premises, save that in one particular instance it may reduce an excessive valuation upon any given item of property, for which reasons the attempted increase in this case was void. General section 5638, Revised Statutes 1908 reads: "Except as an incident to equalization the county board of equalization shall have no power whatever to make any increase or decrease in the total amount of the valuation of the property of the county as set forth in the assessment roll. The power of said board shall be to adjust and equalize the valuation of the property set forth in the assessment roll, and it shall exercise no other power and shall have no other authority in the premises. Except that, if it shall appear that in one or more instances an item or items of property in any given class is assessed above its true value, and it shall also appear that all other items in such class are assessed at the true value, then, in such case and in such case only, the said board shall abate the excess valuation."

It is not to be presumed that clerks of county boards of equalization are always possessed with sufficient legal knowledge and training to enable them to write out and have entered their proceedings in the most perfect, legal, technical form. When this record is considered as a whole, it is sufficient to show that the board met and organized at the time fixed by law as a board of equalization under the provisions of the act of 1902, and that it met for the purpose of equalizing the value of property in that county for that year under its statutory and constitutional powers. The record further discloses that they ordered increased the value of certain specific properties of certain persons; that they likewise ordered decreased the value of certain specific properties of other persons, and, while the record does not so state in specific language, it is reasonably suspectible to the conclusion that in doing so it was done as an incident to the equalization in valuation of the different properties in the county. It also discloses that they did not make the reductions themselves, but ordered them to be made, as required by the laws of 1902, also, that they were in session during the proper time, that they gave the proper notices, and it discloses nothing which shows any act performed in conflict with the provisions of the revenue law of 1902; and under the circumstances of this case it ought not to be overcome by presumptions, or innuendoes, or even by statements made in the minutes pertaining to other matters which their record as a whole discloses that they in fact did not attempt to do.

[2] The plaintiff offered to prove by one witness that, at the time of the hearing before the board of county commissioners upon its claim for a refund of this tax, a Mr. Bradley, who was chairman of the board at the time of the order for the increase of 1903, and who was also chairman at the time of the presentation of the claim for the refund of the taxes, stated that the board made the increase assessment from their estimate of the value of the stock without considering the valuation of other similar personal property in La Plata county. An objection was sustained to this testimony. Complaint is made to this ruling. We find no error in this respect. If admitted it would only show that Mr. Bradley, not under oath, at one time made a statement that years prior thereto the county board of equalization of La Plata county in ordering this increase did so without considering the valuation of other similar personal property. There was no evidence to the effect that there was other similar property, but a more fatal defect to the relevancy of this evidence, as well as to the plaintiff's entire case, is that there is no evidence to the effect that this property, after the raise, was then assessed at a greater value than that of other property similarily situated, or that the assessment when increased was excessive, or unjust, or out of proportion as compared to the valuation fixed upon any other taxable property in the county.

[3] It is not to be presumed that the officers of the law violated their duty. The presumption is that the board performed its duty when it raised the valuation of the plaintiff's stock; besides, it is very questionable if the unsworn statement of a member of one board made at one time can be received to impeach the records of another board, at another time, of which he was a member; or, while acting as a county commissioner, any unsworn statement of his can be received that would tend to impeach the doing of another and distinct board, to wit, the county board of equalization, the constitutional duties and functions of which are entirely different from those of the board of county commissioners.

Perceiving no prejudicial error, the judgment is affirmed.

Affirmed.

MUSSER and GARRIGUES, JJ., concur.

LITTLEJOHN v. PEOPLE ex rel. DESCH.

(Supreme Court of Colorado. Feb. 5, 1912.)

1. ELECTIONS (§ 9*)—STATUTES—VALIDITY—RIGHT TO VOTE.

Rev. St. 1908, § 5919, requiring candidates for school director to file a written notice of intention a specified number of days prior to the annual election, and requiring the secretary to print ballots bearing the names of candidates who have certified such intention, and providing that no other person shall be voted for, does not declare the filing of notice of intention a qualification to hold the office of director, but constitutes a restriction on the right to vote,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and is violative of Const. art. 2, § 5, and article 7, § 1, declaring that elections shall be free, and that every qualified elector shall be entitled to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 6; Dec. Dig. § 9.*]

2. ELECTIONS (§ 9*)—LEGISLATIVE REGULATIONS—VALIDITY.

The Legislature, required by Const. art. 7, § 11, to adopt laws to secure the purity of elections, may prescribe reasonable restrictions under which the right to vote may be exercised, but it cannot impair the right to vote guaranteed by article 2, § 5, and article 7, § 1.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 6; Dec. Dig. § 9.*]

3. ELECTIONS (§ 9*)—STATUTES—"OFFICIAL BALLOT."

Rev. St. 1908, § 5919, requiring persons desiring to be candidates for school director to file a written notice of intention, and requiring the secretary of the school district to prepare ballots containing the names of candidates who have certified such intention, and providing that no other person shall be voted for, cannot be sustained as prescribing an "official ballot," which is a ballot prepared for election by public authority at public expense, and ballots other than those prepared by the secretary cast at the election by duly qualified electors must be counted in the absence of any fraud (quoting Words & Phrases, vol. 6, p. 4952).

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 9.*]

En Banc. Error to District Court, Mesa County; Sprigg Shackleford, Judge.

Action by the People, by R. M. Logan, District Attorney of the Seventh Judicial District, on the relation of C. S. Desch, against F. M. Littlejohn. There was a judgment for relator, and defendant brings error. Affirmed.

Bucklin & Tupper, George Bullock, S. M. Logan, and N. C. Miller, for plaintiff in error. Fry & Welsh, for defendant in error.

WHITE, J. This controversy is over the right to the office of school director of district No. 1 of Mesa county. The district is of the first class. At the general school election held therein in May, 1910, plaintiff in error and one Moses T. Hale filed their respective notices of intention to become candidates for the office of school director, in accordance with section 5919, R. S. The secretary of the school district, five days before such election, published a notice of such filings. Thereafter, and subsequent to the expiration of the time persons could signify their intention to become candidates as provided by the section, Moses T. Hale withdrew and resigned as a candidate. Thereupon the secretary published a notice of such withdrawal, and that Littlejohn "is now the only candidate." At the election, two forms of ballots were used: One, with the name of the plaintiff in error, F. M. Littlejohn, printed thereon; the other, with the name of relator, C. S. Desch, printed thereon. The former was prepared by, and under the direction of, the secretary of the school district, but without any official mark of identification. The latter was not so prepared. The ballots were of the same size, shape, color, and quality of paper, and were identical, except the names printed thereon. No provision was made upon the ballots, nor was there reasonable space thereon, for a voter to write the name of any other person for whom he might desire to cast his vote. Both forms of ballots were placed upon a table in the polling place within view of the judges of election, and were also indiscriminately distributed outside of the polling place by supporters of the respective parties. Each elector, in voting, placed an "X" opposite the name on a separate ballot, and deposited the same in the ballot box provided for that purpose, and the elector's name was thereupon written down by the clerks of the election. 1,281 qualified electors voted. 603 votes were cast for plaintiff in error, and 677 for the relator, as found and certified by the judges of election. The judges, however, declared and certified that Littlejohn, the plaintiff in error, was the only person voted for who, under the law, was qualified for the position, and declared him elected. Both plaintiff in error and relator duly qualified, and each made demand for admission into the office, with the result that the former was recognized by the board of directors and entered upon the discharge of the duties of the office. Thereupon the relator prosecuted a suit in the district court to oust plaintiff in error from, and have himself inducted into, the office. The matter was determined in favor of relator, and judgment accordingly.

[1] The portion of section 5919, R. S., applicable to this controversy, and necessary to be considered in a proper determination thereof, is as follows: "That in districts of the first (1st) and second (2d) class, any person who may desire to be a candidate for the office of school director, shall file a written notice of such intention with the secretary of the school district in which he resides at least eight (8) days prior to the day of the holding of the annual election for school directors, and the secretary of said school district shall for five (5) consecutive days preceding the day of said election, publish in some daily paper or when no daily paper is published in such district, then by posting printed or written notices in not less than five (5) public places in such district, the names of all candidates who shall have so filed notice of such intention; and the said secretary shall also have printed or written ballots prepared, bearing the names of all candidates who have certified such intention of being candidates, as aforesaid, printed or written thereon, and no person other than those whose names appear

upon the ballots, so prepared, shall be voted for."

Plaintiff in error contends that the filing, with the secretary of the school district, of a written notice of intention to be a candidate, as required by the section, was a prerequisite to the right of relator to hold the officer of school director, and he, having failed in that respect, is not qualified to hold the office. In support of this contention, it is said that the purpose of the requirement is to prevent surprise; to afford opportunity for investigation; to permit voters to inquire into the merits of the candidates; to learn their policy; and to interview them, if need be, for the purpose of ascertaining the plan they intend to pursue in conducting the schools.

We are not impressed with the soundness of the contention, or the argument in support thereof. Instead of preventing surprise, it would seem rather to afford opportunity for surprise. While, under its terms, it is true, no one could be elected unless he had so signified his desire to be a candidate, nevertheless electors could be tricked into a feeling of security until it was too late to extricate themselves therefrom. Suppose, in a given case, electors had prevailed upon some one, well qualified, and in whom they had full confidence, to signify his intention to be a candidate, in opposition to some one not satisfactory, who had previously become a candidate by the filing of such notice; and that, thereafter, when it was too late for another to signify his desire to be a candidate, the former is induced to withdraw, removes from the district, or dies. Under such circumstances, the electors, without any fault upon their part, are deprived of the right to vote for one of their own choice, and are compelled to vote for one whom they believe unfit for the position, or not to vote at all. The example illustrates the evil that may arise, for the statute makes no provision by which another candidate may be substituted.

In reference to the argument that it permits the voters to inquire into the merits of the candidates, to learn their policy, to interview them, if need be, for the purpose of ascertaining the plan they intend to pursue in conducting the schools, we suggest that, if such were its purpose, it would be of little practical avail to the voter. If, after inquiry into such matters, he finds the persons who had filed notices of their intention to be candidates unsatisfactory, he is helpless to remedy the evil. There is nothing in the statute that gives him the power to signify whom he desires to be a candidate, either by petition, convention, primary, or otherwise. Moreover, the filing of a notice of intention to be a candidate in no wise tends to make the person more fit to perform the duties of the office, and it would be an unreasonable construction to hold that the requirement under consideration is intended as a qualification to hold the office. A "qualification" ordinarily relates to the fitness or capacity of one for a particular pursuit or profession. It is, as defined by Webster's New International Dictionary: "Any natural endowment, or any acquirement, which fits a person for a place, office, or employment, or to sustain any character." However, in disposing of this case it is unnecessary to so limit the meaning of the word. Were we to concede that the Legislature may have the power, unless inhibited by the Constitution, to specify the doing of any designated act as a necessary qualification to the holding of an office, it has not, either directly or by implication, declared that the filing of a notice of intention to be a candidate is necessary to qualify one to hold the office of school director.

From what has been said it is certain that the requirement in question has some other purpose. Were it not for the words of inhibition as to the persons that may be voted for, found in the last clause of the words quoted from the statute, it would seem that the notice of intention, exacted of the persons desiring to be candidates, would measure the duty of the secretary of the school district as to certain official acts required to be done and performed by him. But when such notice of intention, coupled with the requirement that only the names of such persons who have so signified their intention to be candidates shall be printed or written upon the ballots prepared by the secretary, is considered in connection with the words of the section "that no person other than those whose names appear upon the ballot, so prepared, shall be voted for," the language under consideration must be construed as constituting a restriction upon the right to vote, and in no sense as affecting the eligibility of one to hold the office.

[2] Having determined that the purpose of the legislation is to restrict the elector in casting his vote according to his own individual judgment and preference, it is essential to determine whether such right of restriction was within the legislative power. While the Legislature is expressly commanded by the Constitution to "pass laws to secure the purity of elections, and guard against abuses of the elective franchise," (Const. art. 7, § 11), there are, nevertheless, certain limitations beyond which it cannot proceed.

In People, etc., v. District Court, etc., 18 Colo. 26, 37, 38, 31 Pac. 339, 343, decided by Chief Justice Hayt and Mr. Justice Elliott, the latter, in a specially concurring opinion, in speaking of the extent of legislative power, under this constitutional provision, said: "But I am firmly impressed with the conviction that it cannot be extended so far as to substantially impair the right of any elector to cast his vote at each election according to his own individual judgment and preference, and to have the same counted as cast. These

principles should not be lost sight of, either in legislation or in judicial decisions." This is necessarily true, because the Constitution in the same article, section 1, declares that every duly qualified elector "shall be entitled to vote at all elections." And further, in section 5 of art. 2: "That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of suffrage." This 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. Such is the mandate and spirit of the Constitution, and it thereby vests in the elector a constitutional right of which he cannot lawfully be deprived by any governmental power. While it cannot be questioned that the Legislature has the power to prescribe reasonable restrictions under which the right to vote may be exercised, as said in Nicholls v. Barrick, 27 Colo. 432, 62 Pac. 202, nevertheless such restrictions must be in the nature of regulations and cannot extend to the denial of the franchise itself. The test is whether the effect of the legislation is to deny the franchise, or render its exercise so difficult and inconvenient as to amount to a denial. If the elector "is deterred from the exercise of his free will by means of any influence whatever, although there be neither violence nor physical coercion, it is not" "the free exercise of the right of suffrage," and comes clearly within the inhibition of the Constitution. De Walt v. Bartley, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814, 816.

The language of the court in Sanner v. Patton, 155 Ill. 533, 563, 564, 40 N. E. 290, 293, is peculiarly applicable here, where it is said: "What, it may be asked, is there so sacred in the nomination of a candidate for office by a political caucus that a voter should be compelled to vote for a nominee of the caucus or else be deprived of the elective franchise? * * * And yet, if the construction contended for by 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." And in Daggett v. Hudson, 43 Ohio St. 548, 561, 3 N. E. 538, 542 (54 Am. Rep. 832), where it is said: "The Legislature has full power to regulate the right to vote, but no constitutional power to restrain or abridge the right, or unnecessarily to impede its free exercise. Under the pretense of regulation the right of suffrage must be left untrammeled by any provisions or even rules of evidence that may injuriously or necessarily impair it, and so the citizens cannot forfeit the right except by his own neglect or by such peculiar accidents as are not attributable to the law itself."

Applying these rules to the legislation in question, it is clearly unconstitutional, for the reason it coerces the elector into voting for one who has filed a notice of his intention to be a candidate, and prohibits the free choice of the elector as to whom he shall have to serve him as a public officer, and thereby prevents "the free exercise of the right of suffrage."

[3] The legislation is sought to be sustained, however, upon the theory that it prescribes an official ballot, and it is argued that, where an official ballot is authorized, none other can be used. It may be the ballots prepared by the secretary of the district are, technically, "official ballots," for an "official ballot," as used in statutes relative to elections, necessarily means a ballot prepared for an election or caucus, by public authority, at public expense. Words & Phrases, vol. 6, p. 4952. However, assuming that they are "official ballots," it does not follow that no other ballots may be used. The law here under consideration is unlike the "Australian ballot acts" of many of the states, including our own, which not only prescribe an official ballot in specific terms, but also prohibit the use of any other, and make ample provision for the identification of the ballots as official, how they shall be kept and distributed to the electors, and specify a way and the manner in which the elector may express his choice, if he desires, for some one whose name is not printed upon the ballot. It is these provisions, and especially the latter, found in the "Australian ballot acts," that have enabled the courts in well-considered cases to sustain such legislation. Cole v. Tucker, 164 Mass. 486, 41 N. E. 681, 29 L. R. A. 668, and cases there cited.

In Oughton v. Black, 212 Pa. 1, 6, 7, 61 Atl. 346, 348, it is said: "Unless there was such provision to enable the voter, not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way"—citing Independence Party Nomination, 208 Pa. 108, 57 Atl. 344.

How different the law here under consideration, and the ballots prepared by the secretary of the school district. Such ballots are not expressly declared official; no means of identification are prescribed; no declaration is made that other ballots may not be used; it is not stated how the ballots shall be kept and distributed to electors; nor does the law require a space to be left thereon, or make provision whereby the elector may express his choice according to his own individual judgment and preference, but expressly prohibits it. Moreover, by many decisions of this court we are "committed to the doctrine that all provisions of the election laws are not mandatory, and that the will of the electors, when fully and freely expressed, will not be defeated by a strict and technical construction of the law." Peo-

ple v. Earl, 42 Colo. 238, 252, 94 Pac. 294, 299, and cases there cited.

In Young v. Simpson, 21 Colo. 460, 462, 42 Pac. 666, 667 (52 Am. St. Rep. 254), we said: "The principal object of the rules of procedure prescribed by statute for conducting an election is to protect the voter in his constitutional right to vote in secret; to prevent fraud in balloting and secure a fair count. Such rules are usually held to be directory as distinguished from mandatory, and, unless the statute declares that a strict compliance is essential in order to have the ballot counted, the courts will not undertake to disfranchise any voter by rejecting his ballot, where his choice can be gathered from the ballot when viewed in the light of the circumstances surrounding the election."

In Kellogg v. Hickman, 12 Colo. 256, 21 Pac. 325, it was held, notwithstanding a legislative act prescribed the form, size, color of paper, etc., of ballots to be used by voters, and made it unlawful to print for distribution, or to distribute at the polls, ballots not conforming to the requirements thereof, that, as the purpose of the legislation was to guard the secrecy of the ballot, and to secure to the voter the right of suffrage free of restraint, ballots, printed on paper of different quality, color and dimensions from that prescribed, and duly cast by qualified electors, were not illegal, and, in the absence of fraud, should be held valid.

Under these decisions it cannot be said that ballots, other than those prepared by the secretary of the school district, cast at the election by duly qualified electors, should not be counted, where, as here, no fraud is alleged or claimed.

The judgment of the trial court is therefore affirmed.

Judgment affirmed.

CAMPBELL, C. J., not participating.

(52 Colo. 244)

PEOPLE v. ORRIS.

(Supreme Court of Colorado. Feb. 5, 1912.)

FALSE PRETENSES (§ 7*)—CRIMINAL RESPONSIBILITY—"REPRESENTATION."

A representation, to come within Rev. St. 1908, § 1849, denouncing the offense of knowingly and designedly, by any false pretense, obtaining property from another, must be of some fact, past or present, which is not the case where the property is obtained on promise to deliver a check, and that the check will be paid, though at the time thereof it is the intention of the person so promising to stop payment on the check, as he afterwards does.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5–12; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 3, pp. 2662–2668; vol. 8, p. 7661; vol. 7, pp. 6108–6110.]

Error to District Court, Rio Grande County; Charles C. Holbrook, Judge.

Indictment against John B. Orris was granted, and the People bring error. Ruling approved.

Albert L. Moses, Dist. Atty., for the People.
Jesse Stephenson, for defendant in error.

HILL, J. The substance of the information filed in the district court of Rio Grande county was that the defendant in error, John B. Orris, on the 15th of March, 1911, at said county of Rio Grande, in the state of Colorado, did then and there feloniously, knowingly, and designedly falsely pretend to one Edward S. Cox that a certain check which he, the said John B. Orris, then and there made payable to him, the said Edward S. Cox, and delivered to the First National Bank of Monte Vista, Colo., would be delivered to him, the said Cox, by the First National Bank of Monte Vista and paid by the Exchange National Bank of Colorado Springs, upon which bank it was drawn, and which check was in the words and figures following, to wit: "No. 154. Colorado Springs, Colo., March 15, 19—. The Exchange National Bank of Colorado Springs, Colorado. Pay to the order of E. S. Cox, $250.00. John B. Orris." That said false pretenses were then and there made by the said John B. Orris with the design and for the purpose of inducing the said Edward S. Cox to yield up and deliver the possession of a certain tract of land, described as the W. ½ of the N. W. ¼ of section 2 and the N. E. ¼ of section 3, in township 38 north, of range 7 east, etc., in Rio Grande county, Colo., which said possession was then and there of the value of $250, and the said Edward S. Cox, relying upon and believing the said false pretenses to be true, and being deceived thereby, was then and there induced, by reason thereof, to yield up and deliver the possession of the said land, by which said false pretenses he, the said John B. Orris, then and there, with intent to cheat and defraud the said Edward S. Cox, feloniously, fraudulently, designedly, and knowingly did obtain from the said Edward S. Cox possession of the said land, which said possession was of the value of $250 of the personal property, goods, and chattels of the said Edward S. Cox; whereas, in truth and in fact, the said check was not paid by the said the Exchange National Bank of Colorado Springs, Colo., and the payment thereof was stopped by him, the said John B. Orris, and the same was not of the value of $250, or any other sum whatever, all of which said false pretenses he, the said John B. Orris, at the time he so falsely pretended, as aforesaid, well knew to be false, etc. The defendant moved to quash, alleging that the information did not charge the commission of a crime; this motion was sustained. The people bring the law question here for review upon error.

This information was attempted to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes