidders, but that the decision of public officers, like these commissioners, upon questions such as those here involved, shall not be reviewed by the courts unless it can be shown that such public officers have been guilty of fraud in the exercise of their discretion (*High, Extr. Rem.*, sec 92, and authorities there cited).' See, also *McQuillan on Municipal Corporations* (2nd Ed.), vol. 3, sec. 1340."

VII.

THE CONSTITUTION OF MARYLAND DOES NOT GUARANTEE TO A VOTER THE PRIVILEGE OF WRITING-IN UPON A BALLOT A NAME WHICH IS NOT PRINTED THEREON.

The Appellees base their contention that the write-in privilege is guaranteed to a voter upon the following provisions of the Declaration of Rights and the Constitution of Maryland.

Art. 7 of the Declaration of Rights:

> "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."

Art. 1, Sec. 1, of the Maryland Constitution:

> "All elections shall be by ballot; and every male 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; and in case any county or city shall be so divided as to form portions of different electoral districts, for the election of Representatives in Congress, Senators, Delegates or other Officers, then to entitle a person to vote for such officer, he must have been a resident of that part of the county, or city, which shall form a part of the electoral district, in which he offers to vote, for six months next preceding the election; but a person, who shall have acquired a residence in such county or city, entitling him to vote at any such election, shall be entitled to vote in the election district from which he removed, until he shall have acquired a residence in the part of the county or city to which he has removed."

The Australian ballot was first adopted in Maryland by Act of 1890, Ch. 538, Sec. 137, amended by Act of 1892, Ch. 236. Both these acts expressly allowed write-in voting. The Act of 1896, Ch. 202, Sec. 49 also provided for write-in voting as follows:

> "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."

The same language was repeated by Ch. 2, Sec. 49 of the Extra Session of the Legislature of 1901.

The write-in privilege was actually afforded on paper ballots in general elections from 1896 to 1924. This opportunity was afforded on the ballot by leaving a blank space at the foot of each group of candidates aspiring

for each office, in which space the voter could write-in any name of his own personal selection.

The Legislature in the Acts of 1924, Ch. 581, Sec. 54 (Code Art. 33, Sec. 62), having found by experience that the privilege of write-in voting was practically useless and needlessly lengthened the ballot, revoked the privilege of write-in voting by repealing and re-enacting with amendments the aforesaid Act of 1901 and by eliminating from said Section the provision for write-in voting.

It will be noted, however, that in 1924 the Legislature neglected to amend Sec. 80 of Art. 33 (Ch. 225, Sec. 71 of the Acts of 1914), which provided that—

> "The judges shall open the ballot box and count and announce the whole number of ballots in the box. They shall reject any ballots which are deceitfully folded together, and any ballots which do not have endorsed thereon the name or initial of the judge who held the ballots, or if there shall be any mark on the ballot other than the cross mark in a square opposite the name of a candidate, or other than the name or names of any candidates written by the voter on the ballot as provided in Sec. 62, such ballot shall not be counted. * * *."

The Attorney General of Maryland in 1926, rendered an opinion that Ch. 581 of the Acts of 1924 prohibited a voter from writing in on the ballot the name of any person for whom he may desire to vote (R. 220, and Attorney General's Opinion of 1926, Vol. 11, page 96), holding that the Legislature desired to shorten the ballot by eliminating blank write-in spaces, and that the write-in privilege of Sec. 80 had become nugatory, and that the voter's constitutional rights were not impaired because the election law contains ample provisions by which voters may have their candidate's name printed on the ballot.

Since 1924 the write-in privilege has not been used on any ballots in Maryland. The write-in privilege from 1896 to 1924 had been rarely if ever used in Maryland, and the blank spaces unduly lengthened the ballot. The practice and experience in the State had made this privilege utterly and absolutely ineffective.

The Fewer Elections Amendment of 1922 (Maryland Constitution Amendment, Art. XVII), resulted in even larger ballots (R. 236, 237).

In fact the apparent inconsistency between Sec. 62 and Sec. 80 of Art. 33 of the Code remained unnoticed for many years. The Legislature itself failed to notice the discrepancy, because in 1927 by Ch. 370 it repealed and re-enacted said Sec. 80 with amendments and still retained in the Section the privilege of a voter to write-in on a ballot as provided in Sec. 62. In fact, it was not until 1931 that the Legislature, by Ch. 120, eliminated the provision in said Sec. 80 by striking out the privilege of write-in voting as set forth in Sec. 62.

The Attorney General in 1936 had a further occasion to render an opinion that write-in voting was prohibited in Maryland. The Union Party in 1936 endeavored to place its nominees for office on the Maryland ballot at the Presidential election of November, 1936. The Union Party candidates were not permitted to be placed on the ballot because the Union Party had failed to show a compliance with the Code provisions. *Iverson vs. Jones, Secretary of State,* Court of Appeals of Maryland, November 11th, 1936, 187 Atl. Rep. 863.

On October 17th, 1936, the Court evidently having handed down a *per curiam* opinion in the Union Party case, the Attorney General advised the Board of Super-

visors of Election of Baltimore City that the writing-in of a name on the ballot would cause its rejection. The Attorney General based his opinion upon Ch. 120 of the Acts of 1931. The Attorney General said in part:

> "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. You are, therefore, advised that a ballot upon which a voter has written the name of a person for whom he desires to vote, must not be counted." (R. 214, Attorney General's Opinions, 1936, Vol. 21, p. 354).

The question again arose as to the write-in privilege in 1937, when the Specifications Committee of the Voting Machine Board were preparing specifications for the letting of the contract in question here. The Supervisors of Elections of Baltimore City wrote the Attorney General of Maryland under date of July 22nd, 1937, requesting an opinion on the subject (R. 216).

The Attorney General replied to the Board under date of July 24th, 1937, again holding that write-in voting was prohibited in Maryland (R. 218).

The Voting Machine Board in awarding the contract of September 8th, 1937, rightfully believed that write-in voting was prohibited in Maryland.

The Attorney General's opinion of 1926 was quite prophetic of the present situation, when it said:

> "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." (R. 220).

Sec. 51 of Art. 33 provides that candidates for office may be nominated otherwise than by a convention or primary election, and that Independent candidates may be placed on the ballot by means of petitions signed by a certain number of voters: 2,000 for a state-wide office, 1,500 for a Congressional district or the City of Baltimore, 750 for the cities of Annapolis, Frederick, Cumberland or Hagerstown, 500 for all other elections.

Under the Declaration of Rights, "elections ought to be free" and "every citizen having the qualifications prescribed by the Constitution ought to have the right of suffrage."

The Legislature has prescribed numerous valid limitations and regulations on the right to vote. The voter must register on a designated day; he must identify himself, give his name, age, color, residence, etc. (Sec. 18). A person convicted of infamous crime cannot vote (Sec. 2). The Declaration of Intentions Act (Sec. 31, Art. 33) was declared constitutional in *Pope vs. Williams*, 98 Md. 59 (Affirmed 193 U. S. 621).

Having placed many regulations and limitations on the qualifications of voters themselves, there is no logical or valid reason why the Legislature should be prohibited from placing reasonable regulations and limitations upon the persons for whom the voter may vote. Our opponents claim the write-in privilege on the ground that "elections ought to be free". By that token a voter could write-in his own name or the name of the King of Siam or the Emperor of China for Governor or any other office. He could write-in the name of a non-resident, an alien or an infant. In Baltimore City and the twenty-three counties voters might write-in the name of "John Smith". There are literally thousands of John Smiths in the State. It

might be impossible to identify the selection of this free choice. Voters might write-in for Judge the name of a person who has not resided in the State for five years, or for Governor one not a citizen of Maryland for ten years. In fact, it would be possible by write-in voting to elect to office a person absolutely disqualified by the Constitution. This might result in nullifying an election, causing chaos and confusion, and perhaps calling for an expensive special election. The Legislature has fixed reasonable regulations as to the form, method and manner of certificates of nomination through conventions or primaries (Sec. 50), and these reasonable provisions are completely ignored by the write-in privilege.

Again, there is no assurance that the person elected to office by write-in voting would accept the office. Such person elected might refuse the laurels bestowed upon him.

Again, a person defeated in a primary might be elected through write-in voting, even though such person could not be nominated by petition for the general election under the terms of Sec. 51. The write-in privilege might open up a beautiful vista for defeated primary candidates pursuing their goal in the general election.

The Legislature has been keenly alert to prevent election frauds (Sec. 118) in which the placing of a distinguishing mark upon a ballot subjects the voter to a fine or imprisonment. The write-in privilege affords the best opportunity for distinguishing marks upon a ballot, and literally could nullify the Legislature's effort toward pure elections, free from fraud and corruption.

The authorities cited by our opponents in support of the proposition that write-in voting is a constitutional

requirement, seem at first sight to be imposing by virtue of their very number, but it will be found that this apparently imposing array of authorities largely evaporates upon careful examination.

When the Australian ballot was first introduced, the innovation caused some constitutional qualms. The early Australian ballot laws, virtually without exception, provided for write-in voting. The Courts, in sustaining the constitutionality of these laws, sometimes adverted to the provision for write-in voting and sometimes stated *obiter* that but for this provision for write-in voting the Act would have been unconstitutional.

People v. Shaw, 144 N. Y. 616, 31 N. E. 512 (1892)
Howser v. Pepper, 8 N. Dak. 484, 79 N. W. 1018 (1899)
Voorhees v. Arnold, 108 Iowa 77, 78 N. W. 795 (1899)
State v. Anderson, 100 Wis. 523, 76 N. W. 482 (1898)
Price v. Lush, 10 Mont. 61, 24 Pac. 749 (1890)
Bowers v. Smith, 111 Mo. 45, 20 S. W. 101 (1892)
State v. Johnson, 87 Minn. 221, 91 N. W. 840 (1902) (And holding that it was not necessary under the Minnesota Constitution that the primary election law provide for write-in voting)
Cole v. Tucker, 164 Mass. 486, 41 N. E. 681 (1895).

Obviously these authorities, being mere *dicta*, need cause us no concern.

Then there are other authorities in which the ballot laws were ambiguous: according to one construction they allowed write-in voting, and according to another con-

struction they did not. The former construction was adopted on the ground that if the latter had been chosen, the Act would have been unconstitutional.

Sanner v. Paton, 155 Ill. 554, 40 N. E. 290 (1895)
Cohn v. Isensee, 45 Cal. A. 531, 188 Pac. 279 (1920)
Barr v. Cardell, 173 Iowa 18, 155 N. W. 312 (1915)
Mayor &c City of Jackson v. Howie, 102 Miss. 663, 59 So. 873 (1912)
(But see McKenzie v. Boykin, 111 Miss. 253, 71 So. 382 (1916).

Obviously these authorities come nearer to being actual decisions, but they can hardly rise to that dignity because all that was necessary for the Court to hold was that the constitutional question was a serious one, as it is always the duty of the Court to adopt the construction of a statute which will avoid the necessity of passing upon a grave constitutional question.

U. S. v. Delaware & Hudson Co., 213 U. S. 366, 407-8.

Finally, there are a few cases which amount to flat-footed decisions that ballot laws which do not permit write-in voting are unconstitutional.

State v. Dillon, 32 Fla. 555, 14 So. 383 (1893)
Littlejohn v. People, 52 Colo. 217, 121 Pac. 159 (1912)

These authorities are, however, counter-balanced by other authorities to the contrary.

State ex rel. Mize v. McElroy, 44 La. Ann. 796, 11 So. 133 (1892).
Chamberlain v. Wood, 15 So. Dak. 216, 88 N. W. 109 (1901).

If we look at substance, rather than mere technical form, it must be apparent that write-in voting, at least in any election in any community of considerable size, is a mere sham and a delusion. To all practical purposes, the voter is limited in his choice to the candidates whose names appear upon the official ballot. If the constitutional provision that elections shall be free has any real substance as applied to Australian ballots, it should guarantee not the idle form of write-in voting, but the substantial right of having independent nominations placed upon the ballot by simple and inexpensive methods. If the Courts are to guard the substance of freedom of elections and free choice on the part of each voter, they will not adhere to the letter which killeth, but rather to the spirit and substance.

Of course there must be reasonable restrictions on the right to place the names of independent candidates on the ballot, otherwise every crank in the land might nominate his own candidate. But it is submitted that there is, and should be, a reasonable constitutional right to have independent nominations put on the ballot. The provision (Sec. 55, Art. 33) of the Maryland law (see Act of 1927, Ch. 240, Act of 1931, Ch. 239) that independent nominations shall not be made after the regular party primaries, may perhaps be unreasonable, and therefore in conflict with the Constitution. But the unreasonableness, if such it be, of the provisions for independent nominations does not, as our opponents argue, necessitate that the silly, futile, formality of write-in voting be restored. If constitutional rights are matters of substance and not of mere form, then they protect the freedom of having independent nominations printed on the ballot and not the senseless formality of write-in voting.

The number of signers required to a petition for an independent nomination for a state-wide office (Sec. 51 Art. 33) namely 2,000, seems at first sight to be rather high, but on the other hand unless 2,000 voters will sign such a petition, placing the name on the ballot would be a mere idle form. Here again, however, if there is any unreasonableness in the restrictions on independent nominations, it is those restrictions which should be held unconstitutional rather than the abolition of the useless write-in voting.

Of course, we are not conceding that the restrictions on independent nominations are so unreasonable as to be unconstitutional. All that we suggest is that *if* they are an unreasonable restriction of the freedom of election, then those unreasonable restrictions should be held unconstitutional; and that their unreasonableness, if such it be, cannot be cured, or even substantially alleviated, by requiring write-in voting.

VIII.

IF THE MARYLAND CONSTITUTION DOES GUARANTEE SUCH WRITE-IN PRIVILEGE TO A VOTER, THE PRIVILEGE EXTENDS ONLY TO GENERAL ELECTIONS IN THE STATE OF MARYLAND AND TO GENERAL MUNICIPAL ELECTIONS IN BALTIMORE CITY, AND THE PRIVILEGE DOES NOT EXTEND TO PRIMARY ELECTIONS.

Before the Act of 1924 in which the Legislature revoked the write-in privilege, this privilege in practice was provided for only in general elections and not in primary elections (R. 237).

At the time of the adoption of Maryland's present Constitution in 1867, primary elections were not contemplated in the Constitution, nor had the Legislature passed any

act concerning primary elections. Political parties, prior to 1867, made their nominations by convention, and their conduct and procedure was not regulated in any way either by the Constitution or by statutory law. In fact the first primary law in Maryland was not passed until many years after 1867.

In the case of *Hanna v. Young,* 84 Md. 179 (1896), involving the constitutionality of a public local law applicable to Belair, Harford County, Maryland, in which the Legislature (Sec. 30 of Ch. 359 of the Acts of 1896) had imposed a property qualification upon voters in municipal elections in the City of Belair, this Court held that the Act of 1896 did not violate the terms of Art. 1, Sec. 1 of the Constitution. At page 182 the Court said, quoting from *Smith v. Stephen,* 66 Md. 381:

> "It is sufficient to say that no municipal elections, except those held in the city of Baltimore, are within the terms or meaning of the Constitution."

At page 183 the Court said:

> "It is only at elections which the Constitution itself requires to be held, or which the Legislature under the mandate of the Constitution makes provision for, that persons having the qualifications set forth in said section 1, Article 1, are by the Constitution of the State declared to be qualified electors. Nowhere in the Constitution are the governments of municipalities in this State, or their officials, either clothed with power or designated as any part of our State government, but their very creation, together with all the powers and attributes which attach to their management, are lodged by the Constitution with the legislative department of our State government, save in some respects the city of Baltimore."

The only elections referred to or contemplated in the Constitution of 1867 were general elections throughout the State, covered by Art. 1 thereof, and general elections in the City of Baltimore covered by Art. XI thereof.

Write-in voting has nowhere proved of any practical value except in local elections in small towns or villages where everybody knows everybody else. The only reported instances at which write-in voting has affected the result were cases of such local elections, and even those cases have been very, very few. But as the Maryland Constitution does not apply to such local elections, the write-in privilege certainly does not apply, as a constitutional right, in the only cases where it would be of any, even the slightest value.

In the recent primary election in New York City, there were a large number of write-in votes for LaGuardia in the Democratic primary, but they were not sufficient to come within a mile of affecting the result. Moreover, in Maryland the Constitution does not apply to primary elections; and the primary law has never provided for write-in voting.

IX.

EVEN IF THE WRITE-IN PRIVILEGE IS GUARANTEED BY THE CONSTITUTION, NEVERTHELESS, THE FAILURE OF THE CONTRACT OF SEPTEMBER 8th, 1937, TO REQUIRE THE INSTALLATION OF WRITE-IN EQUIPMENT IN THE VOTING MACHINES DOES NOT INVALIDATE THE CONTRACT.

The lower Court in its opinion said:

> " 'Write in' equipment can be applied to the type of voting machine purchased; but at an additional cost of $82.00 each, and substantial mechanical alterations. It is perfectly natural in view of the acqui-

> escence since 1924 in ballot laws denying the right of 'write in,' and the opinions referred to by two Attorney-Generals that the facility was not required, that neither party to this contract expected or agreed that the more expensive article with the 'write in' appurtenances be supplied" (R. 328).

It should be mentioned in passing that it would be more correct to say that "write-in equipment can be applied to the type of voting machine purchased but at an additional cost of $82.00 per machine and substantial mechanical *additions,*" instead of "mechanical *alterations*" as stated by Judge Dennis.

The Voting Machine Board ordered a machine without write-in equipment. For that reason the standard write-in equipment consisting of mechanism and paper rolls was not installed in the sample machine. In fact, two sample machines were submitted to the Voting Machine Board with the bid of the Automatic Company (R. 201). One of those samples had the full box space for write-in equipment, the voting slots of which were covered over by a detachable metal panel placed thereon. (See similar Exhibit machine in Court with write-in equipment installed therein. R. 258, also pictures in Record Volume of Exhibits.) All that is required in the sample machine is a slight change to install the write-in equipment in the box space at the top of the machine (R. 247, 248, 249). The Board has the option to specify which size top it desires (R. 135).

The Exhibit Plan B machine, practically identical with the Exhibit Plan A machine (R. 251), both produced in Court, may both have write-in equipment installed therein. The Plan A machine would simply require the elevation of the top about two inches to provide sufficient

box space to have write-in equipment installed. The write-in equipment is a standard product of the Automatic Company. The 50 machines purchased by Baltimore City in 1928 have write-in equipment installed therein (R. 259). The exhibit machine with write-in equipment therein shows the location and manner of installation (R. 258). It would, of course, be more economical and more satisfactory to all parties concerned if the write-in equipment is installed at this time in the factory before the machines are delivered.

If the write-in equipment is installed at the additional price of $82. per machine, the comparative results with the Shoup Company bid would be as follows:

Shoup Company bid: 910 machines @ $1,047.		$952,770.00
Automatic Company contract: 910 machines @ $826.95	$752,524.50	
Write-in equipment at $82 each	74,620.00	827,144.50
Contract for Automatic Machines with Write-in Equipment Saves the Board		$125,625.50

In its opinion the Trial Court said:

"* * * chaos will result if the disputed questions are not settled quickly and in time to permit some manufacturer to complete and deliver sufficient voting machines to serve at the primary elections next year, since no election can be held in Baltimore other than by voting machines. The time yet remaining to complete the manufacture of the machines and train the election officials in their use is all too brief at best." (R. 319,320.)

The contract was made September 8th, 1937, almost a month after the bids were opened on August 11th, 1937.

In view of the saving to Baltimore City, and the equities in favor of the Automatic Company, the contract of September 8th, 1937, should not be set aside. The Voting Machine Board, in its discretionary power, can negotiate with the Automatic Company or any Company it chooses, for the installation of write-in equipment. Needless to say, as a practical matter, no other company could possibly install the write-in equipment in these 910 machines as economically and as expeditiously as the Automatic Company. A fair price of $82. per machine, if the equipment is installed at this time, has been offered by the Automatic Company, and the Board should be left free to negotiate with the Automatic Company for the write-in equipment.

On the theory that write-in equipment is required, the Board is in effect in the same situation as a Board which is required to purchase suits of clothes consisting of a coat, trousers and vest. Such a Board would not be required to buy all three pieces at the same time. It could let a contract for the coat and trousers and could not be enjoined from so doing because it would afterwards be required to buy a vest. The proper remedy would not be by bill to enjoin the contract for the coat and trousers, but by a mandamus to compel it to buy a vest.

The Board in effect has purchased a coat and trousers. There is no legal inhibition preventing the Board from buying pants and coat and later buying a vest to match. The write-in equipment represents the vest, and it matches the rest of the suit.

The Board relied on the constitutionality of the Acts of 1924 and 1931, and also on the opinions of the Attorney General. The specifications were silent as to write-in equipment. The sample machine did not have the write-in equipment installed thereon. The Board saw the sample and executed the contract.

This, at worst, is a case of *"error without injury."* The case of *Konig v. Mayor and City Council of Baltimore,* 128 Md. 465, affords a yard stick for guidance. In the former case of *Konig v. Mayor and City Council of Baltimore,* 126 Md. 606, the Court had declared invalid a contract for a filtration plant and directed an injunction, because the contract was not made in accordance with the requirements of Section 14 and 15 of the Charter of Baltimore City. Because, however, the contract had been partly performed and probably would be completed before the case was decided by the Court, the terms of the injunction, if any, were left for determination by the lower Court. After the case was remanded, the lower Court filed an opinion stressing the risk of danger to the public health from any delay in completing the filtration plant, and then passed a decree annulling the contract and refusing an injunction and leaving the Plaintiff free to prosecute any other remedy to which the Plaintiff might otherwise be entitled. An appeal from that decree was the subject of the case in 128 Md., at page 473 of which this Court said:

> "While the mere fact that a municipality can make a good bargain does not authorize it to violate its charter, yet when it so clearly appears as it does in this case, that it was not only no loss, but a very decided benefit to the City to make the contract with the American Company, and that the violation of the charter was of a character which indicates an honest

mistake and not that it was intentional, a Court of Equity ought not to be required to deal with such a case precisely as it would with one where there was a deliberate and wholly inexcusable violation of law, especially if the latter showed fraud, collusion or unjust treatment of others.''

and further at page 480:

''While it must be conceded that the weight of authority precludes a recovery by one relying on a contract made with a municipal corporation contrary to the provisions of its charter, either on the contract itself or on a *quantum meruit,* or *quantum valebat,* authorities are not entirely lacking to support such claim. In 3 *McQuillin on Municipal Corporations,* section 1181, on page 2624, it is said: 'There is considerable authority, however, to support the rule that a recovery may be had on a *quantum meruit* in such cases, upon the theory that it is not justice, where a contract is entered into between a municipality and another, in good faith, and the corporation has received benefits thereunder, to permit the municipality to retain the benefits without paying the reasonable value therefor, the same as a private corporation or individual would have to do. And a municipality has been held liable, in many cases, for water or light furnished, where the exact ground for imposing liability, other than justice in a particular case, is not clear.' But that is not the question in this case. The question here is whether a Court of Equity shall exercise its powers at the instance of one who has not shown that he or the City has lost anything, and deprive the Company which has spent $156,000.00 for the City, of the money already paid it, or what is still unpaid. Quite a number of cases have held that under such circumstances Courts of Equity should leave the parties in such transactions where they placed themselves, and will refuse to grant relief to either.

> "In this case the contractor is not seeking to recover, but a tax-payer asks that it be deprived of the entire contract price, for what we might use a term frequently used in this Court in another connection—'error without injury' its error being entering into a contract which was supposed to be valid, and there being no injury, but on the contrary a benefit to the City resulting from that error."

In the case at bar, Ch. 94 of the 1937 Acts was passed as an emergency measure. The lower Court forecasts chaos in Baltimore if some manufacturer is not permitted to complete and deliver voting machines for use in 1938. The contract was made in good faith by both parties. The annulling of the contract would necessitate still further delay and uncertainty. The present contract saves the City $200,245.50. The spending of $74,620.00 additional for write-in equipment will still save the City $125,625.50. Further competitive bidding would be grossly unfair to the Automatic Company, as competitors would know the Automatic Company's price in advance. This Court said in *Konig v. Mayor and City Council of Baltimore,* 128 Md. at 478:

> "While under the decisions a Court of Equity may grant relief to a tax-payer even if it is not satisfied that he is acting in good faith, or is influenced by proper motives, yet when it is called upon to determine what relief it will grant the plaintiff there is no reason why the Court should be compelled to shut its eyes and not see what the real facts are. This Court refused to grant to Kelly, Piet & Co. (53 Md. 134) any relief, although they were tax-payers as well as bidders, because it was really a controversy between rival tradesmen for the custom of the City."

In *Madison v. Harbor Board of Baltimore City,* 76 Md. 395, in which a disappointed bidder sought to set aside a dredging contract, the Court said at page 397:

> "It is of much more importance that a public contract, like the one in question, should be promptly awarded and speedily executed with due regard to economy, than that any particular bidder should get the contract, * * *"

If write-in equipment is essential in the machine, then certainly there is no legal compulsion requiring the Board to purchase the completed article in one contract. The Board may secure the whole in two, three or more contracts if it so desires. Under the existing conditions, the Board is free, *in its discretion,* to make a further purchase of write-in equipment to be installed in the machine covered by the contract of September 8th, 1937.

The fact is that a definite article was contracted for. Both contracting parties are satisfied with the contract. The Board ordered what it wanted. The machine is satisfactory, up to the point of write-in equipment, assuming the latter to be necessary. The write-in equipment is available. The Board should be permitted to purchase it at the price of $82. per machine, a total of $74,620.00. At any rate the Board should be left as a free agent to negotiate for its purchase at a price not exceeding $82. per machine.

This is an equitable solution of the present public emergency.

CONCLUSION.

It is respectfully submitted that:

1. The contract of September 8th, 1937, should remain in force.

2. The discretionary power vested in the Voting Machine Board by Ch. 94 of the Acts of 1937, is not subject to the terms of Secs. 14 and 15 of the Charter of Baltimore City, and is not subject to the approval of the State Central Purchasing Bureau.

3. Plan A and Plan B are each valid methods on the Automatic machine of first and second choice voting in state-wide party primary elections.

4. On a primary ballot the party designation need not be repeated in connection with each name on the ballot. On Plan A and Plan B on the Automatic machine the place of residence need be printed but once in connection with the name of a candidate for the nomination to a state-wide office, and such place of residence need not be repeated where such name appears for second choice.

5. The sample Automatic machine complies with the specifications prepared by the Voting Machine Board.

6. The privilege of write-in voting is not guaranteed by the Constitution. The Acts of 1924 and 1931, prohibiting write-in voting, are valid legislative regulations.

7. If the write-in privilege is guaranteed by the Constitution, it applies only to general elections in the State of Maryland and to general municipal elections in Baltimore City, and does not apply to primary elections.

8. Even if the Constitution guarantees the write-in privilege, nevertheless the contract of September 8th, 1937, should remain in force, leaving the Voting Machine Board free to have write-in equipment installed in the 910 machines at an additional cost not to exceed $82. per machine.

Respectfully submitted,

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HOWARD W. JACKSON, ET AL.

vs.

WILLIAM S. NORRIS.

IN THE

Court of Appeals

OF MARYLAND.

JANUARY TERM, 1938.

GENERAL DOCKET
NOS. 3 AND 4.

BRIEF FOR WILLIAM S. NORRIS, APPELLEE AND CROSS-APPELLANT.

CHARLES G. PAGE,
Solicitor for William S. Norris.

The Daily Record Co., Print, Baltimore.

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

BRIEF FOR APPELLEE AND CROSS-APPELLANT.

STATEMENT OF THE CASE.

(Unless otherwise clearly shown in context, figures in parentheses refer to pages of the printed record.)

The record* in this case is a consolidated record of two actions brought by taxpayers to test the validity of a contract entered into by the Voting Machine Board with the Automatic Voting Machine Corporation (hereinafter referred to as the "Automatic Corporation") for the purchase of 910 voting machines to be used in Baltimore. William S. Norris, for whom the present brief is submitted, was the plaintiff in the first of these actions and is appellee and cross-appellant in the present appeal. The questions raised have to do with the legality of the procedure adopted by the Voting Machine Board in awarding the contract; the legality of the machines to be delivered under the contract; and the authority of the

* Note: An index to the Record is appended at the end of the Brief.

Board to enter into the contract. Plaintiff Norris prays in his bill that the contract be declared void; that the Voting Machine Board be restrained from proceeding with the contract; that the Board of Supervisors of Election be restrained from using the machines in elections in Baltimore City; and that the City be restrained from paying for the machines.

The lower court in its opinion below found that the procedure adopted by the Board was lawful; that the machines complied with all the requirements of the election laws including the Voting Machine Act, except for their failure to provide for voting for a person not on the official ballot (hereinafter termed "write-in voting"). For the latter reason it declared the contract *ultra vires* and void and granted the injunctive relief prayed.

From this action the Voting Machine Board, the Mayor and City Council of Baltimore, and the Automatic Corporation appealed. Plaintiff thereupon entered a cross-appeal to test the remainder of the court's rulings with regard to the points of law decided in the defendants' favor. It is thus contemplated that the full controversy will be presented, and all questions decided, so that the Voting Machine Board may proceed to complete its function and the Board of Supervisors of Election of Baltimore City be able to proceed intelligently with the installation and use of the voting machines in the coming 1938 elections.

QUESTIONS PRESENTED FOR THE COURT'S DECISION.

(1) Was the contract for the purchase of the voting machines void because the machines to be delivered failed to provide facilities for write-in voting? The lower court

answered this question in the affirmative. Plaintiff Norris contends that the court did not err in so deciding.

(2) Were the machines to be delivered under the said contract illegal in that they failed to provide facilities for voting in primary elections as prescribed by Article 33, Sec. 203 of the Code? The lower court answered this question in the negative. Plaintiff Norris contends that the machines to be delivered do not comply with the law in this respect and that this defect is sufficient to render the contract illegal and void irrespective of the decision of the court with regard to the other questions.

(3) Was the said contract illegal and void because the Voting Machine Board failed to follow the proper procedure in awarding the contract? The lower court answered this question in the negative. Plaintiff Norris contends that the contract was illegal and void for this reason alone independent of the court's decision with regard to the other points herein involved.

(4) Should the injunctive relief prayed in the bill be granted? The lower court answered this question in the affirmative for the sole reason that the voting machines to be furnished failed to provide write-in voting. Plaintiff Norris contends that the injunction should be granted not only for the reason stated by the court but also for the other reasons advanced by his cross-appeal.

THE FACTS.

The Voting Machine Act was approved March 24, 1937.
Acts 1937, Chapter 94.

It was declared constitutional by this Court on the 26th day of May, 1937.

Norris v. Baltimore, 192 Atl. 531.

Section 224A of the Act* created a Voting Machine Board composed of the members *ex officio* of the Board of Estimates of Baltimore City, and the Board of Supervisors of Election of Baltimore City; and required them to purchase voting machines, for use in all subsequent elections in the City, which would conform to certain detailed specifications set out in the Act and such supplementary specifications as the Voting Machine Board should determine.

Specifications were in due course prepared by the Voting Machine Board and advertisements published for bids for 910 voting machines (Stipulation, p. 144; and Stipulation Exhibit No. 6, p. 169). Section 47 of the specifications (Stipulation Exhibit No. 6, p. 197) required the installation of sample machines proposed to be furnished in accordance with a sample ballot which was prepared by the Board (Stipulation, p. 145; Stipulation Exhibit No. 1, p. 147). Several sorts of alternative types of machine could be bid upon but the one in which we are interested was the Type A Size 1 machine which was ultimately ordered by the Board (Contract, Stipulation Exhibit No. 6, p. 208). This type machine is described by paragraph 49 of the Specifications as a machine with nine vertical or horizontal rows of levers and forty voting devices in each of the nine rows (Stipulation Exhibit No. 6, p. 194).

The Automatic Corporation was one of two bidders, the other being the Shoup Voting Machine Corporation (hereinafter referred to as the "Shoup Corporation"). The Automatic Corporation's bid was at the rate of $826.95 for each machine or an aggregate of $772,524.50;

* Note: Chapter 94 added certain sections to Article 33 of the Code, and the references hereinafter made are to the amended sections of the Code.

and the Shoup Corporation bid at the rate of $1,047.00 for each machine or a total of $952,770.00 (Stipulation, p. 145).

After the bids were opened the Board conducted three hearings, two of them public on August 24th and August 26th; and a third in executive session on September 8, 1937 (p. 283).

At the hearings witnesses were heard upon objections to the Automatic Corporation's sample machine. The principal objections which were at that time considered were two: that the machine to be furnished by the Automatic Corporation was not equipped to permit write-in voting; and that the machine was not equipped to permit legal voting for three or more candidates for nomination in a primary election as required by Article 33, Sec. 203, which had been made expressly applicable by Sec. 224 F (d) of the Voting Machine Act. Further objection was made that the voting machines did not comply with the specifications in that only eight rows of levers appeared on the machine in place of nine as required by the specifications, because it was necessary to block off one row of the nine rows on the machine in order to permit labelling for the Republican party as it appeared in the set up on the sample machine.

With regard to write-in voting, the Attorney General had sometime previous rendered opinions sustaining the legality of elimination of blank spaces on the printed ballot for write-in voting (Stipulation Exhibit No. 8, p. 214; Stipulation Exhibit No. 10, p. 218). A third opinion on this subject was rendered on July 24, 1937 (Stipulation Exhibit No. 11, p. 220) one day after the opening of bids by the Voting Machine Board (Spencer, p. 261). The specifications failed to require equipment for write-in voting although paragraph 43 thereof did require that

the voting machines to be furnished should be in strict accordance with the requirements of the Voting Machine Act (Stipulation Exhibit No. 6, p. 194). The sample voting machine deposited by the Automatic Corporation was admittedly not equipped for write-in voting (Griffin, p. 248) and it would be necessary to make substantial alterations both in the body of the machine and the equipment to be furnished to provide facilities for such voting (Griffin, p. 248). The Automatic Corporation claims that it is not liable to furnish such equipment under the bid as made (Court's Statement, p. 250) but offered to make the alterations and furnish the extra equipment at the rate of $82.00 extra per machine (Griffin, p. 249).

When the point was made before the Voting Machine Board that the machines did not provide facilities for legal voting under Article 33, Sec. 203, the Automatic Corporation suggested that it could furnish additional equipment which would enable voting at such elections to be in accordance with a ballot label set-up known as "Plan B" as distinguished from the set-up permitted by the equipment in the sample machine which was known as "Plan A" (See Stipulation Exhibit No. 3A, pp. 165 and 166). This equipment had not been furnished with the sample and was suggested only after the bids were opened. So far as the record shows, no working demonstration of a machine equipped to operate under Plan B was ever exhibited until the trial, Automatic Corporation merely stating that it could produce such equipment and would do so without additional cost to the City. A representative of the Automatic Corporation, however, admitted before the Board that it would be necessary in order to equip a machine with Plan B mechanism "to provide a lot of mechanism" and further that "it is a

very serious thing just before election to have all this extra paraphernalia'' (Hamilton, p. 288).

The Attorney General had informally refused to recognize his duty to advise the Voting Machine Board. Therefore, in order to obtain an opinion, the Board of Supervisors of Election of Baltimore requested an opinion, not upon the legality of the machines offered, but upon the legality of a ballot set-up, first, as to Plan A, and second, as to Plan B (Stipulation Exhibit No. 2, p. 152). The Attorney General thereupon rendered an opinion expressly refusing to pass upon the legality of any machine but stating an opinion that a ballot prepared in the form of Plan A would be illegal but a ballot prepared in the form of Plan B would be legal (Stipulation Exhibit No. 3, p. 157).

Thereupon the Voting Machine Board, without in anywise changing its form of contract to require a different machine than the sample deposited, met, and by resolution, formally approved the sample machine (Stipulation Exhibit No. 4, p. 167); and it immediately afterward, by resolution, awarded the contract to the Automatic Corporation (Stipulation Exhibit No. 5, p. 168). In the resolution approving the machine the Board recited that the Attorney General had stated ''that legal elections * * * can be conducted with the Voting Machines tendered by the Automatic Voting Machine Corporation'' (Stipulation Exhibit No. 4, pp. 167, 168). This, of course, was incorrect.

It was admitted at the hearing that at no time had the Voting Machine Board attempted to comply with the provisions of Article 78, Sec. 3 requiring that state boards make their purchases through or with the approval of the Central Purchasing Bureau (p. 221).

Immediately after the execution of the contract, plaintiff Norris filed the present suit. Shortly afterward the Daley suit was also filed. By stipulation the cases were thereupon heard together, the testimony to be applicable to each case (Stipulation made in open court, p. 142).

THE NEED FOR EQUITABLE RELIEF AND A PROMPT DECISION ON ALL POINTS INVOLVED.

One of the main arguments for voting machines was that it would eliminate the necessity for election clerks and would enable the reduction of precincts in the City. The Voting Machine Act by Sec. 224 A requires that the Board of Supervisors of Election shall rearrange precinct boundaries for this purpose.

Mr. Lindsay C. Spencer, Clerk of the Board of Supervisors of Election of Baltimore, was called as a witness and showed that as a result of the Act precincts have been reduced from 685 to 471 (Spencer, p. 226). This has required the preparation of new maps, new precinct books, the transfer of the name of each voter to the new books, and the cancellation of old precinct books (Spencer, p. 225, *et seq.*).

The new set-up has materially changed the size of the precincts and in order to revert to the old use of printed ballots, the whole amount of work which has been done would have to be undone (Spencer, p. 228). The work was started in early June, 1937, about one week after the decision of this Court sustaining the constitutionality of the Voting Machine Act, and was to be completed about the end of October, 1937 (Spencer, p. 227). Hence a period of about five months has been required. Witness testified that the same amount of time would be required to prepare for a return to use of printed ballots (Spencer, p. 228).

Judges for election will be nominated around July 1, 1937. After that time about 1,884 judges must be instructed in the operation of the machines. The primary elections will be held between the 8th and 15th of September, 1938, and the machines must be in the hands of the Board of Supervisors at the latest on the 15th of August to prepare the ballot labels (Spencer, pp. 229, 230).

From the point of view of the voting public it is therefore essential (1) that it be definitely determined what sort of machine must be furnished; and (2) that contracts for those machines be let in ample time to insure that they be delivered as soon as possible after July 1st. As a preliminary to both these points it is essential that the requirements for a legal machine and a legal set-up and equipment be determined in this suit as there will not be any opportunity for further tests in time to satisfy the need.

Turning to the time required for manufacture of machines, the present contract by paragraph 39 of the specifications requires delivery of 200 in March 1938; and thereafter in installments the last to be delivered on or before July 1, 1938 (Stipulation Exhibit No. 6, p. 191). It has been testified, however, that four and one-half months is sufficient time for manufacture and delivery (Weiss, p. 262). This testimony was not controverted. If, therefore, a contract is awarded before February 15th, there is no substantial cause for worry. If, on the other hand, all the legal points necessary to determine the sort of machine required are not decided in sufficient time to permit a new award at that time, there is danger of serious confusion.

From the taxpayers' viewpoint, there is the added objection that money is being illegally spent. This, of course, gives the court jurisdiction over the controversy.

Weller, et al., v. Mueller, 120 Md. 633, 638,

but a more complete statement of the need for relief has been made, in support of this plaintiff's request for a ruling on all the points raised by his cross-appeal. The Court is therefore respectfully requested to render a full decision on all points involved whether or not such a decision becomes necessary for immediate determination of the propriety of the lower court's grant of the relief prayed.

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ARGUMENT.

I.

THE CONTRACT IS VOID BECAUSE IT REQUIRES THE DELIVERY OF VOTING MACHINES WHICH DO NOT PROVIDE FOR WRITE-IN VOTING.

(a)

The Testimony.

The testimony shows that the sample voting machine deposited by the Automatic Corporation with the Board

of Supervisors of Election as required by paragraph 47 of the Specifications did not have write-in equipment (Griffin, p. 248). The company contends that it is not bound under its contract to furnish such equipment (p. 250) but agrees by statement in open court to make the necessary alterations for a rate of $82.00 per machine (p. 249) or an additional total price of $74,620.00. The additions are substantial. The body of the machine must be altered and raised; new equipment must be added (Griffin, p. 248). The position of the Automatic Corporation that it is not required to furnish the extra equipment under its contract, though the contract includes an obligation to furnish machines which comply with the law (paragraph 43 of Specifications, p. 194) is that there were three opinions of the Attorney General of Maryland ruling that abolition of the privilege of write-in voting was legal and constitutional (Stipulation Exhibits Nos. 8, 10 and 11, pp. 214, 218 and 220, respectively). Furthermore the machines without write-in equipment as demonstrated by the sample, were formally approved by the Voting Machine Board by its resolution of September 8th, 1937, (Stipulation Exhibit No. 4, pp. 167, 168) which was passed prior to the execution of the contract. It is understood that the Voting Machine Board will contend that the Automatic Corporation is bound under its present contract to furnish machines with write-in equipment if such equipment is held by this Court to be necessary, at no additional cost to the City, but under the circumstances the validity of this conclusion is doubted. This plaintiff will argue the case on the assumption that the contract as written does not require write-in equipment without additional cost. If the Court shall hold the contrary plaintiff's prayer for an injunction in so far as it is based upon the question raised under this heading may be regarded as withdrawn.

(b)

The Law.

Prior to 1924, Article 33, Section 63, relating to printed ballots, included the following provision:

> "Immediately following each group of candidates to be voted for there shall be a blank space or spaces with a square or squares to the right, in which any voter may write the name of any person for whom he may desire to vote other than those already printed on the ballot, as provided for in section 54 of this Article."

In that year, following the passage of the Constitutional Amendment, Article XVII, for uniform quadrennial elections, the provision was deleted to shorten the ballot, which had become materially longer by reason of the Amendment.

> Acts 1924, Chap. 58, Section 55
> (See also Acts, 1931, Chap. 80, changing section 80 of the law by providing that a name written on ballot spoils the ballot).

There can be no doubt that the Legislature intended to abolish write-in voting if it could be constitutionally done.

An opinion of the Attorney General sustained the legality of the omission (Stipulation Exhibit No. 8, p. 220). The matter was still regarded as doubtful and when the Voting Machine Act was passed the draftsman of the Act, after providing specifically that the ballot label should conform to Article 33, section 63 of the Code (Voting Machine Act. section 224A), went on by section 224F to require that voting machines purchased 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. * * *"

this indicating that it was the intention of the Legislature to require write-in voting if the abolition of the privilege was determined to be unconstitutional. This requirement was repeated by the Voting Machine Board in issuing instructions regarding sample machines (Stipulation Exhibit No. 1, p. 148).

Under the Election Law as modified by the Act of 1924 above mentioned, the voter is required to cast his vote on an official printed ballot under the so-called Australian Ballot System. The question is therefore directly raised as to whether the Legislature can constitutionally require use of an official ballot—on paper ballots or on a voting machine, without a provision for write-in voting; or to put it the other way, is this an infringement of the right of suffrage guaranteed by our Constitution, Article 1, section 1, and also by Article 7 of our Declaration of Rights.

(c)

The Nature of the Right of Suffrage.

It is fundamental that the right of suffrage is the basis of our democracy. This principle was stated in our Declaration of Independence.

> "* * * Governments are instituted among men, deriving their just powers from the consent of the governed."

And has been repeated by Lord Bryce as follows:

> "All citizens have a right to concur personally or through their representatives in making the law."
>
> 1 Bryce, Modern Democracies, 43.

Unlike foreign governments our theory of government is based upon an absolute political equality of all citizens

independent of property or other qualifications. And though often criticized as not sufficiently exclusive

1 Bryce, The American Commonwealth, pp. 99, 100,

the right to vote has in the United States been maintained without restriction except for age, sex, and disqualification for crime.

1 Bryce, Modern Democracies, 63.
W. F. Willoughby, The Government of Modern States, 271, 273.

It has been stated that it is one of the bases upon which the success of our system is founded.

"Feeling the law to be their own work, the people are disposed to obey the law."

2 Bryce, The American Commonwealth, 595.

See also:

Chapter "Theoretical Foundations of Democracy" in 1 Bryce, Modern Democracies, 43.
Title "Democracy", Enc. of Social Sciences, 76, 79.
cf. Luce, Legislative Procedure, 5.

Since the foundation of our Federal Constitution the effort has been to continually broaden the privilege to vote. The 15th Amendment doing away with restrictions based upon race, color, or previous condition of servitude, and the 19th Amendment admitting women to suffrage, are both great extensions of the right. While not undertaking to determine the qualifications of a citizen to vote, the said Constitution strongly indicates the determination to maintain unrestricted the free right to vote.

"But when the right to vote at any election for the choice of electors for President and Vice Presi-

dent of the United States, Representatives in Congress, the Executive and judicial officers of a State or the members of the Legislature thereof, is denied to any of the male inhabitants of such state being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein (in Congress) shall be reduced. * * *"

Constitution, 14th Amendment, sec. 2.

Our Declaration of Rights sums up this philosophy:

"Article 1. That all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole; and they have, at all times, the inalienable right to alter, reform or abolish their form of Government in such manner as they may deem expedient."

"Article 7. 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."

It is upon these principles that our Constitution has guaranteed political equality in Maryland. Article 1, section 1, provides in part:

"All elections shall be by ballot; and every male 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, * * * shall be entitled to vote * * *."

And upon this guarantee it has been stated

"There is but one necessary qualification of a voter i. e. registration."

Niles, Md. Constitutional Law, 87.

(d)

The Right of Suffrage Must Remain Unrestricted.

Throughout the history of our Federal and State Constitutions the tendency has always been to extend, not to limit, the right of suffrage. Such a tendency, and the mandate of the Constitution itself, are not to be lightly turned aside. The technical words of the Constitution as for instance the words "All elections shall be by ballot" must be read liberally in recognition of this tendency, and the sole justification for a broad construction of those words is that the spirit of the constitutional guarantee of free suffrage is extended.

The Court of Appeals upheld the use of voting machines in a recent case.

Norris vs. Baltimore, (1937) 192 Atl. 531.

It was there held:

> "* * * while the principles of the Constitution are unchangeable, in interpreting the language by which they are expressed, it will be given a meaning which will permit the application of those principles to changes in the economic, social and political life of the people, which the framers did not and could not foresee."

The court's conclusion to support the advance in science by permitting a use not originally contemplated by the Constitution was based upon the idea that voting machines facilitate and do not impair the exercise by the citizen of his constitutional privilege to vote.

> "It is unbelievable that men of ordinary intelligence meant by the use of that phrase to prevent the use of improvements in the system which would promote the very objects and purposes which they had in mind, or that they attached any importance to the

mere physical character of the means used to record the voter's choice."

Just the contrary, however, is the ruling where a substantial right of the voter is infringed. There, even an equivocal statement in the Constitution must be construed to protect the right of suffrage and strike down limitations upon its exercise.

> "The elective franchise 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. However ambiguously or obscurely statutes or Constitutions may be phrased, it would not be just to give them a construction in hostility to the principles on which free governments are founded."
>
> Kemp vs. Owens, 76 Md. 235, 241 (Regarding the registration of a citizen who has changed his residence from one ward to another in the same legislative district to vote).

In the same case the court said:

> "It is declared in section 1 that every male citizen of the United States of the age of twenty-one years or upwards is entitled to vote; * * * We cannot add anything to the qualifications prescribed in the Constitution; neither can we take anything from them. * * * It must, of course, be assumed that the Convention which framed the State Constitution had in view the legal and constitutional provisions which existed at the time on the subject of suffrage. And, of course, it was their intention that everyone should have a full and fair opportunity to vote, who was entitled to the elective franchise." (Pp. 239, 240, 241.)

And see:

State v. Anderson, (1898) 100 Wis. 523, 530, 76 N. W. 482.

(e)

Nature of the Right to Vote at the Time of the Adoption of the Constitution in 1867.

The Australian Ballot System was first introduced in Maryland in 1890.

Steiner, Citizenship & Suffrage in Md., p. 78.

Statutes adopting the law were soon thereafter passed.

Laws of Maryland, 1892, Chap. 236; 1896, Chap. 202, secs. 49, 50.

Up to the time of the adoption of the Australian Ballot System the right of the voter to vote for whom he pleased had been established. Ballots had been furnished the voter by the interested parties at their expense and there was no official ballot.

See:

Steiner, (supra) p. 31.
Brooks, Political Parties and Election Problems (1936, Harper & Bros. Pub. Co. N. Y.) 3 Ed. p. 424.
*Harris, Election Administration in the U. S. (1934), 165.

The power to write-in a name on the official ballot then for the first time became important. Provisions guaranteeing the right to write-in voting were immediately inserted in the law and were continued until deleted by the amendment of 1924 (Laws, 1924, Chap. 58, sec. 55, now Code, Article 33, section 63).

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* Note: This publication is the report of an investigation by The Institute for Government Research of the Brookings Institution and is a comprehensive treatment of the subject. Chapter VII on voting machines is informative.

While some criticism was made of the right to write-in a name, the right was prevalent where the Australian Ballot System was introduced.

> "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, Election Administration (supra), p. 176.

See also:

> Brooks, Political Parties and Election Problems (1936, Harper & Bros. Pub. Co. N. Y.) 3 Ed., p. 428.

The constitutionality of the Australian ballot was upheld mainly because of this provision.

> "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."
>
> Cole vs. Tucker, 164 Mass. 486, 488, 41 N. E. 681.

From these cases the test of the power and the limitation of the Legislature seems clear. If the restriction or regulation is for a lawful purpose and does not materially hamper the right to vote the regulation is constitutional.

"Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations. Such regulations within reasonable limits strengthen and make effective the constitutional guarantees instead of impairing or destroying them. Some interference with freedom of action is permissible and necessary incident to the power to regulate at all, as some interference with personal liberty is necessary and incident to government; and so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot be said to contravene any constitutional right."

State v. Anderson, (1898) 100 Wis. 523, 533, 534; 76 N. W. 482 (Upholding Australian Ballot Law).

And see:

Cook v. State, (1891) 90 Tenn. 407.
Cooley, Constitutional Limitations, 8 ed., 1368.

On the other hand, if the attempted restriction or regulation is a material impairment of the right to vote, it is unconstitutional and void.

Cooley, Constitutional Limitations, 8 ed., p. 139, n. 5, 1394.

(f)

The Authorities.

There are two decisions directly striking down an attempted elimination of the write-in privilege where an official ballot is required.

State v. Dillon (1893) 32 Fla. 545
Littlejohn v. People (1912) 52 Colo. 222; 121 Pac. 129.

There have, however, been several cases where the courts have stretched the literal meaning of statutes to permit write-in voting on the ground that denial of the right would be unconstitutional.

Barr v. Cardell (1915) 173 Ia. 18; 155 N. W. 312
Cohn v. Isensee (1920) (Dist. Ct. of App. Cal.) 188 Pac. 279
Senner v. Patton (1897) 155 Ill. 553, 562-563; 40 N. E. 290
State v. Runge (1898) 100 Wis. 523; 76 N. W. 482
Cole v. Tucker (1895) 164 Mass. 486, 488; 41 N. E. 681
Cook v. State (1898) 90 Tenn. 407; 16 S. W. 471
Dewalt v. Bartley (1891) 146 Pa. St. 529
Bradley v. Shaw (1892) 133 N. Y. 493, 497; 31 N. E. 512

And see:

State v. Hosetter (1896) 137 Mo. 636, 645; 39 S. W. 270
Independence Party Nominations (1904) 208 Pa. St. 108, 112

The refusal to permit a write-in has been described as "a serious interference with the freedom of the expression of the right of franchise."

Elections 9 R. C. L. 1054 (Citing most of the cases on the subject) and for general discussion see 91 A. S. R. 682.

So far as known there have only been three cases where, by direct decision, dictum, or reasoning the court has

suggested that the legislature can prohibit write- in voting.

> Chamberlain v. Wood (1901) 15 S. D. 216; 88 N. W. 109
> McKenzie v. Boykin (1916) 111 Miss. 256; 71 So. 382
> Mize v. McElroy (1892) La. Ann. 796; 11 So. 133.

A distinction should be made, however, between the elimination of the privilege of write-in voting in general elections and the elimination in the case of primaries.

> State v. Johnson (1902) 87 Minn. 221; 91 S. W. 609, 840.

The reason for permitting a write-in voting is not as obvious in the case of primary elections. Furthermore primary elections were unknown until long after the adoption of the Constitution of 1867.

> cf. United States v. Gradwell (1919) 243 U. S. 476
> Willoughby, Constitution of the United States, 2 ed. sec. 356, p. 646.

(g)

Abolition of the Privilege of Write-In Voting Results in a Substantial Impairment of Suffrage.

The Australian ballot system has been so generally enforced that it has been taken very much for granted by the present generation and comments concerning the nature of the privilege to vote have often been made in the light of the use of the Australian ballot system with that system as a standard or criterion. Long use of that system in this State has somewhat dulled the edge of the impairment of the right to vote as it existed when

our Constitution with its guarantee of that right was adopted in 1867. As the court below pointed out, however, long violation of a constitutional limitation does not justify a violation of the limitation.

Somerset Co. v. Pocomoke Bridge Co., 109 Md. 1, 7.

There can be no doubt, if in the light of the privilege to vote as it was known in 1867 there has been a substantial impairment, the Constitution has been violated and the offending provisions must be stricken down.

Furthermore, the privilege of write-in voting must be considered in the light of other substantial restrictions of the privilege, upon which it is based; and consideration of the question must include the cumulative effect of all such restrictions upon the privilege guaranteed.

Comparison Between the Situation in 1867 and the Present.

Comparing the situation in 1867, then, with the present situation, we find, first, that an official ballot has been adopted in the place of a ballot furnished by the candidate or voter, of the type used prior to 1892. The candidate, or the voters who wish to support a candidate, in order to insure an appearance on the official ballot, must follow one of three courses: nomination, in the case of major parties, by primary election (Code, Art. 33, Sec. 90); in the case of minor parties by primary convention or primary meeting (sec. 49, 50); and finally, by petition (sec. 51).

The primary election is a direct result of the adoption of the Australian ballot system with its official ballot

Harris, Election Administration in the United States, 165

and, of course, if it were the only method of nomination would be a major restriction on the privilege of the voter as it limits his choice to the selection of candidates chosen by a majority of a particular party and thus would entirely eliminate any possibility of small party nominations and, for instance, prevent the growth of new parties.

The primary convention by minor parties obviates a considerable part of the objection just considered in that it permits parties which have polled at least one per cent. of the vote in a preceding election to nominate candidates. It still, however, prevents the selection of a person who is the candidate of a party which does not meet such a qualification.

Finally, the right to nominate by petition to some extent lessens the limitations still remaining in that it permits a voter to place on the ballot and cast his vote for a person who is either unaffiliated or whose party has not become established. The lower court, however, has clearly demonstrated that this method of placing a candidate's name on the ballot is a highly burdensome one requiring a petition signed by 500, 750, 1,500 or 2,000 voters to qualify. This, together with the technical requirements for proof of the signatures on the petition, is a costly and tedious undertaking.

In each of the above cases there is added restriction requiring the candidate to pay a filing fee ranging from $25.00 to $270.00 to obtain a place in the official ballot (Art. 33, sec. 198). While what we are here considering is not the right of a candidate to place his name on the ballot, but of a voter to vote for a man of his choice, nevertheless if only those who have filed can be voted for it means in substance that the voter may be required to

pay the filing fees of the various candidates to obtain the right to vote for them.

Added to the limitations above mentioned is the further restriction to free selection in the lapse of time between the last moment for nomination by primary (Art. 33, sec. 191), or by petition (sec. 55), and the date of the election, which may extend from the first Monday in May to the Tuesday after the first Monday in November (Constitution, Art. 17). If, therefore, a person's name is not placed on the ballot prior to May 15th, the voter may lose his chance to vote for that person. This then is an additional impairment in the right to vote as it was recognized in 1867.

The privilege of write-in voting remains as the sole method for the voter who is unable to place his candidate upon the ballot by means described above. So long as it is available it is still possible for a voter, at no real expense, to cast his vote for whomsoever he may choose. Deprived of the right, he faces an almost impossible task unless he is willing and able to obtain a vast amount of cooperation from others. Recalling that it is the right of the voter and not of a candidate which is under consideration, such a requirement would refuse the privilege of voting to those who do not wish to join a concerted movement.

The Secrecy-of-the-Ballot Argument.

Enthusiasts of the cause for the Australian ballot and secrecy in voting have criticized the write-in privilege. It is stated that it violates the requirement of secrecy and enables the voter to identify his ballot.

> Chamberlain v. Wood, 15 S. D. 216, 226
> Brooks, Political Parties & Election Problems (supra), p. 428

With this criticism in mind, it might once have been argued that the abolition of write-in voting was an exercise of the power of the legislature to make laws to protect the purity of elections.

See:

Maryland Constitution, Art. 3, sec. 42

But the reason disappears where voting machines are concerned. The identity of the voter's vote is lost upon his leaving the booth. His writing-in the name of a candidate cannot in any event disclose the rest of the ballot which he cast. The argument, therefore, disappears with the use of voting machines provided with write-in equipment.

The "Practical Question" Considered.

It is urged that the right is of small practical importance. Mr. Machen, in his argument below, suggested that the right claimed is merely that a voter shall have a constitutional privilege to make a fool of himself. A commentator has said:

> "Practically, however, this right is of no value except when exercised in a concerted movement, when it sometimes results in the nomination or election of the candidate. It should be pointed out, though, that this is infrequent, and the candidate whose name is not printed on the ballot stands little chance of election or nomination as the case may be" (p. 176).
>
> * * * * * *
>
> "It should be recognized, however, that this right is of little value, and the necessity for its use by serious minded voters should be avoided as far as possible" (p. 178).

Harris, Election Administration, etc. (*supra*).

But it is noticeable that the true reason for write-in voting is overlooked by this commentator,

See:

Harris, Election Administration, etc., *ubi supra,* particularly pp. 176, 177

and it is submitted that the appellants make the same mistake.

It must at all times be kept in mind that it is the right to vote which is being protected, not the right to elect. The former is the right of each individual whether he be in the majority or the minority and must be protected by the Constitution and the courts or it is lost: the latter is the right of a majority and needs no protection.

Furthermore the viewpoint adopted by the courts in examining the question must be that of a voter and not that of a candidate for office. It is there again the former right which is being protected. It is submitted that the whole theory on which a democracy is based is dependent upon the submission by a minority to the dictates of a majority only upon the express condition that the right of the minority, however small, to have his word and his *unrestricted* right to vote. If practical for no other reason the right becomes of tremendous importance to free people for this reason alone.

The immediate practical results of the privilege as expressed by election of a candidate, as in the case of an ordinary every day election, is not demonstrable. As the lower court stated, the privilege is rarely exercised. The voter who exercises his right may be merely casting his vote away. But the same things can be said of the right of a communist agitator, or in the present

day, of an "economic royalist", to speak his mind; and yet that right is one which our courts regard as of the highest importance. The right to be protected against self-incrimination may be a right in most cases only claimed by a criminal; yet it is jealously guarded.

If a majority in a legislature can impair the individual's right to vote by requiring a nomination by primary or petition and a filing fee, where can a tyrannical majority in the legislature not go?

Nor need we go beyond the law as it now stands to find a ready example of the importance of a write-in privilege. If the candidates for a particular office on the official ballot are suddenly demonstrated to be morally or otherwise unqualified for office, as in the case of some great public scandal, the voter's only recourse is a write-in vote. And in such a case, with a great popular indignation against the organization candidates, a write-in candidate might very possibly win the election.

To sum up: In 1867, the guarantee of the right to vote included an entirely free and unrestricted right of every voter to cast his vote for a person of his own choice; the Australian system has limited that right but the limitation has not been regarded as sufficiently material to warrant interference by the courts, so long as the right of the voter to write-in the name of his own candidate, has been maintained; without that right the opportunity of a citizen to vote for a person of his own choice may depend upon his personal expenditure of hundreds of dollars and much time and effort. Such an impairment is obviously too substantial to withstand attack even if the ultimate cost were the complete abandonment

of the voting machine, with all of its admitted advantages over the old system. Fortunately, the defect is not fatal to the use of voting machines. It is perfectly possible to produce a machine with such equipment, and both of the bidders in the present case can furnish such machines (Record, pp. 303, 304).

More clearly than ever, it is the duty of the Court to strike down any attempted limitation and preserve to the voter this essential of democracy, which has been guaranteed to him by our Constitution.

(b)

The Voting Machine Act Must Be Construed to Require Write-In Voting to Avoid a Serious Constitutional Question.

The law is clear that where a serious constitutional question is raised the court will construe the act in a manner which will avoid the question.

Fox v. Washington, 236 U. S. 273, 277
I. C. C. v. Oregon Co., 288 U. S. 14, 40

Sec. 224F (d) of the Voting Machine Act requires that the machines used 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 * * *"

Sec. 224F (d) must be deemed to require write-in voting and the Act itself is saved. The purchase of a machine without such equipment was, however, properly declared *ultra vires* and illegal.

II.

THE VOTING MACHINES TO BE FURNISHED BY THE AUTOMATIC CORPORATION FAIL TO PROVIDE A LEGAL METHOD FOR PREFERENTIAL (FIRST AND SECOND CHOICE VOTING) IN PRIMARY ELECTIONS UNDER ARTICLE 33, SECTION 203.

The Testimony.

Paragraph 47 of the specifications (Stipulation Exhibit No. 6, p. 197) requires that each bidder set up samples of voting machines "such as he proposes to furnish and deliver if awarded the contract", to be arranged in accordance with a sample ballot to be specified by the Supervisors of Election. The last portion of paragraph 47 (p. 199) reads:

> "The sample voting machines, 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 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 Supervisors of Election duly issued their instructions (p. 147) and the Automatic set up its machine No. 33068, with a set-up for first and second choice voting in primary elections which is referred to as Plan A (p. 231). That machine was put in evidence and will be produced before this Court. Plan A is reproduced in the Record (p. 165).

Objection was made at the hearings to this set-up as in violation of the Voting Machine Act, Section 224F (i). The Automatic Corporation thereupon came forward with a ballot set-up known as Plan B (p. 166) which was never,

however, physically demonstrated before the Voting Machine Board. Inasmuch as the Attorney General was unwilling to advise the Voting Machine Board, the Board of Supervisors of Election thereupon requested the Attorney General's opinion with regard to the legality of the *set up of a ballot* in accordance with Plan A (Stipulation Exhibit No. 2, p. 152); and the Attorney General thereupon rendered an opinion declaring that a ballot set up on voting machines under Plan A would be illegal; but that a ballot set up under Plan B would be legal (Stipulation Exhibit No. 3, p. 157). He expressly refused to rule on any machine, or the legality of any machine, the ruling being limited to an abstract set up on a voting machine (pp. 157, 163, 164).

The Voting Machine Board later misinterpreted the ruling of the Attorney General by declaring in a formal resolution, in which it itself approved the machine and bid of the Automatic (Stipulation Exhibit No. 4, p. 167), that the Attorney General had also advised "that legal elections of all kinds, primary, general and special, can be conducted with the voting machine tendered by the Automatic Voting Machine Corporation (pp. 167, 168). This error was material as it was demonstrated in evidence that the sample voting machine could not operate at all under a Plan B set up unless complicated mechanism not mentioned in the bids were added to the machine (Hamilton, p. 288), and even more material, because it was demonstrated in court that the machine could be made to operate improperly by a person acquainted with the mechanism (see *post*). Other machines were also introduced in evidence to demonstrate the operation of a machine set up under Plan B. These were admitted in

evidence solely for demonstration purposes as they were not set up as samples before the Board and were equipped with additional machinery (pp. 258, 259).

Plan A Set-Up.

Under this set-up each candidate's name appears extended horizontally over a series of voting levers, operation of any one of which will cast a first choice vote for that candidate (see Diagram, p. 165). The lever to the extreme left of the row preempted by a particular candidate votes first choice alone. The levers to the right of the first choice lever permit only a combination vote of first choice for the candidate who preempts the row and second choice for another candidate. Only one lever can be operated, so that operation of a first choice lever locks all other levers, both first choice for other candidates and combination first and second choice levers for all candidates. In the same way the operation of a combination lever for first and second choice prevents further voting on a first choice lever. This system requires that the name of each candidate appear on the machine once in the row he has preempted; and a separate time in each of the rows preempted by other candidates. So that if there are three candidates his name appears in two other rows; if there are five candidates his name appears in four other rows (Demonstration, pp. 242, 243; see p. 244).

Plan B Set-Up.

This set-up (see Diagram, p. 166) did not appear on the sample and was devised as a substitute upon presentation of the objections to the Plan A machine at the hearings before the Board. It differs from Plan A in that though each candidate preempts a row as before,

his name does not extend over the ballot label of the other (second choice) candidates in his row; and to vote a first and second choice, the voter operates *both* the lever at the left *and* a second choice lever—thus separating the voting. The machine is intended to prevent a vote for a second choice unless a first choice lever on the same row has been first operated; but the evidence to be mentioned showed that the machine can be manipulated so as to overcome this mechanism.

The evidence is clear that additional mechanism must be supplied to enable the sample machine to operate under Plan B. At the hearings before the Board it was admitted by an Automatic Corporation spokesman that in order to equip the machine to vote under Plan B, it would be necessary "to provide a lot of mechanism"; further, that "it is a very serious thing just before election to have all this extra paraphernalia on that" (Hamilton, p. 288).

Subpoenas had been issued prior to the trial for the Automatic Corporation to produce the additional parts necessary for Plan B alteration separate from the machine and they were called on to produce them (pp. 238, 239); but this was not done and the court refused to require it to be done (pp. 238, 239). The court further refused to require the Voting Machine witness to separate the mechanism (pp. 246, 247), though the witness admitted it would take not more than ten minutes (p. 246).

Griffin, an Automatic Corporation official, stated that the additional Plan B mechanism consisted of certain metal straps and channels (Griffin, p. 241). These additional straps and channels increase as the candidates in-

crease, the number of straps and channels increasing in accordance with the square of the number of candidates (Weiss, 265, Court's statement, p. 293).

The witness estimated that the additional cost per machine for such equipment would be "exactly" $1.94 (pp. 244, 245). The additional mechanism for three candidates was viewed by the court and estimated at "perhaps a couple of pounds" (p. 244). The witness refused to admit that an increase of candidates and the necessary mechanism would increase the cost of alteration (Griffin, p. 245). A witness for plaintiff, Daly, estimated the additions would cost approximately $35.00 a machine (Weiss, p. 272). This witness (Weiss, p. 264), testified that the proposed mechanism was impracticable when the number of candidates is increased to five because of the "building up of straps". A second witness who had been an engineer specializing in voting machines since 1925 (Shoup, p. 295) stated that even when the machine was set for only three candidates under the Plan B equipment it was possible to vote a second choice without voting a first choice (Shoup, pp. 301, 302); that it was mechanically impossible to set the machine up properly for six candidates (Shoup, p. 298); that the machine on which Plan B mechanism was demonstrated would not preclude a voter from voting for more persons for any office than he is entitled to vote for, and from voting for a candidate for the same office more than once (Shoup, pp. 298, 299, 301). Witness thereupon made a demonstration on the machine (p. 302). Witnesses for the Automatic Corporation at first suggested that the machine had been mutilated in the demonstration.

> "With the necessary force, on any machine, you can so mutilate the machine that the voter can cut

> himself out of a first choice vote. In fact with the necessary force you can do almost anything'' (Hamilton, p. 314).

He later admitted that Shoup did not mutilate the machine in his demonstration; that there was no noise which might be detected outside of the curtain; that the demonstration was by Shoup alone without tools and without anything but the witness' hands (Hamilton, p. 316).

The Automatic Corporation offers to furnish the additional equipment for Plan B mechanism without cost (Griffin, p. 247); but advises against its adoption (Hamilton, p. 289).

The uncontradicted testimony showed that it was possible to construct and produce a machine upon which the defects above demonstrated in the Automatic Machine would be eliminated (Shoup, pp. 303, 304).

(a)

The Automatic Machine, Both Under Plan A and Plan B Is Illegal Because the Candidate's Name Appears Several Times and in Several Columns Instead of Only Once.

The law applicable to written ballots prior to passage of the Voting Machine Act clearly required that a candidate's name shall appear only once on the ballot.

Section 63 of Article 33 provides:

> ''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 * * *.''

Section 203 of Article 33, applying to first and second choice voting in primary elections, specifically requires that a candidate's name shall appear only once with two blank squares thereafter for first and second choice voting.

When the Voting Machine Act was passed many sections of Article 33 were changed to conform the Election Laws to the Voting Machine Act, including Sections 62 and 64.

Acts of 1937, Chapter 95.

Section 63 remained unchanged. The Voting Machine Act by Section 224A expressly made this section applicable to voting machines. Section 224 F (d) required "a substantial compliance with the provisions of Section 203 of this Article".

These sections all demonstrate that the Legislature intended that the names of candidates appear only once on a ballot and it is submitted that prior to the Voting Machine Act had the names appeared more than once, the ballot would have been illegal.

The same policy of the law, to prevent confusion and possible disenfranchisement of voters, was express in the requirement of the Voting Machine Act that names be arranged in separate rows *or* columns. The alternative provision was to permit a variation in the design of particular machines. An arrangement of names in rows *and* columns is a violation of this law. Section 63 reiterates the provision with regard to the printing of a ballot.

> "All candidates for office shall as far as possible be placed in one column but when the names to be printed on the ballot are over thirty-six then another column shall be added."

The arrangement on the voting machine obviously violates both the provision against multiple naming of a single candidate and multiplication of the rows in which the names of candidates appear. Under the setup of

Plan A (p. 165) and Plan B (p. 166) the name of a candidate appears not once but three times and the names of all the candidates appear not in one row but in three rows. Furthermore, if there are six candidates the name of each must appear six times in each of six rows so that there must be thirty-six ballot labels for the six candidates. This renders the voting in such an election highly complex and confusing and is exactly what the Legislature sought to prevent by the above quoted provisions of the law.

(b)

The Sample (Plan A) Machine Does Not Comply With the Law.

The same act, Section 224F (i) requires that the machine "have voting devices for separate candidates and questions.

The Voting Machine Act, Section 224 F (d) requires "a substantial compliance with provisions of Section 203.

Section 203 provides for preferential voting in primaries and a form of ballot where each candidate's name is followed by two squares to be designated "First Choice" and "Second Choice"; further, that a second choice vote without a first choice vote shall be counted as first choice.

The above provisions of the law are violated by the sample as demonstrated under Plan A. The operation of one lever to register the vote for two candidates, instead of having a voting device for each separate candidate constitutes "group voting" and is a violation of Section 224 F (i).

Attorney General's Opinion to Board of Supervisors of Election—Stipulation Exhibit No. 3, p. 157.

(c)

The Plan B Machine Does Not Comply With the Law.

The alternative Plan B as set up with additional machinery in the Automatic machine is mechanically imperfect and subject to manipulation. The testimony is uncontradicted that the machinery furnished by the Automatic for Plan B equipment though relatively simple if only a limited number of candidates are up for nomination becomes highly complicated as the number increases. The machinery for the plan has been hastily produced to meet an objection after the bids were opened and already has been demonstrated to be defective by the witness Shoup who was able without help of tools of any sort and without in any way leaving a mark on the machine to cause it to vote illegally. The testimony of Mr. Hamilton, representing the Automatic before the Voting Machine Board, shows a strenuous objection to the adoption of Plan B because the machinery necessary is highly intricate and complicated. The testimony of Shoup and Weiss was that the mechanism is not practical and that it is mechanically impossible to use the mechanism with any success where there are 5 or 6 candidates. The further fact that the manipulation already demonstrated can be made without any sound which could be heard by persons outside the booth leaves a possibility of corruption in the use of the machine which would far outdo the true value of voting machines.

(d)

It Is Not Within the Administrative Powers of the Voting Machine Board to Waive Such Irregularities.

The Board Cannot Disregard the Directions of the Legislature.

"Where the Legislature has regulated the form of the ballot it does not lie within the power of any officer to change that form."

Davidowitz v. Phila., 187 Atl. 585, 589 (1936) (Where party appellation was required to be listed at edge of machine: an arrangement disregarding provision was held illegal).

Helme v. Bd., 149 Mich. 390, 113 N. W. 6 (Machine could not be so adjusted as to comply with law permitting voting for certain combinations of candidates).

And see:

Line vs. El. Canvassers, 154 Mich. 329, 117 N. W. 730, 732 (Use of voting machines in primaries held illegal because order of candidates' names on ballot were not rotated as required by law: also voter not confined to voting for candidates in own party).

"A voting machine is not in proper condition, if there is anything about it which in any way serves to impede or obstruct the honest, intelligent and complete wish of the voter. A voting machine is not in daily use, its service is confined and restricted to election days and the voter is entitled as a matter of right to have a voting machine free of any obstruction which may in any possible way obstruct or interfere with the exercise of his or her right of suffrage."

Application of Robinson, 218 N. Y. Supp. 3 (Holding mechanical arrangement illegal).

The Board's Authority Is Expressly Limited by the Act.

The Board is expressly limited in its authority to the making of specifications "supplementary to the specifications hereinafter set forth" (Sec. 224 A).

Under the specifications for the machines contained in Section 224 F (i) mentioned above, where a candidate's name appears only once and all candidates are in a single row; and where each voting lever is identified with a particular candidate, the mechanism would be relatively simple and easy for a voter to understand. Such a set-up if anything would be as quickly, or more quickly deciphered by a voter than the ordinary ballot. Apparently this was the thought of the Legislature as it inserted an additional provision in Section 224 A of the Act to read as follows:

> "No voter in the use of a voting machine, shall be permitted to occupy more than two minutes while other voters are waiting to use the same." (224 A.)

It is submitted that the complicated and confusing mechanisms submitted both under Plan A and Plan B are not sufficient to meet this standard; and that the average voter cannot be expected to decode the machine offered and register his vote in the two minutes allowed.

For this reason the machines should be declared defective for use in Primary Elections under Section 203.

(e)

The Contract Should Therefore Be Declared Void.

The sample voting machine presents a highly complicated mechanism which the voter will find difficult to vote in primary elections. It has been stated that it is impos-

sible to correct the defects in the machine in so far as they repeat the names of the candidates and have them appear in different rows, and the lower court swept aside the objections made by plaintiff on this ground (Court's Opinion, p. 322). The same cannot, however, be stated with regard to the other defects exhibited under the Plan A and Plan B mechanism in the machines offered by the Automatic Corporation.

The testimony clearly indicates that Automatic Corporation's make-shift device for Plan B is too complicated to be of practical use; further that it can be manipulated and illegally operated. Unless the Court can sustain the operation of machines under Plan A the contract should be thrown out (independent of the Court's decision with regard to write-in voting and other objections) and a new notice for bidding be required to permit bids on a legal machine. It is uncontradicted that the Shoup machine is designed to avoid the above mentioned difficulties (Shoup, pp. 303, 304), and under such circumstances at least the Board should not be permitted to waive the specific requirements of the Legislature.

III.

THE PROCEDURE FOLLOWED BY THE VOTING MACHINE BOARD IN AWARDING THE CONTRACT WAS ILLEGAL.

The Voting Machine Board has taken the position that it was not bound to comply with any particular procedure in making the purchases authorized by the Act. This position is based upon the assumption that it is not bound by sections 14 and 15 of the City Charter which applies to purchases by City boards; and not bound by Article 78 of the Code which applies to State boards.

This anomalous position would leave them as they themselves claim, "as free as the wind," without any duty to provide for competitive bidding or advertisement or in other ways to comply with the usual requirements for large purchases on the public account. Despite its claim the Board apparently recognized that such a course would be improper, and it adopted a procedure which in form resembles the requirements for advertising and competitive bidding prescribed by both the City Charter and the State law. This plaintiff takes the position that the Board followed only the form and that it failed to follow, in substance, the requirements for competitive bidding; that such competitive bidding was required because Article 78 of the Code is directly applicable; and, therefore, that the procedure adopted was illegal and the contract void.

(a)

The Machines Offered by the Automatic Corporation Failed to Comply With the Specifications and the Law, and There Was No Competitive Bidding for the Alternative Mechanisms Offered by the Automatic Corporation.

The Law.

While minor defects in specifications can be waived, any material variation from the specifications is fatal to competitive bidding and a contract made thereunder is ultra vires and void.

3 McQuillan, Municipal Corporations, 2 Ed., Sec. 1321, p. 898; Sec. 1322, p. 900; Sec. 1309, p. 886.

Fuller Co. v. Elderkin, 160 Md. 660, 665.

The Sample Machine Failed to Provide Nine Rows of Forty Voting Devices Each as Required by the Specifications.

Paragraph 44 of the specifications describes the Type A Size 1 machine (for which the contract was closed) as follows:

> "*Type A—Size 1.* A manually operated voting machine which shall contain nine (9) vertical or horizontal rows of levers or devices for voting for nine (9) different political parties; sufficient spaces and levers or devices for operators of said machines to record their votes in connection with at least twenty (20) questions or special measures, and forty (40) voting devices in each of the nine (9) political party rows or columns." (Stipulation Exhibit No. 6, Record pp. 194, 195.)

In order to permit a suitable heading above the names of the candidates for governor in the Republican party on the sample machine it was necessary for the Automatic Corporation to block off a complete row of voting levers by a metal strip, thus making them unavailable for use. The consequent condition of the machine is demonstrated by the last illustration in the supplemental record. It was argued that this metal strip could be eliminated but if that were done there would be no space for the headings appearing in the present set up which, as the machine is set up under Plan A, are necessary to make the voting devices understandable. In substance and effect, therefore, the machine is only equipped with eight usable rows of voting devices instead of nine and in this respect is a material variation from the specifications. Other bidders in complying with the letter of the specifications may have been substantially misled into believing that nine full rows would be required.

The Machinery Offered to Equip the Sample Machine for Plan B Voting Would Involve a Material Alteration of the Contract Which Was Executed.

The testimony with regard to first and second choice equipment shows additional equipment is admittedly necessary, consisting of straps, channels and locks to permit the machine to operate under Plan B. Even as so equipped, the equipment is makeshift and may be manipulated so as to operate improperly and cast votes in violation of Section 203. Such equipment is admitted by Mr. Hamilton (of the Automatic) to be complicated and objectionable. The cost is estimated by the Automatic to be $1.98 per machine which they agree to absorb. Weiss and Shoup testify that it will cost $35.00 a machine, and that as the number of candidates is increased above three, the machinery gets so complicated that it becomes inefficient. This type of substitution is clearly a variation from the specifications and the bid of the Automatic Corporation.

There Has Been No Bidding for the Machinery Necessary to Equip and Alter the Sample Machine for Write-in Voting.

The sample machine furnished by the Automatic Corporation admittedly had no equipment for write-in voting. The testimony of defendants was that it would take eighty-two dollars ($82) worth of additional machinery and alterations to equip the sample with write-in vote mechanism and that that cost would be charged *extra* for each machine; or a total additional expenditure of $74,620. Further, that if the alterations were made later it would probably cost more. The machine body and structure on the sample were admittedly not large enough to equip the machine with write-in voting mechanism.

The Procedure Followed by the Board.

It is clear that no truly competitive bidding was ever received for the alternative mechanism which would be necessary to equip the machines for Plan B voting or write-in voting. Furthermore, it seems obvious that although there is no evidence on the point there would have been a substantial difference in the bidding had the specifications only called for an eight row machine.

The Voting Machine Board, although it denied that it was bound to follow any procedure, adopted a procedure which carried out the form of competitive bidding. There was a customary notice and advertisement and bids were opened publicly at the hearing; on the other hand the Board is now taking the position that because of the very general requirements of paragraph 43 of the specifications (Record, p. 194) it is entitled to a performance not even actually contemplated by it when it approved the machines; and it is obvious that the Board did not require machines which met with the requirement of paragraph 44 regarding the nine rows of voting levers. It would seem that all of these variations between the contract which the Voting Machine Board claims to exist and the contract which was contemplated at the time of bidding are material and come within the definition in the Elderkin case mentioned above.

The Voting Machine Board Is Attempting to Justify an Alternative Award.

Furthermore, it is clear that the Board has taken the theory that it will accept the machines as offered if such machines are declared legal by this Court; but on the other hand will claim machines with all of the necessary additional equipment and alterations if this Court de-

clares that they are necessary to make the existing machine legal. This is not alternative bidding but in substance and effect an award of a contract which is alternative.

A clear distinction should be recognized between the right of a Board to ask for *alternative bids,* which is legal,

Balto. v. Flack, 109 Md. 130,

and an attempt to make an *award* which is alternative, which is illegal,

Koenig v. Balto., 129 Md. 606.

The right of the Board to ask for bids on alternative plans is demonstrated by Fuller Co. v. Elderkin, 160 Md. 660 (*supra*), which is clearly distinguishable from the present case.

Here it is inconsistently claimed that the Voting Machine Board is entitled to sample Plan A machine, or Plan B machine, if Plan A is declared illegal; and the sample machine as furnished or a sample machine equipped with write-in mechanism if such a machine is declared illegal; all without an additional charge under the contract as executed. Whether or not the Automatic Corporation is willing to comply with this claim such a contract would come directly within the prohibition against awarding contracts in the alternative, forbidden by the Koenig case.

(b)

The Board Failed to Comply With Article 78 of the Code and the Contract Was, Therefore, Illegal.

It was admitted in the lower court that the Voting Machine Board made no attempt to comply with the pro-

visions of Article 78 of the Code (p. 221). That Article was devised for the express purpose of establishing a procedure for purchases by public boards. By section 1 thereof a bureau known as the Central Purchasing Bureau is created composed of the Governor, the Secretary of State, the Comptroller, the Treasurer, and the heads of various departments and institutions. Section 3 of the Article provides in part:

> "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 * * *"

The Policy of the Law.

It is an established policy of the law that regulations for public contracts and purchase of public supplies shall apply to all purchases in order to insure as far as possible competitive bidding, elimination of favoritism, etc.

See:

Anne Arundel Co. v. U. Rys. Co., 109 Md. 377, 385.

In the absence of special provisions regulating the procedure for purchases it is invariable that the general provision applies. A similar provision to Article 78 appears in Baltimore City Charter (1927), Sections 14 and 15.

This policy is demonstrated by the penalty for violation of the provisions of the Act provided by section 3

above quoted. The Court should not lightly disregard the policy of the law, in favor of the suggestion of the Voting Machine Board that it may follow a "foot-loose and fancy free" procedure to be established by itself.

The Voting Machine Board Is a State Board Within the Meaning of Article 78, Section 3.

The Board is composed of the members of two other boards, the Board of Estimates (a City board) and the Board of Supervisors of Election of Baltimore City (a State board). The Board, however, performs a State-wide function as is demonstrated by the decision of the Court of Appeals in holding that the Voting Machine Act was not a "special law" in the recent case.

Norris v. Balto., 192 Atl. 531, 537-538

And see:

Langford v. Somerset, 73 Md. 105, 117.

It is analogous to many of the Boards including the Board of Supervisors of Election of Baltimore City, over which the State Purchasing Bureau assumes jurisdiction (see list pp. 222-224).

This conclusion is admitted by the Voting Machine Board in its answer to the Daly bill (p. 95), where it is said:

> "And this Board, consisting of members of both City and State boards, is not only not a board of the Mayor and City Council of Baltimore, *but the function* to be performed by it *is strictly a State function* relating as it does to the elective franchise, the function which under our Constitution has not been and could not be delegated to the Mayor and City Council of Baltimore."

Rules of Construction.

The court in its opinion stated that

> "it is impossible to conclude that the Legislature to any extent whatever intended to subject the Board to the control of, or to divide its responsibility with the Central Purchasing Bureau." (Court's Opinion, p. 324.)

Section 3 of Article 78, however, sweepingly refers to "every State officer, board, department, commission and institution" and covers the purchase of "all materials and supplies, merchandise, and articles of every description". This language clearly covers the present transaction unless the Voting Machine Act is sufficiently inconsistent to require the court to hold that the Voting Machine Act repealed Article 78 insofar as it applied to the Voting Machine Board.

The general rule for construction of a statute in such a situation is not new.

> "It can hardly be necessary to say that the repeal of a prior existing act of the Legislature by implication is never favored in law, and it is only when the two Acts are repugnant and plainly inconsistent with each other that the rule applies. If the two Acts can by a fair and reasonable construction stand together, there is no ground on which it can be held that the latter Act operates as a repeal of the former Act."
>
> The Frostburg Mining Co. v. The Cumberland Co., 81 Md. 28, 35.

> "These Acts being *in pari materia* must be construed together, that is, as if they constituted but one statute."
>
> Ranoul v. Griffie, 3 Md. 54, 60
> Bolgiano v. Cooke, 19 Md. 375, 393.

"It is a well recognized rule that all statutes upon the same subject matter are to be harmonized as far as possible, and this is true whether the Acts relating to the same subject were passed at different dates, separated by long or short intervals. They are all to be compared, harmonized if possible, and, if not susceptible of a construction which will make all their provisions harmonize, they are made to operate together so far as possible consistent with the evident intent of the latest enactment. *Sutherland on Statutory Construction, section* 283. This rule of construction is applied even when the constitutionality of a statute is called in question."

Gregg v. Public Service Commission, 121 Md. 1, 30.

Article 78 Is Not Inconsistent With the Voting Machine Act in Any Material Detail.

Article 78 was devised to create a standard procedure for purchasing of articles by State boards. The Voting Machine Act created the Voting Machine Board to determine what machines to purchase. There is nothing whatsoever inconsistent with the requirement that the Voting Machine Board make its purchases under a procedure approved by the State Purchasing Bureau. This does not at all indicate that the State Purchasing Bureau would interfere with the functions of the Voting Machine Board. By section 224A of the Act the Board is given authority to determine the specifications. The only thing remaining for the State Purchasing Bureau to do is to insure that a proper procedure is followed.

The alternative leaves the Board with no established procedure, and the policy of the law, as particularly expressed in section 3 of Article 78, is to prevent just such a situation.

Three possible arguments toward an apparent inconsistency may be made, based upon the wording of the statute, all of which can be completely answered.

(1) The Voting Machine Act by section 224A requires the Voting Machine Board "to purchase" machines. It might be argued that this is inconsistent with the requirements of section 3. This objection, however, disappears when section 3 is analyzed. Section 3 does not require that the Central Purchasing Bureau make the purchases. It merely requires that "every State board * * * shall purchase * * * articles of every description, **through** or **with the approval of**" the Bureau. The two statutes are in this respect, therefore, entirely consistent.

(2) Section 224A of the Voting Machine Act gives the Voting Machine Board the right to establish specifications for the machines supplemental to those appearing in the remainder of the Act. It might be argued that delegation of this power to the Board is inconsistent with the application of Article 78. This is not true. In many instances the Central Purchasing Bureau expects to establish specifications. Very often, however, where complicated machinery is to be purchased the Bureau adopts the choice of specifications indicated by the State board which makes the purchase, and which presumptively knows more about the machinery needed than the Bureau. The plaintiff offered to prove that this was the practice of the Bureau but this evidence was excluded (p. 224). The two Acts are, therefore, not inconsistent in this respect. The Voting Machine Act merely requires that the Bureau in the present case follow a procedure which, in many instances, it has followed without such a requirement, i. e., that it accept specifications prepared by the Voting Machine Board.

(3) It may be urged that inasmuch as the City is to foot the bill, Article 78 does not apply. It is true that we have here a State board making purchases which a City must pay for and this to some extent renders the Board's function anomalous. It is not, however, unheard of to have the City paying for expenditures made and audited by a State board.

Anne Arundel Co. v. U. Rys. Co., 109 Md. 377, 385 (State aid roads: City paying part: audit required by State Comptroller)

Norris v. Balto., 192 Atl. 531 (Voting Machine Act not a special act merely because a State board spends money for the City).

In the present case, had the Voting Machine Act established any procedure which the Board should follow the arguments suggested above would be of considerably more weight. But the present alternative of leaving the procedure for the purchase entirely to the Board's discretion, renders it highly improbable that the Legislature intended to impliedly except the Voting Machine Board from the application of Article 78.

(c)

The Contract Should Therefore Be Declared Void.

In this case it has been demonstrated that though the Board established a form of procedure which was along conventional lines, in substance it has received no competitive bidding for the machines which must be purchased to comply with the law. The Board's excuse has been that it is not bound by any procedure except such as it wishes itself to adopt. Article 78, section 3, clearly supplies the necessary procedure and it is not only within the letter of the law but within the policy of the law that the Board follow a procedure established by some au-

thority other than itself. The court should, therefore, sustain the plaintiff's contention that the Board must comply with the provisions of Article 78, and the present contract for that reason should be declared void.

IV.

THE CONTRACT DOES NOT REQUIRE THE AUTOMATIC CORPORATION TO FURNISH PLAN B MACHINES AND SHOULD THEREFORE BE DECLARED ILLEGAL AND VOID IF THE SAMPLE MACHINE AS SUBMITTED IS DECLARED ILLEGAL.

It is claimed by the defendants that there is an obligation under the contract to install additional mechanism in the machines to be furnished, to meet the requirements of Plan B without charge; and that therefore if the Court sustains the design of the machine except for changes required by Plan B the contract may be sustained. Section 47 of Specifications (p. 184), however, states that the sample machine shall in all respects be regarded as the machine to be furnished and delivered by the bidder. By resolution, after the question of the legality of Plan A had been considered, the Voting Machine Board expressly approved the bid of the Automatic to furnish machines as demonstrated by its said sample, which sample had been at that time inspected by the Board (Stipulation Exhibit No. 4, p. 167). The defects in the sample were known when this resolution was adopted.

Under these circumstances the act of the Board in executing the contract was an integration of the declared intention of the parties to furnish a machine as demonstrated by the sample. Parole agreements made prior thereto would be inadmissible to qualify the written agreement under the parole evidence rule. Further-

more, even though the agreements made in open court might be admissible against the Voting Machine Corporation, they would be a material alteration of the obligation in the performance bond and the sureties would not be bound as to the alteration and might perhaps be entirely discharged.

Defendants argue that the contract itself covers an obligation to furnish a legal machine and reference is made by some of the defendants to Section 43 of the Specifications (p. 197). The Automatic Corporation, at the same time, denies that it is required, under the same reasoning, to furnish write-in voting mechanism, for which it states it will make an additional charge of $82.00 a machine. It is obvious that the Automatic Corporation is attempting to assume the lesser of two burdens not upon an admission that Section 43 requires it to furnish legal machines but on the theory that this is a loss it can absorb and therefore it is willing to assume to eliminate objections.

The contract, as written, does not cover an obligation to furnish a machine other than that demonstrated by the sample, or to furnish any equipment other than required by the sample under its existing set up. If the sample machine is in any material respect illegal, the contract should be stricken down and a reletting required.

V.

THE DECREE OF THE LOWER COURT GRANTING A PERMANENT INJUNCTION AGAINST PERFORMANCE OF THE CONTRACT AND USE OF THE MACHINES SHOULD BE SUSTAINED.

If write-in voting is found necessary, there is clearly no alternative but to set aside the contract and begin

over. A decree approving the contract upon condition that defects found to exist be remedied, in the form suggested by defendants, would require the Voting Machine Board to make a purchase of approximately $74,000.00 worth of new material without competitive bidding of any sort. More important, such a decree would cause a material violation of the rules of competitive bidding as applied to the contract now in question, as there can be no doubt that a material defect is involved. It is submitted that the Court would therefore have no alternative in the event of such a finding.

If the Court finds that write-in mechanism is not necessary but that "Plan B" must be followed, a more difficult question arises. The cost of the mechanism offered by Automatic is variously estimated as $1.98 to $35.00 per machine. One figure is obviously well within the margin of a "substantial defect", the other ($1.98) not so clearly so. But along with this objection is the added testimony that the machinery supplied is hastily developed, make-shift, and not fool proof. Also that it is complicated and of doubtful efficiency where a number of candidates must be accommodated.

The Board has clearly not exercised a discretion in this matter as it has approved the machine *as it stands*. (For resolution see Stipulation Exhibit No. 4, p. 167.) It is submitted that the Court must, therefore, exercise its own judgment with regard to the proposed substitutes and not only find that the alternative "Plan B" machine is defective but also that the defect is substantial; and must upon that finding conclude that the contract is void and must be relet. The injunction should therefore stand.

The probable result. Little harm can result from a reletting. The prices are established under the present set up. There is no chance of Automatic raising its bid with a corporation ready to furnish an admittedly satisfactory machine, competing with it for the contract. A new letting will give Automatic an opportunity to perfect its bid so as to cover the exact machine necessary and will encourage a competitive bidding which may result in a saving to the City of thousands from the present cost.

CONCLUSION.

It has been demonstrated that the sample voting machine submitted under the contract does not comply with the law in that it fails to provide facilities for write-in voting, and fails to comply with certain specifications of the Voting Machine Act. And it has been further shown that the procedure adopted by the Board did not provide for competitive bidding nor comply with the requirements of the law. The lower court granted a permanent injunction based solely on its decision with regard to write-in voting. The other reasons urged below and in this brief are also sufficient to justify the injunction independent of such a finding. The plaintiff, therefore, respectfully submits that the action of the lower court in granting the permanent injunction should be affirmed for all of the additional reasons advanced in its cross-appeal. Plaintiff further prays the Court, no matter what its decision with regard to any particular point or with regard to the propriety of the injunction, to render a decision on all points involved in the case so that the Board can not only prepare legal specifications for its machines but can be guided in its procedure by the opinion of this Court.

Plaintiff Norris prays the Court to affirm the order granting the injunction and declaring the voting machines defective because not equipped for write-in voting; and to reverse the lower court in so far as it declared that the machines to be furnished under the contract are lawful in other respects and that the procedure adopted by the Voting Machine Board in awarding the contract was legal.

Respectfully submitted,

CHARLES G. PAGE,
Solicitor for William S. Norris.

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HOWARD W. JACKSON, Etc., et al.,

vs.

HATTIE B. DALY.

HATTIE B. DALY

vs.

HOWARD W. JACKSON, Etc., et al.

IN THE

Court of Appeals

OF MARYLAND.

JANUARY TERM, 1938.

GENERAL DOCKET Nos. 3 and 4.

APPEAL AND CROSS-APPEAL TO THE JANUARY TERM, 1938, ADVANCED TO BE HEARD AT THE OCTOBER TERM, 1937.

BRIEF FOR HATTIE B. DALY, APPELLEE AND CROSS-APPELLANT.

ISAAC LOBE STRAUS,
WILLIS R. JONES,
Solicitors for Hattie B. Daly,
Appellee and Cross-Appellant.

The Daily Record Co., Print, Baltimore.

HOWARD W. JACKSON, Etc., et al.,
vs.
HATTIE B. DALY.

HATTIE B. DALY
vs.
HOWARD W. JACKSON, Etc., et al.

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APPEAL AND CROSS-APPEAL TO THE JANUARY TERM, 1938, ADVANCED TO BE HEARD AT THE OCTOBER TERM, 1937.

BRIEF FOR HATTIE B. DALY, APPELLEE AND CROSS-APPELLANT.

Hattie B. Daly, the Plaintiff below, although successful in her application to have a certain contract between the defendant Voting Machine Board and the Automatic Voting Machine Corporation declared invalid, on the ground that the machines purchased by said contract did not preserve the Constitutional right of the voters of this State to vote for persons of their choice whose names are not printed upon the official ballot, has nevertheless entered a cross appeal (R. 342) from certain portions of the decree (R. 334) passed by the Circuit Court No. 2 of

Baltimore City (Dennis, C. J.), wherein the Court ruled against certain other contentions of the Plaintiff, which all parties to the litigation are desirous of having finally and judicially determined at this time for the guidance of the defendant Board in the acquisition of voting machines in Baltimore City which will conform to all requirements of the Constitution and Laws of Maryland.

QUESTIONS IN CONTROVERSY.

I.

Does a registered and qualified voter of the State of Maryland possess the constitutional right to vote for a person for whom he desires to vote whose name is not printed upon the official ballot?

The Court below decided the above question in the affirmative, and the plaintiff Daly contends that this decision should be affirmed.

II.

Is it necessary under Chapter 94 of the Acts of 1937 and the other statutes of the State of Maryland relating to Elections, that the voting machines to be acquired and used in Baltimore City have separate voting devices and levers for each candidate and each choice of candidate, so as to enable a voter to vote separately and independently for a first choice candidate and a second choice candidate for nomination for state-wide office in a primary election?

The Court below decided the above question in the negative, and the plaintiff Daly contends that this decision should be reversed.

III.

If, as decided by the Court below, the law permits the voting machines to be so equipped as to require a voter, desiring to vote for one candidate for first choice and another candidate for second choice, to do so by the operation of one voting device or lever, then, and in that event,

A. Is it necessary to print the party designation or principle which each candidate represents just above the name of each such candidate, as it appears upon the ballot; and

B. Is it necessary to add to the name of each such candidate as it appears upon the ballot the name of the county or city in which the candidate resides; and

C. Is it necessary that the entire name of each of the two candidates and such party designation and residential location, as may be required, be printed immediately under or opposite the particular voting device or lever which must be operated in order to vote for those two candidates; and

D. Is it necessary that the size of the type in which the name of the first choice candidate is printed be of the same size (so far as practicable) as the type in which the name of the second choice candidate is printed; and

E. May the necessary printing of the names and descriptions of two candidates to be voted for by the operation of one voting device or lever be accommodated within the limited space of less than one inch square underneath each voting device on the Automatic machine in "plain, clear type so as to be readily readable by persons with normal vision" as required by Section 224-G of Chapter 94 of the Acts of 1937?

The Court below decided questions A, B, C, and D in the negative, and question E in the affirmative, and the plaintiff Daly contends that each of said decisions was erroneous and should be reversed.

IV.

If separate voting devices for each candidate and each choice of candidate are required, did the defendant Voting Machine Board have the right to purchase voting machines which did not provide the necessary equipment for such voting upon the mere oral statement of the Automatic Voting Machine Corporation that it could and would, if required, change said machines by the addition of new mechanism and attachments so as to provide for such voting?

The Court below decided this question in the affirmative, and the plaintiff Daly contends that this decision should be reversed.

V.

May voting machines be so constructed as to enable a voter to vote for a second choice candidate without voting for a first choice candidate for a state-wide office in a primary election?

The Court below, after observing a demonstration on the Automatic machine, in which this result was accomplished by a witness unaided and without any tools or noise, nevertheless held that the Board was authorized to purchase such a machine on the ground that no voter would attempt such a course of procedure, and the plaintiff Daly contends that this decision was erroneous and should be reversed, by reason of the provisions of section 224-E of Chapter 94, that the machine "shall preclude

each voter from voting for more persons for any office than he is entitled to vote for''; the law (section 203 of Article 33) expressly providing that a vote for second choice only shall be counted as a vote for first choice only.

VI.

May voting machines be so constructed as to enable a voter to vote for the same individual candidate for first choice and second choice?

The Court below declined to permit the Plaintiff's witness to demonstrate on the Automatic machine that such a result could be accomplished, although the same witness had testified that it could be accomplished, and the plaintiff Daly contends that this decision was erroneous and should be reversed, by reason of the further provision in section 224-E of the Voting Machine Act, that ''the machine shall preclude each voter from voting * * * for any candidate for the same office or upon any question more than once.''

VII.

Were the specifications promulgated by the defendant Board, which required the machine to have nine rows of levers or voting devices for candidates with forty such levers or voting devices in each row, satisfied by the purchase of a machine which had only eight rows of voting devices, with forty such devices in each row available for candidates, it appearing that one of the original nine rows had been blocked out and used as a space for an office index, and could not be used for candidates without reconstruction or new equipment?

The Court below decided the above question in the affirmative, and the plaintiff Daly contends that this decision should be reversed.

STATEMENT OF FACTS.

The Plaintiff, Hattie B. Daly, as a taxpayer of the City of Baltimore, State of Maryland, filed her Bill of Complaint (R. 57) in the Court below, praying that a certain contract (R. 208) executed by and between the defendant Voting Machine Board and the Automatic Voting Machine Corporation on September 8, 1937, for the purchase of nine hundred and ten (910) voting machines for use in Baltimore City be declared void and of no effect, alleging that the machines purchased by said contract did not conform to the Constitution and statutes of the State of Maryland or the specifications which had been promulgated by the Voting Machine Board for competitive bidding upon machines to be acquired by said Board under the authority of Chapter 94 of the Acts of 1937.

It is undisputed and conceded that the machines purchased by the contract in question make no provision by which a voter may vote for any citizen whose name is not printed upon the official ballot or ballot labels (R. 247), and it was for this reason that the Court below declared the contract to be void and of no effect. This question arose while the specifications were being prepared, when it was contended on behalf of the Shoup Corporation that the write-in or personal choice equipment was required (R. 236). At the suggestion of that company, the question was submitted to the Attorney General for an opinion on July 22, 1937 (R. 147). On the next day, and without awaiting the ruling of the Attorney General, the call for bids was published (R. 261). Under date of July 24, 1937, the Attorney General rendered his official opinion, holding that the laws of Maryland do not permit a voter to vote for any person whose name is not printed upon the official ballot (R. 218).

There was no change in the specifications following this ruling and the Automatic Corporation submitted its bid without the write-in or personal choice equipment (R. 247), while the bid of the Shoup Corporation included such equipment (R. 262).

It is also undisputed and conceded that in submitting its bid and furnishing its sample, as required by the specifications (R. 197), the Automatic Voting Machine Corporation did not submit with or include in its said bid or its sample the necessary equipment, mechanism or attachments to enable a voter to vote at a primary election for one candidate for a state-wide office for first choice by the operation of one voting device or lever, and for another candidate for second choice by the operation of another voting device or lever (R. 240), so that the only method by which a voter on that machine could vote for one candidate for first choice and another candidate for second choice was by the operation of one device for the two candidates. This method of voting for first and second choice candidates is known as Plan A (R. 165).

The legal sufficiency of the Automatic Voting Machine, equipped as aforesaid and tendered to the Voting Machine Board, was challenged by the Shoup Voting Machine Corporation, another bidder which had submitted a machine equipped with "separate spaces and levers, or voting devices, so as to enable the voter to vote separately and independently for his first choice and second choice candidates for state-wide office" (R. 154). This method of voting for first and second choice candidates is known as Plan B (R. 166). The controversy thus presented was submitted to the Attorney General for an opinion, and this official ruled (R. 157) that the Plan A arrangement, with and for which the Automatic machine was equipped,

was illegal, but expressly declined to pass upon the question as to whether the Automatic Voting Machine Corporation should be permitted, after the bids had been opened, to install additional equipment so as to conform to the Plan B arrangement for which the Shoup machine was equipped. The specifications had expressly provided in Section 47 (R. 198) that "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."

On the same day, September 8, 1937, that the above opinion of the Attorney General was delivered to the Board of Supervisors of Election, there was a meeting of the Voting Machine Board in executive session, at which the contract was awarded to the Automatic Voting Machine Corporation (R. 168), although there had been no change in the sample submitted (R. 231, 232), or demonstration that the Automatic Voting Machine Corporation could so re-equip its machine as to accommodate first and second choice voting in primary elections by the operation of separate voting devices or levers for each choice of candidate. Notwithstanding the ruling of the Attorney General, the Board at this executive session adopted a resolution (R. 168) "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 entilted to be received by this Board as in all respects legal and valid."

The proceedings before the Voting Machine Board on August 26, 1937, when the legal sufficiency of the Auto-

matic machine, as tendered, was submitted to the Attorney General, were offered in evidence during the trial below for the purpose of showing that the said Board had indicated that no change or substitution of mechanical equipment in the samples submitted would be permitted by the Board, but the Court below declined to admit this testimony which is set forth in the record at pages 279-281.

The identical machine, equipped for Plan A voting, tendered by the Automatic Voting Machine Corporation as its sample to the Voting Machine Board was offered in evidence (R. 231), and it was conceded that no changes had been made in this sample and that it was therefore not equipped either for personal choice voting or for Plan B second choice voting. The Defendants, however, offered in evidence another machine of similar character, but somewhat larger (R. 258, 259), containing additional equipment, mechanism, and attachments, which the Defendants contended would accommodate the Plan B method of second choice voting, that is, a separate lever for each choice of candidate, and a demonstration by an unsworn demonstrator (R. 242), representing the Automatic Voting Machine Corporation, took place in open Court, as a result of which it ostensibly appeared that this additional mechanism would accommodate the Plan B method of first and second choice voting, where there were three candidates for the same state-wide office. Following this demonstration, two witnesses were called on behalf of the Plaintiff both of whom testified that the Automatic machine, as then equipped and demonstrated to the Court, would not practically accommodate the Plan B method of first and second choice voting. The testimony of Mr. Weiss, the President of the Shoup Voting Ma-

chine Corporation, on this point is found at pages 263-266 of the Record, and the testimony of Mr. Shoup, the Chief Engineer of the same corporation, is found at pages 295-307 of the Record. The testimony of Mr. Shoup was accompanied by an additional demonstration on the Automatic machine, in which he, without any mutilation of the machine, without tools or noise, and without the aid of any other person, recorded a vote for a second choice candidate with no vote for a first choice candidate (R. 302 and 316). This witness had testified (R. 301-302) that on the Automatic machine, which was said to be equipped for Plan B voting, it was possible to record a vote for a candidate for first choice and for the same candidate for second choice and immediately after the demonstration by this witness, the Plaintiff sought to have him make a further demonstration to see whether this could be done (R. 303), but the Court declined to permit any further demonstration, or to allow the witness to state for the Record what he did in voting for a second choice candidate without recording any vote for first choice (R. 305).

The specifications issued by the defendant Board call for bids on two sizes and types of voting machines. The type A, size 1 is described in paragraph 44 of the specifications (R. 194) as "a manually operated voting machine which shall contain nine (9) vertical or horizontal rows or levers or devices for voting for nine (9) different political parties; sufficient spaces and voting levers or devices for operators of said machines to record their votes in connection with at least twenty questions or special measures, and forty (40) voting devices in each of the nine (9) political party rows or columns." The obvious meaning of this language is that the machines are required to have three hundred and sixty (360) spaces

available for candidates. On the machine tendered by the Automatic Voting Machine Corporation with its bid, one of the rows for candidates had been blocked out and used as an index of the offices for which the various candidates of one of the political parties were seeking nomination, with the result that the particular machine contained but eight (8) rows of voting devices with forty (40) such devices in each row, or a total of three hundred and twenty (320) such devices available for candidates. It could not provide three hundred and sixty (360) spaces available for candidates without reconstruction or the attachment of additional equipment (R. 257). The machine tendered by the Shoup Corporation on the other hand contained nine (9) clear rows for candidates or three hundred and sixty (360) spaces for that purpose (R. 262).

The failure of the Automatic Voting Machine Corporation to include in its bid equipment (a) for personal choice or write-in voting, (b) for Plan B second choice voting, that is, separate voting devices for each candidate and each choice of candidate, and (c) for nine (9) clear rows for candidates, enabled this company to bid a price substantially lower than the price submitted by the Shoup Corporation, whose bid included all of the extra equipment necessary to provide those facilities.

The Court below declined to permit the Plaintiff to show what would have been the actual difference in price between the two companies, if the Shoup Voting Machine Corporation had known that personal choice voting was not required, that one of the nine (9) rows for candidates could be used for an index, and that the Plan A method of voting for first and second choice candidates, as shown on the Automatic machine, would have been acceptable

to the Board (R. 263). It is elsewhere shown, however, by the testimony of Mr. Weiss, that the cost of the Plan B equipment on the Shoup machine was $84.00 per machine (R. 267, 270), and the cost of the addition of the personal choice equipment to the Automatic machine will be $82.00 per machine (R. 249). There is no evidence as to the added cost of a literal compliance with the requirement that there by nine (9) rows of levers or voting devices for candidates with forty (40) such levers or devices in each row, by reason of the Court's ruling above referred to. It is clear, however, that the bidders in submitting prices figured upon substantially different mechanisms, and that there was no detailed guide or specification which enabled the bidders to determine definitely what type of mechanism or method of voting would be acceptable to the Voting Machine Board. It is therefore apparent that there was no actual competition between the two bidders upon substantially the same product, and the object of this Cross-Appeal is to obtain a final decision which will clarify the essential requirements of voting machines for use in this State, so that when bids are again invited by the Board, bidders will be able to determine and know with certainty what is expected of them.

I.

A QUALIFIED VOTER OF THE STATE OF MARYLAND HAS THE CONSTITUTIONAL RIGHT TO VOTE FOR ANY PERSON OF HIS CHOICE WHOSE NAME IS NOT PRINTED UPON THE OFFICIAL BALLOT.

The right of franchise in Maryland is granted by Section 1 of Article I of the Constitution, which reads as follows:

> "All elections shall be by ballot; and every male 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;* and in case any county or city shall be so divided as to form portions of different electoral districts, for the election of Representatives in Congress, Senators, Delegates or other Officers, then to entitle a person to vote for such officer, he must have been a resident of that part of the county, or city, which shall form a part of the electoral district, in which he offers to vote, for six months next preceding the election; but a person, who shall have acquired a residence in such county or city, entitling him to vote at any such election, shall be entitled to vote in the election district from which he removed, until he shall have acquired a residence in the part of the county or city to which he has removed."

Article 7 of the Maryland Declaration of Rights reads as follows:

"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.*"

In the case of *Southerland v. Norris,* 74 Maryland 326, the Court, speaking through Judge McSherry, at page 328 said:

"The qualifications of a voter in this State are prescribed by the first section of Article one of the Constitution of Maryland. Those qualifications are

that he shall be a citizen of the United States of the age of twenty-one years or upwards, and that he shall have been a resident of the State for one year, and of the Legislative District of Baltimore City, or of the county in which he offers to vote, for six months next preceding the election at which he offers to vote. Before he can exercise his right to vote he must be duly registered. *These qualifications, fixed by the organic law, can neither be enlarged nor curtailed by the General Assembly.*" (Italics ours.)

In *Cole v. Tucker,* 164 Massachusetts 486, the Court sustained the validity of an act prescribing an official ballot for that State. At page 488 of the Opinion, it is said:

> "The provisions of the Statute requiring the use of an official ballot do not touch the qualifications of 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 states of this country, have been sustanied 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 a reasonable opportunity to write in or insert such names.*" (Italics ours.)

In the case of *Sanner v. Patton,* 155 Illinois 553, the Court had under consideration the Ballot Act of 1891 under which it was contended that a voter was prohibited from writing on the ballot the name of a person who has not been nominated. In rejecting this contention, the Court said:

> "Under Section 1, Article 7 of our Constitution, every male citizen of the United States above the

age of twenty-one years, who has resided in the state one year, in the county ninety days and in the election district thirty days next preceding any election, is entitled to vote at such election. To exercise this right there is one exception, and but one, so far as we have been able to find; and that is found in Section seven of the same article, which declares that the General Assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes. Adopting the well known maxim or rule of construction that the expression of one thing is to be regarded as the exclusion of another, *the Legislature does not possess the power to take away from a resident citizen the right of suffrage unless he has been convicted of an infamous crime. Nor can the Legislature do indirectly what they cannot do directly, and yet, if the construction contended for by the Appellee be the correct one, the voter is deprived of the constitutional right of suffrage. He is deprived of the right of exercising his own choice and when this right is taken away there is nothing left worthy of the name of the right of suffrage—the boasted free ballot becomes a delusion.*" (Italics ours.)

In *State v. Dillon,* 32 Florida, 545, the Court had under consideration an act of the Legislature providing for the election of municipal officers of the City of Jacksonville. Among other things the Act restricted the right of the voter to vote for the candidates whose names were printed on the ballot and did not permit the voter to write in the candidate of his individual choice. This portion of the act was declared to be unconstitutional. The Court said at page 579:

"The distinguishing theory of the ballot system is that every voter shall be permitted to vote for whom he pleases, and that no one else shall be in a position to know for whom he has voted, or shall

know unless the voter shall of his own freewill inform him. There is no doubt in our minds about the right of the Legislature to prescribe an official ballot and to prohibit the use of any other, and the provisions of the act in reference to printing the names of candidates regularly nominated by a convention, mass meeting, or primary election, or who run as independents, are valid. *But the Legislature can not, in our judgment, restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases, and the Constitution has guaranteed to him this right. If the Legislature can restrict the voter to some candidate whose name is printed upon the official ballot, then it may prescribe such regulations for getting the names of candidates on the ballot as will completely destroy the liberty of choice.*" (Italics ours.)

Continuing at page 582, the Court said:

> "That phase of the act, then, which restricts the voter to checking the name of some candidate on the official ballot is in conflict with the constitutional provisions in reference to voting by ballot."

In *Bowers v. Smith,* 111 Missouri 45, the Court had under consideration the Ballot Act for the State of Missouri passed in 1889. The Act was sustained. The Court at page 52 said:

> "In interpreting the statute in question it must be remembered that its adoption here brings it into subordination to the fundamental law of Missouri, and that prior decisions elsewhere construing enactments on the same general topic cannot properly be followed if inconsistent with that fundamental law.
>
> By our constitution general elections are held at certain fixed dates, and the right of suffrage is ex-

pressly secured to every citizen possessing the requisite qualifications. *The new ballot law cannot properly be construed to abridge the right of the voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it.* Nominations under it entitle the nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there." (Italics ours.)

In the case of *Bradley v. Shaw,* 133 New York 493, the relators were voted for by means of paster ballots. These ballots were rejected on the theory that they invalidated the ballot. Petition for mandamus was filed to compel the Board of Canvassers to issue a certificate of election to the candidates having the greatest number of votes including the paster ballots. The opinion in this case was rendered by Judge Gray who in sustaining the petition said:

"The first objection that the relators having failed to receive a proper nomination by a political party which at the last election before the holding of the convention or primary meeting polled at least one per centum of the entire vote cast in that political division of the State, for which the nomination is made, could not be voted for is wholly unsound and without force. The Plan contained in Sections 2 and 3 of the Ballot Reform Act was a provision for the printing of an official ballot at the public expense, a feature well designed to secure the desired secrecy and independence of the ballot. But that it was in no wise intended to prevent the voter to vote for any candidate for whom he chose, is evident from the further provision of the law (sec. 25) that 'the voter may write or paste upon his ballot the name of any person for whom he desires to vote

> for any office.' Indeed, to hold otherwise would be to disfranchise, or to disqualify the citizen, as a voter or a candidate, and, in my opinion, to affect the law quite unnecessarily with the taint of unconstitutionality in such respects."

In the case of *Cohn v. Isensee* (California) 188 Pacific 279, decided in 1920, a petition for mandamus was filed to compel the city clerk to provide blank spaces on a ballot to be used at a recall election to enable voters to write the names of persons whose names were not printed on the ballot. The general law of the State provided for blank spaces but there was no provision in the act for the recall of elective city and town officers requiring the ballots to be printed with blank spaces to allow the voter to write in names not printed on the ballot. It was therefore contended that such spaces might properly be omitted from the municipal recall election. In holding that the blank spaces must be provided, the Court said:

> "If, therefore, the ballots that are required to be used at a recall election have no blank space wherein the voter may write the name of a person whose name is not printed on the ballot, the voter must be compelled to vote for the person or persons whose name or names may be printed on the ballot furnished him, or be deprived of the privilege of voting for any person whatever. If that is the construction that must be placed upon the act for the recall of elective city and county officers the statute must be held to be unconstitutional and void; for *it is not within the power of the Legislature to restrict electors in their choice of candidates or prohibit them from voting for persons whose names are not printed on the ballots. Eaton v. Brown,* 96 California 371; *Britton v. Board of County Commissioners,* 129 California 337; *Spier v. Baker,* 120 Cali-

fornia 370; *Sanner v. Patton,* 155 Illinois 553; 15 Cyc. 289; note on page 688 et seq. 91 Am. St. Rep. * * *

"It is no answer to say that the voter, by filing a nomination petition, may have the name of the nominee of his choice placed upon the ballot. He may not be able to induce the requisite number of electors to join with him in so nominating the candidate of his choice. If the narrow construction of this act that respondent contends for be the only permissible construction, the voter is deprived of his constitutional right of suffrage; deprived of the right of exercising his own choice; and where that right is taken away, there is nothing left worthy to be called the right of suffrage; the boasted free ballot becomes a delusion." (Italics ours.)

In the case of *Dewalt v. Bartley,* decided by the Supreme Court of Pennsylvania and reported in 15 L. R. A. 771, the Court upheld in an opinion by Chief Judge Paxson the validity of the ballot law charged to be unconstitutional upon the special ground that:

"The Act carefully preserves the right of every citizen to vote for any candidate whose name is on the official ballot and this is done in a manner which does not impose any unnecessary inconvenience upon the voter."

In the case of *People ex rel Goring v. President, etc.,* 144 N. Y. 616, pages 619, 621, Judge Gray, for the New York Court of Appeals, said:

"We had occasion to say, lately, in '*People ex rel Bradley v. Shaw*' (133 N. Y. 493), that to hold that a voter could not vote for any candidate whom he chose, notwithstanding that his candidate failed to receive a nomination by a political party, etc., pursuant to the requirements of a certain provision of that law, would be to disfranchise, or to disqualify

the citizen as a voter, or a candidate, and would affect the law with the taint of unconstitutionality in such respects. * * *

"In contemplation of law, the official ballot prepared by the voter is deemed to contain the names of all the offices to be filled at the election and if, by omission, clerical or otherwise, an office is not named upon it, the voter is warranted in writing, or pasting, upon it the name of the office and the person whom he desires to vote for as the incumbent thereof. To construe the law otherwise would be to affect its validity. The 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. The legislature may prescribe regulations for ascertaining the citizens who shall be entitled to exercise the right of suffrage, for that power is given to it by the Constitution. In prescribing regulations for that purpose, or in respect to voting by ballot, it does so subject to and, presumably, in furtherance of the constitutional right and its enactments are to be construed in the broadest spirit of securing to all citizens, possessing the necessary qualifications, the right freely to cast their ballots for offices to be filled by election and the right to have those ballots, when cast in compliance with the law, received and fairly counted. Legislation which fails in such respects and prevents the full exercise of the right as secured by the Constitution is invalid."

In *Independence Party Nomination,* 208 Pa. St., p. 112, the Court, through Chief Justice Mitchell, said:

"The constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right and each elector is entitled to express his own individual

will in his own way. His right cannot be denied, qualified or restricted, and is only subject to such regulation as to the manner of exercise, as is necessary for the peaceable and orderly exercise of the same right in other electors. * * * B* Anything beyond this is not regulation but *unconstitutional restriction.* It is never to be overlooked, therefore, that the requirement of the use of an official ballot is questionable exercise of legislative power and even in the most favorable view treads closely on the border of a void interference with the individual elector. *Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector.*" (Italics ours.)

In *Oughton v. Black,* 212 Pa. St. 1, in rendering the Opinion of the Court, Mr. Justice J. Hay Brown (afterwards for many years a member of the Supreme Court of the United States) said:

"By declaring that elections shall be free and equal, the constitutional guaranty is not only that 'the voter shall not be physically restrained in the exercise of his right by either civil or military authority': *Com. v. Reeder,* 171 Pa. 505; but it is that by no intimidation, threat, improper influence or coercion of any kind shall the right be interfered with. The test of the constitutional freedom of elections is the freedom of the elector to deposit his vote as the expression of his own unfettered will, guided only by his own conscience as he may have had it properly enlightened." (Pages 4-5).

(And again on Page 6) "If they wish to vote for offices for which candidates are not named on their ticket, they not only have the right to do so, but can do so by making the proper marks on the ballot, or writing the names of their choice."

In the case of *Barr v. Cardell,* 155 N. W. 312 (Iowa), decided on December 16, 1915, it appeared that Barr

who had been nominated at the preceding primary received 214 votes for the office of Superior Judge. Cardell had not been nominated but many voters wrote his name on the ballot and in this way he received 440 votes. Barr claimed the office on the ground that only those nominated were eligible for the office, and that the write-in ballots could not be considered.

The opinion in this case reviews practically all of the authorities on the subject and holds that the write-in ballots were valid. In reaching this conclusion, the Court said:

> "*If the constitutional right to vote at all elections may be whitted away by denying the privilege to the Elector of voting for persons to fill all the elective offices or denying him the right to vote for any one other than those whose names are on the Ballot, then such right is worth no more than the Legislature cares to make of it, and nothing is acquired under the fundamental law through the provision relating to the right of suffrage.* Those qualified are given the right to vote at all elections by the section quoted, not for persons the Legislature directly or indirectly specify, but according to their own free and unrestricted choice. Only by the free and untrammeled choice can the Electors be said to exercise all that political power which is declared by the Constitution to be inherent in the people." (Italics ours.)

The Court quoted with approval from Judge McCrary in his work on Elections (page 700), as follows:

> "The Statutes of most of the States expressly permit the voter to cast his ballot for the person of his choice for office, whether the name of the person he desires to vote for appears upon the printed ballot or not. Statutes which deny the voter this privilege are in conflict with the constitutional provision guaranteeing the right of suffrage to every citizen

possessing the requisite qualification, and are void. Legislatures may provide for the printing of an official ballot and prohibit the use of any other, *but they cannot restrict the elector in his choice of candidates, nor prohibit him from voting for any other than those whose names appear on the official ballot.*"

The Court further stated after reviewing the authorities that:

"The only decision directly the contrary is that of *Chamberlain v. Wood,* 15 S. D. 216, 88 N. W. 100; 56 L. R. A. 187, 91 Am. St. Rep. 674, by two Judges, and we have only to say that the dissenting opinion by Justice Fuller seems to us the more persuasive." * * *

"The learned annotator of the note to *Chamberlain v. Wood,* 91 Am. St. Rep., has this to say at page 688:

'The foregoing copious extracts from the decisions in various jurisdictions leave little to be said on the question of the right of electors to vote for a candidate whose name is not printed on the official ballot. On principle, nothing can be clearer than this right, and nothing can be more subversive of a free ballot than its denial. We have not discovered a single authority save the principal case, and perhaps *Commonwealth v. Reeder,* 171 Pa. 505, 33 Atl. 67 (33 L. R. A. 141), that intimates the competency of the Legislature to deny this right. And, as before pointed out, the Court in the latter case misconceived the law. We should admire the courage of the South Dakota Court in announcing its conclusion in the face of the decisions of the other states, if it were defensible on principle. But, regarding it, as we do, to be destructive of one of the greatest institutions yet realized in the evolution of society, we have no hesitancy in denouncing it as a dangerous precedent."

In Littlejohn vs. The People, 52 Colorado 217, decided in 1911, the Supreme Court of Colorado held that under the Colorado Constitution every qualified voter has an equal right to cast a ballot for the person of his selection, and nothing can lawfully prevent the exercise of that right. Hence, it declared unconstitutional an act which provided that no person other than those whose names appear upon the official ballot shall be voted for. The Constitutional provisions construed provided that every duly qualified elector "shall be entitled to vote at all elections" and "That all elections shall be free and open; and that no power, civil or military, shall at any time interfere to prevent the free exercise of suffrage." At page 223, the Court said:

> "That means that every qualified elector shall have an equal right to cast a ballot for the person of his own selection, and that no act shall be done by any power, civil or military, to prevent it" * * * "While it can not be questioned that the legislature has power to prescribe reasonable restrictions under which the right to vote may be exercised" * * * "such restrictions must be in the nature of regulations, and can not extend to the denial of the franchise itself."

In State vs. Johnson, 87 Minn. 221, decided in 1902, the Supreme Court of Minnesota had before it for decision the matter of a primary election official ballot which offered no facility for a voter to write in the name of a person or to vote other than for persons whose names were printed on the ballot. The Court said at page 223:

> "If the election of candidates to the position of nominees is an election within the meaning of Article 7 of the Constitution, then the primary law above construed is unconstitutional. It would in certain cases deprive the voter of his privilege to exercise

the elective franchise. Such an occasion might arise when no candidates appear for nomination, no provision being made for filling vacancies, or for leaving blank lines on the ballot to enable the voter to write in the name of some person of his choice.''

The Minnesota Constitution provided that:

> ''Every male person of the age of twenty-one'' * * * ''shall be entitled to vote at such election'' * * * ''for all officers that now are or hereafter may be elective by the people.''

In addition to the decisions above referred to, see also:

State v. Runge (Wisc.), 42 L. R. A., p. 243.
Patterson v. Hanley, 136 Cal. 265.
Outman v. Fox, 114 Mich. 652.
People v. McCormick, 261 Ill. 413.
Fletcher v. Wall, 172 Ill. 426.
Voorhees v. Arnold, 108 Iowa 77.
State v. Hossettes, 137 Mo. 636.
Price v. Lush, 10 Mont. 61.
Howser v. Pepper, 8 N. D. 485.
Capon v. Foster, 12 Pickering 485.

In 20 Corpus Juris, ''Elections'', Section 16, pp. 62-63, it is stated that when the elective franchise ''has been granted by the Constitution of the State, it cannot be denied or abridged by the legislature'' (Cases in Note 51, page 62).

In the same section it is further said:

> ''Where the Constitution of a State fixes the qualifications of voters in direct positive terms, these qualifications cannot be added to or changed by legislative enactment. * * * In short it is not within the power of the legislature in any way to change the qualifications of voters as defined by the Constitution of the State. Such qualifications can be al-

tered only by an amendment of the Constitution" (See Cases in Note 57, pp. 62-63; also in Note 60, page 63, and in Note 61, page 63).

In the same Article of the same Work, Section 91, page 105, it is said:

"The fact that a person has not been nominated as a candidate does not render him ineligible to office or *preclude the electors from voting for him* or invalidate votes so cast" (Cases in Note 45, page 105).

In the same article of the same Work, Section 162, pp. 140-141, it is also said:

"Ballot laws providing for an official ballot with the names of all the candidates regularly nominated printed thereon are not objectionable as violating the freedom of elections, *so long as the electors have the right and opportunity to vote for whom they please, by inserting in such ballot the name of any person for whom they may desire to vote,* (Cases in Note 67, p. 141) but since the constitutional right of suffrage entitles every qualified voter to vote for whom he pleases, it is not ordinarily regarded as within the power of the legislature to restrict voters in their choice of candidates or prohibit them from voting for persons whose names are not printed on the ballots (Cases in Note 69), although there is some authority to the contrary, (citing *Chamberlain v. Wood,* 15 S. D. 216, and calling attention to *McKenzie v. Boykin,* 71 Southern 382, these being the only cases referred to as contrary to the general rule supported by the wealth of cases referred to in the other notes to the text) and the right of electors to vote for any person eligible for office whether he has been nominated or not has been generally recognized (Cases in Note 71, p. 141) as requiring blanks for the writing or pasting in of names next to the printed

names. (Cases in Note 72). *A candidate for public office is entitled to have his name written upon the official ballot by voters who desire to support him as their choice, although he has not been nominated by any convention, caucus or meeting.*'' (Note 73.) (Italics ours.)

See also

1 Cooley's *Constitutional Limitations*, 8th edition, pp. 139-140, Note 5.

In 2 Cooley's *Constitutional Limitations*, 8th edition, p. 1370, it is said:

''All regulations of the elective franchise, however, must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.''

Upon page 1376 of the same Volume of the same Work, it is also said:

''The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time.''

In 10 *American and English Encyclopedia of Law*, Second Edition, pages 586, 587, it is said:

''Constitutionality of Laws—(1) In General—These statutes are merely regulations for the exercise of the right of suffrage, and, like other regulations, are constitutional, provided they do not deny the franchise or render its exercise so difficult and inconvenient as to amount to such a denial.

"(2) Provisions as to Nominations—Thus they are not unconstitutional because they provide for legal nominations and require them to be made in a certain way in order to entitle a candidate to have his name printed on the official ballot, provided the voter is allowed, by writing on the ballot, to vote for others than those nominated, if he sees fit. But as the constitutions guarantee to voters the right to vote for whom they please, a law restricting the right to vote to those candidates whose names appear on the official ballot is to that extent unconstitutional."

There can be no doubt, as found by the Court below, that the overwhelming weight of authority is to the effect that where the right of franchise is granted by the Constitution, as in Maryland, the Legislature may not restrict the exercise of this right by denying to the voter the right to vote for whom he pleases, including the right to vote for candidates whose names are not printed upon the official ballot.

The case of *McKenzie v. Boykin,* 71 Southern 382, relied upon by the Defendants below, had reference to a point different from that under consideration in this case, and at page 385 of the report of that case, the opinion distinctly differentiates the point in that case from the point in this case and goes on to sustain the position of the appellee and cross-appellant herein by reference to the cases of *City of Jackson v. State,* 102 Mississippi 663, and *State v. Ratcliff,* 66 Southern 538, both of which support the contention of the Plaintiff in this case.

The case of *Chamberlain v. Wood,* 15 South Dakota 216, in which a contrary conclusion was reached by a divided Court of two to one, has been severely criticized and is clearly out of line with the overwhelming weight of authority. Moreover, in that case the law required a

petition for the purpose of having the name of a candidate printed upon the official ballot to be signed by only twenty voters, which could not be said to be a very onerous burden. It is believed that even that Court would have reached a contrary conclusion if the South Dakota law had required, as does Section 51 of Article 33 of the Code of Public General Laws of Maryland, signatures of from five hundred (500) to two thousand (2000) voters supported by affidavits of the persons procuring the signatures. The meeting of these requirements is too much of a burden and involves too much labor and expense to expect a voter to meet the requirements merely to obtain the right to vote for whom he pleases. The practical effect of these requirements, therefore, is to deny the voter the right to vote for anyone whose name does not appear upon the official ballot. In this connection, it should be remembered that the freedom of the right of franchise in Maryland is further emphasized by Article 15 of the Maryland Declaration of Rights by which it is provided that "the levying of taxes by the poll is grievous and oppressive and ought to be prohibited." Obviously, the plain terms of Article 1, Section 1, of the Constitution, vesting the elective franchise in those who possess the qualifications prescribed by the Section, do not contemplate, and make not the slightest reference to, any extraneous acts, upon the part of such qualified voters, to secure the franchise which the Constitution vests in them.

The attention of the Court is also invited to the provisions of Section 55 of Article 33 of the Code of Public General Laws, by which it is no longer possible in Maryland to make independent or party nominations after the primary election, except to fill vacancies occasioned by death, resignation or invalidity of original nominations. By restricting the voters in the general election to a

choice between the candidates who have been nominated in the manner provided by law, the legal and qualified voters of the State will have no escape from the election of one of these nominees, no matter how undesirable all of these nominees may be proven to be after nomination and before the date of the election. Although the write-in privilege is not generally availed of, it is worthy of note that in *Bradley v. Shaw,* 133 N. Y. 493, and *Barr v. Cardell,* 155 Northwestern 312, the successful candidates whose names had not been printed upon the ballot won the election by write-in votes. It is only through the recognition of this privilege that the free and complete election franchise may be preserved.

It is furthermore respectfully submitted that the entire absence of equipment for personal choice voting from said Automatic Corporation voting machines, and the exclusion of personal choice voting by said Automatic voting machines, not only violate the provisions of the Declaration of Rights and the Constitution of Maryland, above referred to, but also violate the express mandate of Section 224-F, Sub-section (d), of the Voting Machine Act of 1937, which is plainly intended, in so far as it applies to general elections, to effectuate the guaranties of the Declaration of Rights and the Constitution, above mentioned, of a free and complete elective franchise in every voter qualified under the requirements of the Constitution.

It will be noted that said Section 224-F of said Chapter 94 of the Acts of 1937, requires that,

> "Every voting machine acquired or used under the provisions of this sub-title *shall:*
>
> "(c) Permit each voter, at other than primary elections, to vote a ticket selected from the nominees

> of any and all parties and from independent nominations; (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.''

It is manifest that said Sub-section (d) expressly requires that the voting machines acquired or used under the provisions of the Voting Machine Act shall be so equipped and operable that every qualified voter in every general election in Baltimore City shall be secured in the free and complete exercise of the unrestricted elective franchise with which he is vested by the Constitution. This mandate of the Voting Machine Statute, doubtless designed to comply and harmonize, beyond question, with the franchise vested by the Constitution in the qualified voters of Baltimore City, is admittedly not only not complied with, but violated by the voting machines intended to be purchased under the contract of September 8, 1937.

For all of the above reasons it is clear that the decision of the Court below should be affirmed insofar as it holds that the contract in question is void because the voting machines intended to be purchased do not preserve the constitutional right of the qualified voters of this State to vote for persons of their individual choice.

II.

VOTING FOR TWO CANDIDATES BY THE OPERATION OF ONE DEVICE IS PROHIBITED.

Voting for two candidates by the operation of one device is in conflict with the Voting Machine Act, Section

224-F, Sub-section (i), requiring the machines to "*have voting devices for separate candidates.*" It is also in conflict with Section 224-A of the Voting Machine Act which provides that "the form and arrangement of ballot labels shall be in accordance with the provisions as to ballots contained in Section 63 of Article 33 of Bagby's Annotated Code, edition of 1924, (or as may herein and hereafter be prescribed by law)", with certain exceptions to meet the design of voting machines, but there is no exception which authorizes voting for two candidates by the operation of one lever or voting device. On the contrary, this right is preserved by the Voting Machine Act, requiring the machines to "*have voting devices for separate candidates*", and also by Section 63 of Article 33 of Bagby's Annotated Code, edition of 1924, which was repealed and re-enacted by Chapter 232 of the Acts of 1937 and which provides:

> "Ballots shall be so printed as to give each voter a *clear opportunity* to designate by *a* cross (x) in *a* square at the right of the name of *each* candidate and at the right of each question, *his choice of candidate* and his answer to such question."

It also appears from an examination of the various arrangements of ballot labels suggested by the Automatic Voting Machine Corporation to accommodate the voting for a first choice candidate and a second choice candidate by the operation of one voting device or lever "*that the designation of the party or principle which each candidate represents*" does not appear "*just above the name of each such candidate*", as required by Section 224-A of the Voting Machine Act; that these ballot labels are not "*so arranged that exact uniformity (so far as practicable), will prevail as to the size and type of printing of all candidates' names and party designations*", as required

by the same section; that the *place of residence* of each candidate does not follow the name of each candidate as it appears upon the ballot, as required by Section 63 of Article 33; that there is a failure to comply with a further provision of Section 224-A, providing that *"there shall be printed below the office title the words 'Vote For One', 'Vote For Two' in accordance with the provisions of Section 63 of Article 33 of Bagby's Annotated Code, edition of 1924, or such number as the voter is lawfully entitled to vote for out of the whole number of candidates nominated for such office"*, and that the requirement of Section 224-F (p) that the machines *"be so constructed that a voter may readily learn the method of operating it"* will be rendered practically meaningless, as the Plan A arrangement, as it appears upon the Automatic machine, is very difficult of understanding to the mass of voters.

There can be no doubt that a vote for one candidate for first choice and a vote for another candidate for second choice are separate votes for separate opposing *candidates.* The term "First Choice Candidate" and the term "Second Choice Candidate" are repeatedly referred to in Section 203 of Article 33 of the Code of Public General Laws. A vote for A for first choice and a vote for B for second choice is primarily a vote for A as against B, as the vote for B does not become effective until A is eliminated. Secondarily, it is a vote for B because after A is eliminated it becomes a first choice vote for B. If A and B are separate candidates, can it be said that a voting machine which will not permit a voter to vote for A for first choice and B for second choice except by the operation of one device for the two candidates is equipped with *"voting devices for separate candidates"*, as required by

Section 224-F (i) of Chapter 94 of the Acts of 1937, or that it complies with the *above quoted provisions of Section 63 of Article 33?*

Moreover, if Plan A is accepted, there will be no counter on the machine which will show the first choice votes of any candidate. To obtain the total first choice votes of any candidate it will be necessary to add the votes on as many counters as there are candidates and there is no mechanism on the Automatic machine for adding these results. The Legislature obviously intended that there should be a separate counter for each candidate not only by the requirement of "voting devices for separate candidates", as set forth in Section 224-F, Sub-section (i), but also by Section 224-Q, where it is further provided that on the return sheets "the designating number and letter, if any, *on the counter for each candidate* shall be printed thereon opposite the candidate's name."

By requiring the voting machines to have "voting devices for separate candidates", the uniform and well understood custom, by which each voter has been able in the past on a paper ballot to indicate his choice of each candidate by a single act, will be preserved. Voting devices for separate candidates will also simplify the ballot for the voters and produce an automatic result of the total number of first choice votes received for each candidate. The printing of the party designation or principle "just above the name of each" candidate furnishes the voter with information concerning the party of the candidate for whom he is voting, and is desirable on voting machines, because, where the machines are used, instead of printing the ballot labels of different parties in different colors, as in the case of paper ballots in primary elections, machine ballot labels are now required by Section

224-A of Chapter 94 of the Acts of 1937 to "be printed in black ink on clear, white material." It is apparent that the object of requiring ballot labels to be so printed was to increase their legibility, as it is generally accepted that black ink on white paper is more legible than any other combination of colors. The printing of the place of residence of each candidate with the name of each candidate, as required by Section 63 of Article 33 of Bagby's Annotated Code, and in accordance with the firmly settled custom which has obtained throughout Maryland both before and after the adoption of the Australian ballot, enables the voters to know the place of residence of each candidate for state-wide office for whom they vote. Without this information, voters might, without knowledge, vote for a group of state-wide candidates for different offices, all residing within the same city or county. It is also imperative, if there is to be an intelligent understanding of the ballot labels submitted to the voters, that there be a simple and specific instruction to the voter as to the number of candidates for whom he may vote for a particular office, as required by the quoted provision of Section 224-A of Chapter 94 of the Acts of 1937.

The wisdom or expediency of all of the above statutory provisions, specifically designating the essential requirements of voting machines to be acquired for use in the State of Maryland, properly belongs to the Legislature, and no valid reason has been advanced to justify the Court in departing from these statutory directions. On the contrary, an examination of any one of the various samples submitted by the Automatic Voting Machine Corporation in an effort to accommodate the voting for two candidates by the operation of one device will at once

disclose that inevitable confusion and disfranchisement will follow any such unprecedented, complicated, and unauthorized ballot arrangement, and that the statutes referred to should, therefore, be rigidly observed and followed.

At the trial below, it was contended by solicitors for the Automatic Voting Machine Corporation that the Voting Machine Act "specifically permits broad flexibility even beyond the strict letter of the statute", and to support this contention the following language was seized upon:

> "The form and arrangement of the 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."

Obviously, the Legislature never intended by the use of the above language to permit the Board of Supervisors of Election to override or forego the express mandatory provisions of this act or any of the other election laws of the State, and the Legislature could not constitutionally delegate to such a board in Baltimore City the right to abrogate any of the mandatory or essential requirements of the State-wide primary or general election laws.

The expression *"as nearly as may be"* is a *positive* injunction upon the Board of Supervisors of Election to follow and adhere to, as fully and closely as may be possible, the provisions of the Sub-title relating to the form and arrangement of ballot titles as against releasing or eliminating any of the essentials of the law. If it be *possible* to carry out the provisions of the law, the expression *"as nearly as may be"* affirmatively requires the provisions of law to be observed. It is only in the event of real and insuperable impossibility to carry

out the law that such impossibility may prevent it. The machine tendered by the Shoup Voting Machine Corporation, equipped for Plan B voting, shows that it *is possible* to observe the law, and there is therefore no necessity for relinquishing any of the essential statutory requirements.

In support of the Plaintiff's contention on this point, the attention of the Court is invited to the case of *Davidowitz v. Philadelphia County,* 187 Atlantic (Pa.) 585, where there was an application for injunction to restrain the use of voting machines on the ground that the form and arrangement of the ballot was not in accord with the election laws of Pennsylvania. In that case the Act provided:

> "The form and arrangement of the ballot labels to be used at any election, shall be determined by the Secretary of the Commonwealth, *as nearly as may be* in accordance with the provisions of the laws prescribing the form and arrangement of ballots at such election, and shall be furnished by him to the County Commissioners." (Italics ours.)

The Court said:

> "The Secretary, through his counsel, contends that his discretion to arrange the ballot labels on voting machines empowers him to disregard the provisions of the Ballot Act of June 10, 1893, P. L. 419, and its amendments, and to place Plaintiff's political appellation on the machine with no other indication to it than that found in the body of the machine beside the Plaintiff's name as a candidate for office. If this discretion exists, it is apparent it could be exercised whether or not the voting machines are large enough to accommodate all political organizations and that his arrangement of the ballot labels would be unregulated applying alike to any and all

parties or political groups. Under such an interpretation he could take a major party, scatter its candidates for offices in various lines, force a lever to be thrown for each candidate, producing such inconvenience and confusion as to practically disfranchise many thousands of voters. If the words 'as nearly as may be' authorize such unlimited discretion as is here urged, what is the 'impractical' operation of the machine mentioned in section 21 of the Act (25 P. S. 1831), and what becomes of the mandatory provisions that apparently were not violated? If his discretion is limited, where is the line to be drawn? * * *

"The listing of the party names on the left or top of the machine must correspond so far as possible to that on the paper ballots. It is within the power of the Secretary to adjust any small differences as he, in his judgment, deems proper, but this does not extend to a total disregard of the mandatory provisions of an act which requires all party names or political appellations represented in a given district to be placed on the left hand column, or the top. The Secretary is not permitted to substitute his discretion in this regard for that which the legislature has there definitely commanded. To say that the Legislature by this section intended to vest in the Secretary of the Commonwealth an uncontrolled regulation of the arrangement of the ballot labels would cause the act to run afoul of the principle which forbids delegation of legislative power. * * * "Where the Legislature has regulated the form of a ballot, it does not lie within the power of any officer to change that form.

"To carry forward the beneficent purposes of the Ballot Act and preserve the voting machine for use the difficulties of placing all political appellations on the front row must be obviated if possible. This can be accomplished but not in the submitted arrangement of the Secretary."

The Court then suggested an arrangement, not conclusive, which could be readily accomplished in the particular election.

In the case of *Line v. Board of Election Canvassers*, 154 Michigan 329, the statute authorized the use of voting machines at all "state, county, city, village and township elections." One of the machines was used in a precinct in a primary election. The Petitioner, Line, was a candidate for nomination for the office of Prosecuting Attorney by the Republican Party in said primary election. He contended that the use of the voting machine at a primary election was unauthorized by law and therefore that the votes recorded on the machine and shown in the returns should not be considered.

On the part of the Board of Canvassers, it was urged that the use of a voting machine was permissible at primary elections, but even if the primary law could not be construed to intend the use of voting machines at such election, yet if used in good faith and the choice of the electors was expressed, no fraud or prejudice appearing, the use of the machine ought not to invalidate the election.

The Court pointed out certain provisions of the statute relating to primary elections, relating to ballots, which could not be observed on the voting machine, and then said:

> "It appearing that there is no provision of law which permits the use of voting machines at primary elections, and also that the mandatory provisions of the law cannot be carried out if such machines are used, thereby defeating the purpose and intent of the Legislature, it follows that the use of a voting machine at such primary was unlawful."

The effect of the above decision was to change the result of the election.

In the case of *Helme v. Election Commissioners,* 149 Michigan 390, an Act of the Legislature of 1907, under which a voter at an election at which voting machines were used was required to call for a paper ballot in case he desired to vote for a combination of candidates which could not be voted on the machine, was declared unconstitutional. The effect of such a requirement was to compel the voter to disclose his intention not to vote his party ticket. The Act was held to violate the right of an elector to vote a secret ballot. The Court said:

> "It is obvious that a voter cannot ask for and vote such a ballot (paper ballot) without indicating that he does not vote for his full party ticket, and, to the degree that he is reluctant to have his want of party fealty known, it acts as a deterrent to his voting for persons of his choice, and operates against his independence as a voter. We are of the opinion that the requirements found in Section 10, Act No. 287, Public Acts 1907, are unconstitutional as applied to this case, because they violate the right of the elector to vote a secret ballot."

It will be observed that the Election Laws of Maryland, throughout all their provisions, uniformly provide that the vote of each voter for his choice of candidate or with respect to any measure to be passed on in the election, shall be by *a single act in each instance.* There is no authorization in our Election Laws of the expression by a voter of a double choice or a double vote as to candidates or measures subject to his vote by a single act. In other words, each choice and each vote is to be expressed and cast by the voter by a single act upon his part. The purpose of this invariable feature of our Election Laws is clearly intelligible, when it is remembered that an election, to be participated in by the great

masses of qualified voters, must be so conducted and maintained by the laws providing for popular elections that the act of voting shall be rendered as simple, as easy, as understandable, and as free from complication or confusion, as is practically possible. The supreme essentials of an election law providing for popular elections are that the voting therein shall be, as aforesaid, exercised in the easiest, simplest, most uncomplicated and unconfused manner possible. All popular Election Laws have those conditions as their studied ends. Obviously, the most effective method of achieving those ends is to provide that each expression of choice upon the part of the voter shall be by a single, simple, uncomplicated act upon his part. Our Election Laws never depart from that method or principle and are written to accomplish the purpose stated. It is obviously for that reason that Section 63 of Article 33 has always provided that, "Ballots shall be so printed as to give each voter a clear opportunity to designate by *a* cross mark in *a* square at the right of the name of each candidate, and, at the right of *each* question, his choice of candidates and his answer to such question"; and that, in preserving and effectuating that principle of our legislative policy, the Voting Machine Law peremptorily requires that the voting machines, under the Act, shall "Have voting devices for separate candidates", and that, "The form and arrangement of the ballot labels shall be in accordance with the provisions as to ballots contained in Section 63 of Article 33 of Bagby's Annotated Code, Edition 1924."

Solicitors for the Defendants also contended that, inasmuch as Section 224-F, Sub-section (d) requires that the machines 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, 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''*, it is not essential that the statutory provisions to which we have referred be observed at primary elections involving first and second choice voting for state-wide offices. The Court below accepted this view and cited the case of *Carr v. Hyattsville,* 115 Maryland 545.

In the first place, it will be observed that the ''substantial compliance'' mentioned in the statute is ''with the provisions of Section 203 of this Article'', which relates to first and second choice voting in state-wide primary elections, and there is nothing in the Voting Machine Act to suggest any relinquishment of any of the essential requirements of the Voting Machine Act, such as (1) Sub-section (i) of Section 224-F, requiring ''voting devices for separate candidates'', or (2) Section 224-A, requiring ''that the designation of the party or principle which each candidate represents shall appear just above the name of such candidate'', or (3) the further provision in the same section that ''there shall be printed below the office title the words 'Vote For One', 'Vote For Two' in accordance with the provisions of Section 63 of Article 33, etc.'', or (4) the provision of Section 63 of Article 33, providing that ''to the name of each candidate for state office or candidate for congress shall be added the name of the county or city in which the candidate resides'', or (5) the further provision of Section 63 of Article 33, designed to give each voter *''a clear opportunity'' to indicate by a single act opposite the name of each candidate, ''his choice of candidate.''*

It is also clear that the Legislature did not intend to repeal any of the provisions of Section 203 as applied to Baltimore City, so as to leave those sections unaltered insofar as they are applicable in the Counties and materially changed insofar as they are applicable in Baltimore City. After providing for the indication of the voter's "first choice" and "second choice" by separate marks, Section 203 expressly provides that "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." Certainly the Legislature did not intend by the use of voting machines to permit a voter in Baltimore City to record a vote for a candidate for first choice and for the same candidate for second choice, because Section 203 expressly provides that a ballot so marked shall be counted for first choice only. Similarly, it is not permissible in Baltimore City for a voter to record a vote for a candidate for second choice without recording a vote for first choice, as the section expressly provides that such a vote shall be counted for first choice. The state-wide primary election law must afford to each voter an equal opportunity to express his choice of candidates, and the words "substantial compliance", as used in Section 224-F Sub-section (d), were not intended to destroy the uniformity of opportunity to which all qualified voters throughout the State are equally entitled.

The Legislature probably realized that where voting machines are used, it will be impossible to have two voting devices after the name of each candidate for state-wide office so as to enable the voter to operate one de-

vice for first choice and another device for second choice, as such arrangement would not *preclude* the recording of votes for the same candidate for first choice and second choice by the same voter or the recording of a second choice vote with no vote for first choice. By the use of the words "substantial compliance", therefore, the Legislature undoubtedly meant that the machines should be so constructed and the ballot labels should be so arranged that all of the essential provisions of Section 203 should be preserved.

Plan B, which provides one voting device for each candidate for first choice and a separate voting device for each candidate for second choice in the same row, together with the party designation and place of residence of each candidate and each choice of candidate as his name appears upon the ballot with appropriate directions to the voters to vote for one for first choice, then one for second choice in the same row, is a substantial compliance with Section 203 of Article 33 and a literal compliance with the provision of the Voting Machine Act requiring voting devices for separate candidates.

Plan A does not constitute a substantial compliance with Section 203, because it does not provide the above required facilities and further because in the operation of that plan, where a voter votes for one candidate for first choice as he has a lawful right to do, he may not vote for another candidate for second choice without first removing the first choice vote.

The words "substantial compliance" are uniformly held to mean compliance with all of the "essential requirements". See *Words and Phrases*, Second Series, page 750. If the words be given any other meaning,

then the entire Voting Machine Statute becomes vague, uncertain, and confusing, with the result that the conduct of future state-wide primary elections in Baltimore City will be subject to the indeterminate discretion of a Board of Supervisors of Election, usually dominated by the party in control of the State government, and the definite and certain safeguards with respect to the conduct of such elections, heretofore carefully and deliberately prescribed by the Legislature to insure a free and easy exercise of the right of franchise, will cease to be secure.

III.

A.

IT IS NECESSARY TO PRINT PARTY DESIGNATION ABOVE THE NAME OF EACH CANDIDATE.

It is necessary to print the party designation above the name of each candidate, as it appears upon the ballot, because Section 224-A of Chapter 94 of the Acts of 1937 expressly provides "*that the designation of the party or principle which each candidate represents shall appear just above the name of each such candidate.*" The same section also provides that the machines shall be purchased for use "*at all primary, general, special, and other elections, held or to be held in the City of Baltimore after the first day of January, 1938.*" It is further provided in Section 224-F, Sub-section (f) that the machines acquired shall "*be capable of adjustment * * * so as to permit each voter at a primary election to vote only for the candidates seeking nomination by the political party with which he is affiliated * * *, and so as to preclude him from voting for the candidates seeking nomination by any political party with which he is not affiliated.*" In other words, the same machine is re-

quired to accommodate primary ballots of more than one political party. It is also further provided in Section 224-A that the *"ballot labels shall be printed in black ink on clear, white material"*, so that where voting machines are used, the law no longer requires the ballots of the different parties to be printed in different colors. In making these changes in the law where voting machines are used the Legislature expressly provided that *"the designation of the party or principle which each candidate represents shall appear just above the name of each such candidate"*, and the object of this requirement is to acquaint the voter with the particular party of the candidate at the particular place where the name of the candidate appears upon the ballot. To hold that this language is directory and not mandatory, or that it has no application in a primary election, is to unduly restrict the meaning of the language employed and will operate to deny to the voter specific information concerning the candidate which the Legislature in its wisdom declared should be *"just above the name of each such candidate."*

III.

B.

IT IS NECESSARY TO PRINT THE NAME OF THE COUNTY OR CITY IN WHICH THE CANDIDATE RESIDES WITH THE NAME OF EACH CANDIDATE.

It is necessary to print the name of the city or county in which each candidate resides with the name of each such candidate as it appears upon the ballot, because Section 63 of Article 33 of the Code of Public General Laws expressly provides that *"to the name of each candidate for state office or candidate for Congress shall be added the name of the county or city in which the candidate resides."* Section 224-A of Chapter 94 of hte

Acts of 1937 requires that *"the form and arrangement of the ballot labels shall be in accordance with the provisions as to ballots contained in Section 63 of Article 33 of Bagby's Annotated Code,"* etc. Although there are certain exceptions to the form and arrangement of ballot labels on the machines as distinguished from paper ballots, there is no exception which abrogates this essential requirement of the law concerning the place of residence of the candidate. The obvious purpose of this requirement is to enable every voter *to know the place of residence of the candidate for state office for whom he is voting,* and it is not enough to print the place of residence with the name of the candidate as it appears upon the ballot label at one place and not with the name of the candidate where it appears upon the ballot at another place or for another choice. Voters should not be required to look up the place of residence of each candidate at some other place upon the ballot, especially since sec. 224-A of the Voting Machine Act provides that *"no voter in the use of a voting machine shall be permitted to occupy more than two minutes while other voters are waiting to use the same."*

III.

C.

IT IS NECESSARY TO PRINT THE ENTIRE NAME OF EACH CANDIDATE, HIS PARTY DESIGNATION, AND PLACE OF RESIDENCE UNDER OR OPPOSITE THE PARTICULAR VOTING DEVICE WHICH MUST BE OPERATED TO VOTE FOR THAT CANDIDATE.

It is necessary to print the entire name of each candidate, his party designation, and the place of residence under each voting device necessary to vote for that candidate in order to prevent confusion. The Plan A arrangement (R. 165) submitted by the Automatic Voting Machine

Corporation in which the name of the first choice candidate is scattered under several voting devices is highly misleading, and the confusion of such an arrangement will be greatly increased as the number of candidates increases. The variations in the size of type under this arrangement are in conflict with the provisions of Section 224-A, requiring 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."*

III.

D.

IT IS NECESSARY THAT THE SIZE OF TYPE IN WHICH THE NAME OF THE FIRST CHOICE CANDIDATE IS PRINTED UPON THE BALLOT BE THE SAME (SO FAR AS PRACTICABLE) AS THE TYPE IN WHICH THE NAME OF THE SECOND CHOICE CANDIDATE IS PRINTED.

The reasons for this requirement are set forth in the preceding Section III C of this Brief. See Record, 165.

III.

E.

THE NECESSARY PRINTING OF NAMES AND DESCRIPTIONS OF TWO CANDIDATES UNDER ONE VOTING DEVICE CANNOT BE ACCOMMODATED WITHIN THE LIMITED SPACE AVAILABLE ON THE AUTOMATIC VOTING MACHINE, SO AS TO BE READILY READABLE BY PERSONS WITH NORMAL VISION.

By giving effect to Section 224-A of Chapter 94 of the Acts of 1937 and Section 63 of Article 33 of the Code of Public General Laws, it is necessary to print the party designation "just above the name of each candidate", and to add to the name of each candidate "the name of the county or city in which the candidate resides." If the names and descriptions of two candidates are to appear under one voting device, that is, one for first

choice and one for second choice, it will be found that within the limited space of one inch in width and less than one inch in depth under each device for candidates on the Automatic Machine, the exact dimensions of which spaces are disclosed in Plaintiff's Exhibit No. 5, as shown by the last exhibit in the volume of exhibits attached to and forming a part of the Record in this case, there must be printed the following:

1F
REPUBLICAN
PHILLIPS LEE
GOLDSBOROUGH
BALTIMORE CITY
FIRST CHOICE

REPUBLICAN
HARRY W.
NICE
BALTIMORE CITY
SECOND CHOICE

It is obvious that all of the above information cannot be accommodated in *"plain, clear type so as to be readily readable by persons with normal vision"*, as required by Section 224-G of Chapter 94 of the Acts of 1937.

IV.

THE DEFENDANT VOTING MACHINE BOARD HAD NO AUTHORITY TO PURCHASE VOTING MACHINES WHICH WERE NOT MECHANICALLY EQUIPPED TO ACCOMMODATE PLAN B VOTING UPON THE MERE ORAL STATEMENT OF THE AUTOMATIC VOTING MACHINE CORPORATION THAT IT COULD AND WOULD, IF REQUIRED, RE-EQUIP THE MACHINES PURCHASED WITH NEW MECHANISM AND ATTACHMENTS TO ACCOMMMODATE PLAN B VOTING.

One of the essentials of every contract is that it be definite and certain, and where the parties have left an es-

sential part of the agreement for future determination, the contract is not complete. 6 R. C. L. 643. The admitted lack of certainty with respect to the particular type of machine purchased by the contract of September 8, 1937, here in question, is illustrated by paragraph 28 of the Answer of the Defendant Board to the Bill of Complaint of the Plaintiff, William S. Norris, where it is said that "this Board must therefore elect as soon as possible whether to require said machines to be so arranged and equipped as to vote 'Plan A' or 'Plan B'." (R. 28). This Answer was filed on September 24, 1937.

Obviously, it is essential that the element of uncertainty as to the thing purchased or to be purchased be eliminated from any transaction involving the expenditure of public monies through competitive bidding, in order to promote effective competition and to diminish the opportunity for waste, fraud and favoritism.

In the case of *Packard v. Hayes,* 94 Maryland 233, at page 249 it is said:

> "The absence of any definite and precise basis for competition among the bidders; the allowing of each bidder to submit his own independent proposition as to what would form an important element of the contract; and the reservation of the discretion to be exercised by a municipal authority as to an essential of the contract after bids had been submitted, make the contract here the subject of controversy violative of the intent and purpose of the provisions of the law in question as well as of the essential character of competitive bidding."

In support of the above conclusion, the Court referred to the case of *Mazett v. Pittsburgh,* 137 Pa. 548, where it was said:

> "How can there be a *lowest* bidder when parties proposing to bid are instructed to prepare their own specifications and submit them with their respective bids? The expression 'lowest bidder' necessarily implies a common standard by which to measure their respective bids, and that common standard must necessarily be previously prepared specifications of the work to be done, and the materials to be furnished, etc., specifications freely accessible to all who may desire to compete for the contract, and upon which alone their respective bids must be based."

In the case of *Konig v. Mayor and City Council*, 126 Maryland 606, the Court at page 623 said:

> "There can be no competition as to a thing or things indefinite and undetermined, and if, where they are determined, the proposals or contract awarded could depart from the specifications, it would defeat the competition sought to be obtained, and result in a contract for a thing for which there had been no competitive bidding. The same result would follow the reservation of any discretion to be exercised by the municipal authorities as to an essential of the contract. This rule is in accordance with one recognized in other States."

If it be determined that the Plan A method of voting for first and second choice in primary elections is illegal, then the failure of the machine tendered by the Automatic Voting Machine Corporation to contain the equipment necessary to accommodate Plan B voting represents a substantial and essential failure to meet the requirement of the specifications by which it was expressly provided in section 47 (R. 198) that "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."

The evidence offered by the Plaintiff below indicates that the cost of the necessary equipment to accommodate Plan B on the Shoup machine is $84.00 per machine (R. 267), while the representative of the Automatic Voting Machine Corporation claimed that the cost of re-equipping its machine to accommodate Plain B would not exceed $1.94 per machine to the company with no additional cost to the City. With respect to this difference, the attention of the Court is invited to the testimony of Mr. Weiss, the President of the Shoup Voting Machine Corporation, and Mr. Shoup, the Chief Engineer of the same corporation, indicating the insufficiency of the equipment which the Automatic Voting Machine Corporation demonstrated at the trial below to accommodate Plan B method of voting (R. 261-307). The painstaking and persistent efforts of the Automatic Voting Machine Corporation to sustain the legality of the confusing Plan A arrangement in this litigation indicates a very much more serious concern than the mere addition of a little insignificant equipment at a cost of $1.94 per machine. The fact is, as testified by the Plaintiff's witnesses, that the Plan B arrangement cannot be accomplished successfully with the strap arrangement suggested and proposed by the Automatic Voting Machine Corporation. Admittedly (R. 292), this company, notwithstanding its wide experience had never used Plan B method of first and second choice voting, and it had had but one experience with first and second choice voting about 1912, when Plan A was used at Milwaukee and the law was repealed a few years thereafter (R. 291).

The unsatisfactory results which flow from permitting a bidder to deviate from specifications or a sample submitted, by the acceptance of oral promises as to what a

bidder can or will do if the contract is awarded to him, are aptly illustrated by this case, when it is shown by actual demonstration in open Court that the added Plan B equipment which the Automatic Voting Machine Corporation orally said it could and would furnish without additional cost, will not accomodate Plan B voting.

The position of the Appellee and Cross Appellant Daly on this phase of the case is exactly in line with the position of City Solicitor R. E. Lee Marshall, a member of the Defendant Board, at the public hearing on August 26, 1937, as will be observed by the following transcript of a portion of the proceedings at the said hearing, which were offered in evidence at the trial below, but the Court sustained the Defendants' objection to same (R. 279):

> "(Mr. Marshall) I think this is true. We are dealing with samples submitted to correspond with specifications; the bids have been opened and there should be no change in the samples at this time; I believe that is the general rule in competitive bidding, that there should be no change in samples after bids have been opened. We, therefore, have to deal with this question upon the basis of the samples submitted in response to the specifications put out.
>
> (Mr. Jones) That is my point, Mr. Marshall; that is exactly what I am trying to find out, and he will not answer. He did tell us it was a complicated system and required considerable equipment to change it.
>
> (Mr. Hamilton) I don't think I said that; I said we required some time—
>
> (Mr. Jones) May we not have, for the record, a statement from the witness who knows what additional equipment in addition to that which was in the sample submitted, with his bid, will have to be installed in order to accomplish it.

(Mr. Marshall) I think the question would be this: Is any additional equipment necessary to make the change in your Exhibit B?

(Mr. Hamilton) Yes, sir, there would be."

The distinguished City Solicitor adhered to this position rigidly in the executive session, which was held immediately after the above public session and when the matter of requesting the Attorney General for a ruling upon the legality of the Plan A arrangement was passed upon. In connection with the motion to request such a ruling, the record of proceedings of the Board in this executive session, offered in evidence at the trial below, but not admitted, as the Court sustained the Defendants' objection to same, discloses the following:

"(Mr. Gans) We are not passing on the specifications, as I understand it, and if the machines can be changed——

(Mr. Marshall) No, you are basing your opinion on these machines, as submitted.

(Mr. Gans) Isn't that part of the thing, in other words, if they can change it so the objection can be removed——

(Mr. Marshall) But they have not changed it. You are not going to consider subsequent changes. These are the machines they submitted under the specifications. Can we vote a legal ballot on those mechines? That's all we want to know—that's all the Supervisors of Election want to know. It does not involve any questions of what could be done, or what could not be done, but what can be done with these machines.

(Mayor Jackson) As submitted or exhibited.

(Mr. Marshall) We do not have to consider what they could do; if they can't do it on these. What we are considering is what we can do on these we are buying."

It is respectfully urged that the Court erred, prejudicially to the rights of Hattie B. Daly, as Cross-Appellant, from the Court's determinations in Paragraphs 1 and 2 of its Decree, by excluding this testimony, which was offered for the specific purpose of showing that the position of the Defendant Board, expressed through the City Solicitor of Baltimore City, as a member of said Board, whilst the sample machines of the respective bidders were under consideration by the Board, was in complete accord with the position of said Cross-Appellant that no change in the machine and its equipment could, after the bids had been opened, be adopted and made by the Board, and especially in the case herein presented, where the changes were suggested in merely an oral proffer.

V.

VOTING MACHINES WHICH ENABLE A VOTER TO VOTE FOR A SECOND CHOICE CANDIDATE WITHOUT VOTING FOR A FIRST CHOICE CANDIDATE MAY NOT BE USED IN THIS STATE.

Section 224-F, Sub-section (e) expressly provides that "every voting machine acquired or used under the provisions of this Sub-title shall:" * * *

> "(e) preclude each voter from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once."

Section 203 of Article 33 expressly provides that where the vote is "for second choice only it shall be counted for first choice."

The effect of these two statutory provisions is to prohibit any vote for second choice unless there is also a first choice vote by the same voter, and if the machine

permits a voter to record a vote for second choice with no vote for first choice, it does not "preclude each voter from voting for more persons for any office than he is entitled to vote", as required by Section 224-F, Sub-section (e). Unless the voter votes for a first choice candidate, he is not entitled to vote for any candidate for second choice.

The additional equipment which the Automatic Voting Machine Corporation claims will accommodate Plan B voting does not successfully or practically accomplish this result, as was testified and demonstrated by Mr. Shoup, the Chief Engineer for the Shoup Corporation, in the course of his testimony at the trial below (R. 302-303). The accuracy of this demonstration was virtually conceded by the witness Hamilton, representing the Automatic Voting Machine Corporation, for it will be noted on pages 316 and 317 of the Record that he admitted that the above demonstration was accomplished without the aid of any other person or tools, without noise or damage to the machine, and that it was accomplished by the application of his thumb which retarded the movement of one lever while he operated the other with his other hand.

VI.

VOTING MACHINES WHICH ENABLE A VOTER TO RECORD A VOTE FOR THE SAME INDIVIDUAL CANDIDATE FOR FIRST CHOICE AND FOR SECOND CHOICE MAY NOT BE USED IN THIS STATE.

The statutory provisions referred to in Section V of this Brief are equally applicable to support this contention. It will be noted that *the Plan B arrangement is an exact replica of the form of tally sheet for first and second choice voting as set forth in Section 203 of Article 33,* where the second choice votes of the other candidates

are set forth in the same row in which the first choice candidate appears at the beginning of the row in the following manner:

First Choice	Second Choice	
Smith	Robinson	Brown
Robinson	Smith	Brown
Brown	Smith	Robinson

It will be observed that a vote for one candidate for first choice and for the same candidate for second choice in different rows will enable that candidate to obtain two votes for first choice from the same voter, if and when the third candidate in the third row is eliminated.

This is true because Section 203 of Article 33 contains the following provision:

> "In case no candidate receives a majority of all the 'first choice' votes cast and counted in any county or legislative district, but only receives a plurality thereof, then the candidate receiving the lowest 'first choice' vote shall be dropped at the canvass and the ballots tallied for him for 'first choice' shall be distributed among the remaining candidates according to the way his said voters voting for said lowest candidate for first choice have indicated their 'second choice.'"

Mr. Shoup testified at page 302 of the Record that the above result could be accomplished with the Plan B equipment which the Automatic Voting Machine Corporation demonstrated in open Court, but the Court below declined to permit him to demonstrate this result on the Automatic Plan B machine offered in evidence by the Defend-

ants, as will be observed by reference to page 303 of the Record. Mr. Hamilton, representing the Automatic Voting Machine Corporation, was asked specifically about the testimony and demonstration of Mr. Shoup (R. 313). It is noteworthy that Mr. Hamilton did not say or attempt to say that it was impossible to vote for the same candidate for first and second choice on the Automatic machine with its so-called Plan B equipment. He contented himself on this point by saying that "in Mr. Shoup's demonstration on that machine, he endeavored to show—and did not show * * * that he could vote second choice and the first choice for the same candidate" (R. 313).

VII.

THE FAILURE OF THE AUTOMATIC VOTING MACHINE TO HAVE NINE CLEAR ROWS FOR CANDIDATES WITH FORTY VOTING DEVICES IN EACH ROW RENDERED THAT MACHINE INELIGIBLE FOR PURCHASE UNDER THE SPECIFICATIONS.

The requirements of paragraph 44 of the specifications, set forth at page 194 of the Record, are clear in the mandate that there shall be nine (9) vertical or horizontal rows of levers or devices, with forty (40) in each row, or a total of three hundred and sixty (360) such levers and devices for candidates on each machine. The use of one of these rows as an office index leaves but three hundred and twenty (320) spaces available for candidates. It is conceded that the only method by which the Automatic machine will accommodate nine (9) clear rows in primary elections with two party ballots on one machine is by the addition of an attachment to accommodate one office index between the rows. No such attachment was on the machine tendered to the Voting Machine Board and the first suggestion that the Automatic Voting

Machine Corporation would attempt to overcome the difficulty in this manner was made during the trial below when a strip was offered in evidence as Defendants' Exhibit E (R. 258). An examination of this Exhibit as well as of the machine will disclose that the space between the rows for such an office index will be very much smaller than the space for the other index at the top of the machine. It is the contention of the Cross-Appellant Daly that, under a proper interpretation of the specifications and of the provisions of Section 224-A of Chapter 94, it is not permissible to print the office index of one party in type of one size and the office index of the other party, whose ballot appears upon the same machine, in type of a different size, and that the law contemplates "exact uniformity" so far as practicable. The method suggested to overcome this failure of the Automatic machine to meet the requirements of the specifications not only involves a change in the machine as tendered and sought to be purchased by the contract but also represents an unsatisfactory makeshift which again portrays a lack of competition inasmuch as the Shoup machine did contain nine (9) clear rows for candidates with forty (40) voting devices in each row as specifically required by the specifications, paragraph 44.

The failure of the Automatic machines tendered to the Defendant Board to contain nine (9) clear rows for candidates, as required by the specifications, should be considered with the other deficiencies in these machines with respect to the absence of equipment for personal choice or write-in voting and also of equipment for Plan B voting. All of these deficiencies should also be considered in connection with Section 43 of the specifications (R. 194), which reads as follows:

"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 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. All voting machines must be properly equipped with lights, electric wiring, connections, instruction models and all other accessories that may be necessary to properly install and operate said voting machines in such places as are ordinarily used for polling places in the City of Baltimore, State of Maryland."

Moreover, Paragraph 47 of the Specifications clearly prohibits the substitution of a machine different from the sample of the voting machine, equipment and accessories, which the bidder set up and tendered as the machine, equipment and accessories which he proposed to furnish and deliver if awarded the Contract. Said Paragraph 47 is perfectly definite and specific upon that subject. Its manifest intent is to secure certainty in the Contract with respect to the machines to be purchased, and also to secure a proper basis for competitive bidding, so that when the bids are opened and the samples set up and furnished with the bids, as samples of the voting machines, equipment and accessories which the bidder proposes to furnish and deliver if awarded the Contract, the Board may have before it actually precisely the machines presented by the respective bidders in competition with each other upon their merits. It is important to note the repeated and undeviating language of Paragraph 47 throughout the whole text of the Paragraph in the important respect here referred to.

The Paragraph is as follows:

"47. *On or before the day that a bidder submits his bid, he shall set up,* at his sole cost, expense and risk, in the office of the Supervisors of Election, located in the Court House, Baltimore City, Maryland, *the following samples of the voting machines, equipment and accessories, such as he proposes to furnish and deliver if awarded the contract:*

"A sample of each size of the 'Type A' machines, if the bidder is bidding on 'Type A' only;

"If the bidder is bidding on both 'Type A' and 'Type B' machines it will be sufficient for him to so set up *samples of each size* of 'Type B' only, provided that at any time after the bids have been opened, every bidder who has submitted samples of 'Type B' only, shall at his own expense and risk, and promptly upon written notice from the Voting Machine Board, remove from his said 'Type B' samples all equipment pertaining to the electrical operation of his said samples, *and thereafter said sample machines, without said electrical equipment, shall be held and taken to be said bidder's samples of manually operated (Type A) machines which he proposes to furnish and deliver if awarded this contract."*

* * *

"Upon *each sample machine so set up,* there shall be arranged such sample ballots as may be specified by the Supervisors of Election. Such ballots shall provide space for a contest for officials on said ballots in the case of every office to be filled. *Such sample machines may be subjected to such tests as the said 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. Such sample machines, equipment and accessories, shall remain in place until the contract is awarded to the successful bidder or until all bids are rejected, and the sample*

machine so set up by the successful bidder and upon which his bid is accepted (together with all equipment and accessories) shall thereafter remain in place until all of the machines, equipment and accessories, to be furnished by him shall have been delivered and accepted, and such sample machine, equipment and accessories, may, in the discretion of the Voting Machine Board, be accepted as one of the machines, equipment and accessories, to be delivered under the contract.

"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 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."

It is submitted that argument would be superfluous to show that the said paragraph 47 of the Specifications distinctly prohibits any such substitution, as is attempted in this case, of a machine different in its equipment and accessories for the voting machine, equipment and accessories set up and tendered by the Automatic Company with and as part of its bid as *the machine, equipment and accessories which it proposed to furnish if awarded the Contract.* And, as heretofore submitted, the acceptance by the Board, which had invited proposals upon its own Specifications, of such a substitution upon *a mere oral statement,* made long after the bids had been opened and after the insufficiency of the samples set up and tendered by the Automatic Company had been seriously challenged, presents itself as an utter violation of the paragraph referred to of the Specifications.

CONCLUSION.

Inasmuch as the voting machines tendered by the Automatic Voting Machine Corporation to the Defendant Board and intended to be purchased by the contract of September 8, 1937, were deficient in failing to provide (a) equipment for personal choice or write-in voting, (b) equipment for separate voting for first and second choice in primary elections, and (c) nine (9) clear rows of voting devices with forty (40) such devices in each row, it is respectfully submitted that the said machines were not eligible for purchase by the Defendant Board, and for all of these reasons the said contract of September 8, 1937, should be declared void and of no effect.

Respectfully submitted,

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