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CONSTITUTIONAL LAW — VALIDITY OF VOTING MACHINE IN GENERAL ELECTION — CONSTITUTIONAL CONSTRUCTION — Pursuant to statutory provisions¹ the fiscal court of Jefferson County, Kentucky, appropriated \$1,000 for renting voting machines to be used in the general election of 1938. The county on relation of its attorneys filed suit for a declaratory judgment on the constitutionality of the statute. The relators appealed from a judgment declaring the act valid. *Held*, the statute authorizing the use of voting machines in popular elections is a violation of section 147 of the Kentucky Constitution which provides for a "secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited." *Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court*, 273 Ky. 674, 117 S. W. (2d) 918 at 920 (1938).

The desirability and utility of the voting machine from a practical standpoint is no longer questioned. It is easily understood and operated, insures absolute secrecy to the voter, prevents the cancelling of ballots which are doubtful or void because of technical deviations from required marking methods, performs with mechanical accuracy to the point of infallibility, alleviates congestion of polls by its efficiency, prevents the necessity of recounts by its conclusiveness, eliminates tampering and other election frauds, expedites election returns from days to a matter of minutes, and cuts election expenses to a minimum by reducing printing expenses, election supplies, the number of election officials and their hours of work, and the number of voting precincts.² The federal government and approximately one-half the states have by statute authorized the use of voting machines in general elections. In some jurisdictions the constitutionality of the statutes has been questioned because of the nearly universal provision in state constitutions that all votes shall be "by ballot." Some doubt was early expressed as to the scope of these words to include more than a written or printed paper.³ However, the authorities are now unanimous in holding that the provision covers the voting machine,⁴ since the purpose of providing for "ballot"

¹ Ky. Acts (1938), c. 133.

² ZUKERMAN, *THE VOTING MACHINE* 45-63 (1925) (Political Research Bureau of Republican County Committee of New York); Griffen, "Voting Machines: Theory and Experience," 32 *AMERICAN CITY* 167 (1925); 21 *AM. POL. SCI. REV.* 603 (1927).

³ *State ex rel. Karlinger v. Board of Supervisors*, 80 Ohio St. 471, 89 N. E. 33 (1909), later expressly overruled by *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 168 N. E. 131 (1929).

⁴ *Re Voting Machine*, 19 R. I. 729, 36 A. 716 (1897); *Detroit v. Inspectors of Election*, 139 Mich. 548, 102 N. W. 1029 (1905); *Lynch v. Malley*, 215 Ill.

voting was to insure secrecy by eliminating the older method of voting *viva voce*.⁵ The only decision other than that in the instant case which has declared a voting machine statute unconstitutional was in Massachusetts⁶ where the constitution required elections "by written votes." That decision rested upon a strict construction of the word "written" just as the principal case was based upon the Kentucky court's literal interpretation of the words "marked" and "deposited," so neither have the force of authority as legal precedent for cases arising under the ordinary constitutional provision. Kentucky early adopted the view that the state's power is residual and that consequently the state legislature, unlike Congress, has power to enact any law not prohibited by the state or federal constitutions.⁷ But if the constitution deals with a particular subject, the literal provisions are mandatory and conclusive,⁸ and the court will construe them as they were written and understood at the time of the constitutional convention.⁹ The present decision, then, is consistent with Kentucky's well-established theory of strict construction.¹⁰

574, 74 N. E. 723 (1905); *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698 (1906); *United States Standard Voting Machine Co. v. Hobson*, 132 Iowa 38, 109 N. W. 458 (1906); *People ex rel. Deister v. Wintermute*, 194 N. Y. 99, 86 N. E. 818 (1909); *State ex rel. Empire Voting Machine Co. v. Carroll*, 78 Wash. 83, 138 P. 306 (1914); *Spickerman v. Goddard*, 182 Ind. 523, 107 N. E. 2 (1914); *State ex rel. Fenner v. Keating*, 53 Mont. 371, 163 P. 1156 (1917); *State ex rel. Automatic Voting Machine Co. v. Green*, 121 Ohio St. 301, 168 N. E. 131 (1929); *Norris v. Mayor and City Council of Baltimore*, 172 Md. 667, 192 A. 531 (1937); *Mooney v. Phillips*, 173 Tenn. 398, 118 S. W. (2d) 224 (1938).

⁵ McCrary, *AMERICAN LAW OF ELECTIONS*, 4th ed., 359 (1897); 66 A. L. R. 855 (1930); 18 AM. JUR. 323 (1938).

⁶ *Nichols v. Board of Elections Commrs.*, 196 Mass. 410, 82 N. H. 50 (1907).

⁷ *Griswold v. Hepburn*, 63 Ky. 20 (1865); *Louisville & Nashville Ry. v. Herndon*, 126 Ky. 589, 104 S. W. 732 (1907); *Banks v. Commonwealth*, 145 Ky. 800, 141 S. W. 380 (1911); *Rouse v. Johnson*, 234 Ky. 473, 28 S. W. (2d) 745 (1930).

⁸ *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457 (1888); *Craft v. Baker*, 194 Ky. 205, 238 S. W. 389 (1922).

⁹ *Crick v. Rash*, 190 Ky. 820, 229 S. W. 63 (1921); *City of Lexington v. Thompson*, 250 Ky. 96, 61 S. W. (2d) 1092 (1933); 1 COOLEY, *CONSTITUTIONAL LIMITATIONS*, 8th ed., 123 (1927).

¹⁰ The desirability of such construction is questionable in the light of the present provision for amendment. "As the Constitution of Kentucky now stands, it is an extremely difficult task, an almost insuperable task, to get it amended in particulars where there is crying need for amendment. This difficulty arises . . . from the drastic limitations imposed by the Constitution itself on the processes of amendment. For example (Sec. 256), 'Not more than two amendments shall be voted on at any one time,' 'Nor shall the same amendment be again submitted *within five years* after submission,' and 'No amendment shall relate to more than one subject.'" WILSON, *A NEW CONSTITUTIONAL CONVENTION* 16 (1931).