The testator, in this instance, had contemplated and had entertained the idea of restricting the institution of the third defendant by requiring the executors to certify to his good conduct in certain respects, but he never carried out this intention (*consilium*), he never wrote the letter. There was no error, no conflict between the words of the will as written and the intention (*voluntas*) of the testator, and the action must fail and judgment be given for the defendants. Costs to come out of the estate.

Plaintiff's Attorneys: *Lunnon & Nixon;* Defendant's Attorneys: *Pienaar & Marais.*

[G. v. P.]

NICHOLSON v. VAN NIEKERK.

1915. *December* 7, 8, 9. WESSELS, MASON and GREGOROWSKI, JJ.

Elections.—Parliamentary.—Ord. 38 *of* 1903, *sec.* 108.—*Interpretation of.—Election petition.—Examination of ballot papers.—Practice.—"Cross opposite" name of candidate.—Meaning of.—Additional marks on ballot paper.—What are.—Identification of voter.—Numbers placed on ballot papers by presiding officer.—Illegal act.—Affecting result of election.—What are crosses.—Ballot paper.—Form of.—Position of crosses.—Sched. II, Transvaal Constitution Letters Patent,* 1906, *secs.* 49 (ii) (iii), 55 (3) *and* 59.

Sec. 108 of Ord. 38 of 1903 provides that on the trial of an election petition complaining of an undue election or return, and claiming the seat for some person, the respondent may give evidence to prove that the election of such person was undue in the same manner as if he had presented a petition complaining of such election. *Held* (GREGOROWSKI, J., *diss.*), that though the respondent need not file an independent petition, he—in order to be entitled to prove certain facts—had to set out those facts in his replying affidavit.

Where the Court on an application allows an inspection of the ballot papers, each party may only make use of and produce before the Court the particular

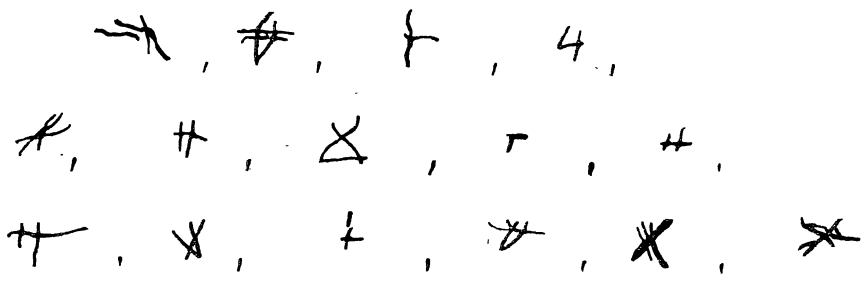
papers complained of by him, and is confined to the terms of the Order of Court allowing the inspection, and the Court will not, after the inspection has taken place, allow an amendment of the petition, or the replying affidavit in order to rely upon other defective ballot papers discovered at the inspection. (GREGOROWSKI, J., *diss.*)

Sec. 49 (ii) of Schedule II. to the Transvaal Constitution Letters Patent, 1906, provides that at an election the voter shall secretly place "a cross opposite" the name of the candidate for whom he desires to vote. *Held*, that a cross was obligatory. *Held*, further, that the word "opposite" was a relative term, and that if the Court were satisfied from inspection that the cross was meant for a particular candidate, then it must be considered as being "opposite," though it was placed on the right, the left, above or below the name of such candidate.

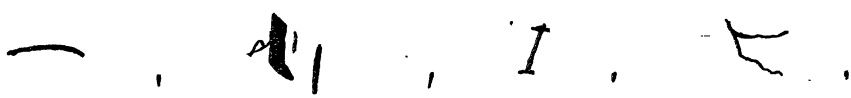
Sec. 49 (iii) of the said Schedule provides that if a voter makes any mark . . . on the ballot paper by which it would become recognisable, such paper shall be considered blank and not taken into account, and sec. 55 (3) provides that ballot papers bearing any writing or mark by which a voter can be identified shall be rejected. *Held*, that where the Court was satisfied that the additional mark was there by accident, in an attempt to make a cross, and not a mark *ex facie* intended to violate the secrecy of the ballot, such mark should not disqualify the ballot paper.

Where a presiding officer at a polling station *bona fide*, but wrongly, placed on every ballot paper at that station the number of the station, and stated in evidence that he on that account could identify every person who voted on those papers, *Held*, that such officer acted illegally, that the figures were marks by which the voters could be identified, and that those ballot papers had been rightly rejected; where, however, the result of an election was actually affected by such illegal act, the Court, under sec. 59 of the said Schedule, declared the election void.

Held, that the following marks were crosses :—



Held, that the following marks were not crosses :—



BALLOT PAPER—STEMBRIEF.

Election of a Member of the House of Assembly.

Verkiezing van een Lid van de Volksraad.

Electoral Division of WATERBERG.

Kiesafdeling WATERBERG.

Date: 20th October, 1915.

Datum: 20 Oktober 1915.

1	NICHOLSON (Richard Granville Nicholson, of Box 30, van Postbus 30, Nylstroom, Farmer—Landbouwer).	
2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of / van Vygeboomspoort, P.O. / P.K. Nylstroom, Farmer—Landbouwer).	

"A"

Held, that crosses placed in the two open spaces to the left and right of the date would be good votes for Nicholson, and that crosses in space "A" would be good votes for Van Niekerk, and that the crosses marked (1) (2) and (3), each of which appeared on a different ballot-paper, were good votes for Nicholson, and that the crosses marked (4) (5) and (6) similarly so appearing were void for uncertainty.

2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of/van Vygeboomspoort, P.O./P.K. Nylstroom, Farmer—Landbouwer).	

2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of/van Vygeboomspoort, P.O./P.K. Nylstroom, Farmer—Landbouwer).	X /

2	VAN NIEKERK / (Pieter Wynand le Roux van Niekerk, of/van Vygeboomspoort, P.O./P.K. Nylstroom, Farmer—Landbouwer).	X

2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of/van Vygeboomspoort, P.O./P.K. Nylstroom, Farmer—Landbouwer).	— +

1	NICHOLSON (Richard Granville Nicholson, of Box 30, / van Postbus 30, Nylstroom, Farmer—Landbouwer).	
2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of / van Vygeboomspoort, P.O. / P.K. Nylstroom, Farmer—Landbouwer).	+

2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of / van Vygeboomspoort, P.O. / P.K. Nylstroom, Farmer—Landbouwer).	+

2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of / van Vygeboomspoort, P.O. / P.K. Nylstroom, Farmer—Landbouwer).	

1	NICHOLSON (Richard Granville Nicholson, of Box 30, van Postbus 30, Nylstroom, Farmer—Landbouwer).	
2	VAN NIEKERK (Pieter Wynand le Roux van Niekerk, of van Vygeboomspoort, P.O. P.K. Nylstroom, Farmer—Landbouwer).	

Held, that the above were good votes for Van Niekerk.

Election petition.

Petitioner stated in his petition that he was a candidate for the electoral division of Waterberg for the House of Assembly. That at the election which took place on October 20th, 1915, the respondent obtained 997 votes and the petitioner 994 votes, and that the respondent was declared duly elected. Petitioner asked that the election of the respondent be declared void on the following grounds: (5) that a number of voters marked their ballot papers by placing a straight or wavy line or marks other than a cross opposite the name of the respondent; (6) that several voters marked their ballot papers by placing a straight or wavy line or the figure 1 or marks other than a cross opposite the name of the petitioner, and also by placing a cross opposite the name of the respondent; (7) that one voter marked his ballot paper by placing a cross, which was smudged and scratched opposite the name of the petitioner and by also placing a more defined cross opposite the name of the respondent; (9) that a number of voters, about 30, in marking their ballot papers, placed no cross opposite the name of either candidate in the place indicated for such cross in the ballot papers, but placed a cross in the parellellogram to the left of the name of the respondent, or in the parallellogram containing the name of the respondent; that in some of the latter cases the voter placed the cross to the left, above, below, to the right of, or actually on the

printed name of the respondent; that in others the voter placed a mark other than a cross in the parallellogram containing the name of the respondent. That objection had been taken to the said ballot papers, but that the returning officer refused to reject them and counted them in favour of the respondent. He submitted that the said ballot papers were not marked as prescribed by law and were void. He further alleged that there were six double votes giving names of the voters, that the six votes were counted for the respondent, and that three of those votes should therefore be deducted. He asked for an order that the election of the respondent be declared void, and that he (the petitioner) be declared elected.

In the alternative, petitioner repeated all the above allegations, and stated further that about 15 voters marked their ballot papers by placing a cross on the ballot papers above the name of the petitioner, but outside the parellellogram containing the figure 1, the name of the petitioner and the space for the voters' marks. That about five of these crosses were in very close proximity to the top line of the said parellelogram, some actually intersecting the said line. That at the counting the returning officer refused to count the said votes (about 15) in favour of the petitioner and rejected them. That if the Court held that the votes referred to in par. 9 were properly counted, petitioner submitted that the said 15 votes had been wrongfully rejected, and should have been counted in his favour.

Respondent, in his replying affidavit, stated that at the counting of the votes the returning officer rejected 21 ballot papers or votes—6 of which were in favour of the petitioner and 15 in favour of the respondent—on the ground that certain figures on the said ballot papers made it possible for the voters concerned to be identified. That respondent objected to the rejection of the 15 votes; that the said figures had not been placed there by voters concerned, and that it was not possible there and then and even subsequently, for anyone to identify the said voters. That it had since come to the notice of the respondent that the said figures had been written on the said rejected ballot papers by the presiding officer at polling district No. 323. That a number of voters marked their ballot papers by placing a straight line, a wavy line, mark or smudge other than a cross opposite the name of the petitioner and that such ballot papers, notwithstanding the objection by the respondent, were allowed and counted in favour of the petitioner. That about the same number of ballot papers marked in the same way as set

out in par. 9 of the petition had been allowed by the returning officer and counted in favour of the petitioner. Respondent further alleged that there were 10 double votes—giving the names of the voters—that the said ten votes had been counted in favour of the petitioner, and that therefore at least five votes should be deducted.

After hearing the evidence on behalf of the petitioner—except as to the double voting—the Court, on application by parties, made the following order as to inspection of the ballot papers: "The Registrar of the Court is appointed to open the ballot papers and to place them face downwards; counsel may be present at the examination of the ballot papers. Parties to pick out those they object to. Rejected and accepted papers to be kept separate. Parties are confined to particulars of which notice has been given." The Court also authorised the following persons to be present, viz., Skirving, Returning Officer; Boggs, assistant resident magistrate; Linder, scrutineer for the petitioner; and Brevis, scrutineer for the respondent.

D. de Waal (with him *B. A. Tindall*), for the petitioner: According to our law a cross is compulsory: see sec. 49 (II) of Sched. II of the Letters Patent, 1906, a voter must place "a cross opposite the name" of the candidate. The English Act, 35 and 36 Vict. Ch. 33, sec. 2, is different; there a cross is not compulsory. See *Reid* v. *Briggs* (1907, T.S. 329); *Palmer* v. *Molteno* (15 S.C. 307). According to the American decisions a cross is essential: see *Hope* v. *Flentge* (47 L.R. An. 815). See further Rogers, on *Elections* (18th ed., p. 133); the *Stepney* case (4 O.M. & H. 34); the *Wigtown* case (2 O.M. & H., at p. 220). Any mark or writing by which a voter can be identified, avoids the paper: see secs. 49 (III) and 55 (3) of the Letters Patent, Sched. II. See also *Pontardawe Rural District Council Election Petition* (1907, 2 K.B. 313).

Counsel dealt with the specific ballot papers, which were before the Court. Two of the ballot papers, now before the Court, have only been detected during the inspection, and I submit those two papers cannot be brought before the Court as they have not been mentioned in the replying affidavit of the respondent, and the respondent is restricted to his affidavit.

A. S. van Hees (with him *Gey van Pittius*), for the respondent, being called upon to argue the question as to why those two votes were brought before the Court. Both these ballot papers are specifically referred to in petitioner's affidavit. In par. 7, *e.g.*, petitioner specifically refers to a ballot paper which was smudged;

that paper has been rejected, and should have been counted for the respondent. The other paper has a cross above the parellellogram, petitioner says that those votes have all been rejected; this particular vote has been counted in favour of the petitioner, and I am entitled to argue that it has been wrongly counted for the petitioner. I am entitled to bring these two ballot papers before the Court also, because they show that certain of the allegations of the petitioner are unfounded. The fact that these papers have been found in a different set does not disentitle the respondent to bring them before the Court. Under sec. 108 of Ord. 38 of 1903, if an election is challenged, and the person challenging it claims the seat, the respondent need not file a petition at all; the section entitles him to lead evidence as if he had presented a petition. It was my duty to bring these two ballot papers before the Court, and I am fully entitled to do so. See also *Rogers* (*ibid.*, Vol. II, p. 147).

de Waal was not called upon in reply.

WESSELS, J.: Two votes, Nos. 2307 and 2721, are brought before the Court by the respondent, not upon any allegation made in a reply to the petition, nor in any allegation made in the substantive petition, but from the fact that, during the inspection allowed by the Court, these two papers were detected by him. The question is whether he should be allowed to argue upon them. Unlike the English Court, we have no specific rules with regard to inspection in election petitions. As was pointed out in *Palmer's* case, the rules applicable to an inspection of documents in an ordinary lawsuit do not apply to an inspection of ballot papers. It is unfortunate that rules have not been framed and that Courts have practically to make their own rules on general principles. The legislature could perhaps have adopted the view that the Supreme Court should be the ultimate judge of which candidate has, in fact, been elected according to law, in which case all the ballot papers could be brought before the Court by either party, and the Court would have to examine scrupulously each of the papers to see whether it has been properly rejected or accepted. That course has not been adopted. There is nothing in the Ballot Act which says that this Court is to be the ultimate judge, upon scrutiny, of whether a person has been elected or not; on the contrary the policy of the Act is that for six months the ballot papers shall be kept under seal and not opened except on the order of a

Judge. The law, however, did not go so far as to entirely exclude a revision; it allowed the Court, under certain circumstances, to allow an inspection of the documents in order to see whether or not the returning officers had acted in accordance with law. The procedure, as laid down in Ordinance 38 of 1903, is that one of the parties must approach the Court with a petition under oath, setting out the grounds upon which the Court is asked to open the ballot papers or scrutinise the matter. It is a general principle of the Court that a petitioner must stand or fall by his petition. In that petition he sets out the particular facts upon which he relies, and he must stand or fall upon the proof of those facts. But, in order to avoid multiplicity of petitions, sec. 108 allows the respondent to come before the Court and to lay his grievances before it. According to my reading, it is unnecessary for the respondent to file an independent petition; he can remain quiet until such time as he is attacked. Immediately the petitioner attacks him and asks the Court to admit or reject certain votes, it is open to the respondent to act similarly; it is unnecessary for him to make a substantive and independent petition; he can reply to the petition lodged and raise the points he desires to raise in exactly the same way as if he were himself a petitioner. He is in no better position than the petitioner; instead of making a counter-petition he sets out in his reply, with the same exactitude, the facts upon which he relies.

In order to avoid a multiplicity of suits and in order to discourage litigation, all Courts of law have laid down as a general principle, that they will not allow a fishing application; they will not allow a candidate to come to the Court and ask for an order to have the ballot papers opened, because he wishes to know whether his opponent has really been elected or not. Against such roving applications the Court has always set its face. In ordering the inspection the Court gave a specific order framed in such a manner as to avoid giving to either party an opportunity of laying before it matter newly discovered during the inspection. The petitioner was allowed to examine those documents to which reference had been made in the papers before the Court. The respondent was given the right to examine the ballot papers of which he complained. The petitioner said that amongst the admitted and counted ballot papers were certain papers, marked in a particular way, which should have been rejected. The respondent said that amongst the rejected papers were certain papers, marked in a par-

ticular way, which should have been admitted in his favour. If, in examining the ballot papers, the petitioner brought any papers before the Court, the respondent could use such papers for the purpose of showing that the vote ought to be for him. The petitioner could do the same with regard to the papers brought before the Court by the respondent. Mr. *de Waal* was allowed to inspect all the papers which were counted, in order to produce to us such votes as he alleged should be given in his favour, and counsel on the other side were entitled to be present and to see those papers. After that was done, Mr. *van Hees* had an opportunity to examine all rejected papers and to take out such papers as he relied upon. During the inspection of the ballot papers, Mr. *van Hees* found a paper which was rejected, and which he said ought not to have been rejected, and a counted paper which he said ought not to have been counted. With regard to the counted paper, seeing that Mr. van Niekerk had his agents at the scrutiny, and that there is no note upon the paper of any objection, I do not think Mr. *van Hees* was entitled, upon the order which the Court gave, to make use of this ballot paper. The same applies to the rejected paper. Under the circumstances I think he cannot be allowed to argue upon those two papers.

It is as well that the matter has been brought before the Court. I do not mean in any way to impugn the honour of Mr. *van Hees*, or the manner in which he has brought these papers before the Court. I think he was entitled to raise the question of the extent of his right of inspection: the question is one of very great importance. It is not a matter of easy decision, and I think that good service has been done in bringing it forward. But from the view now expressed, it appears that these papers should not even have been brought to the notice of the Court.

MASON, J.: Before expressing my opinion on the legal question, I also should like to say that I think Mr. *van Hees* was quite entitled to raise this question and to do so in the way he has done. If, during the argument, I made any remarks to the contrary effect, I am quite prepared to recall them.

The Court made a special order allowing parties to inspect these documents subject to the provision that they were confined to the particulars of which notice had been given. Mr. *van Hees* had authority to inspect the rejected papers for the purpose of extracting those which had the mark of the returning officer on them, by

which they could be identified. During that inspection he saw another rejected paper which he thought ought not to be rejected, and he wishes to bring that before the Court. I do not think he is entitled to do so. The fact that the petitioner thought that this particular paper had not been rejected does not, to my mind, give Mr. *van Hees* the right to use his inspection of the rejected papers for a purpose other than that for which the order was given. Exactly the same applies to the other paper, which was accepted and passed as a vote for the applicant. Mr. *van Hees* was only allowed an inspection of the accepted papers on certain terms, which did not comprise a right to produce this particular document. Under these circumstances, I think we cannot allow these two papers to be challenged. If we once go beyond the terms of the order and allow parties to challenge votes which they now think should be challenged, that privilege should be allowed to both sides. It would be an injustice that we should grant such a favour to the respondent without granting it also to the applicant. That would mean that we set aside all questions of notice to the petitioner or respondent and examine the whole of the papers again and act as a revising officer after the returning officer has dealt with the papers. I do not think the law contemplated any such course of conduct on the part of the Court.

GREGOROWSKI, J.: I regret I do not take the same view, which, if I may say so, seems to me to be a somewhat narrow and technical view. Once an election petition is before the Court, I take it the Court has power to deal with it in such a way as really to attain the object of the parties in bringing it before the Court. For instance, I see no reason why the Court should not allow a petition to be amended, or why a respondent should not be allowed to extend particulars previously given or give new particulars. Apparently the law contemplated certain regulations being made with regard to election petitions. No such regulations have been made. I understand it is admitted that one of these ballot papers is one distinctly referred to in the petition. The petitioner was under a wrong impression in thinking it was one which had been accepted, and it was found by him amongst the rejected papers. I think that paper, although wrongly described, is still a ballot paper before the Court. The fact that it was found amongst the one set of papers, instead of amongst the other, is no reason why it should not be a matter of argument. Its production from amongst the rejected papers shows that the petitioner's allegation with regard

to it is unfounded, and I see no reason why the respondent should not contend that the papers ought to be counted on his behalf. The question whether Mr. *van Hees* is entitled to the benefit of that paper will be subsequently decided, but I do not see why the question should not be raised.

With regard to the other paper, I think the argument should not be stopped at this stage. It is an important question. The respondent is in the same position as the applicant. The petitioner comes into Court as the unsuccessful candidate, and not only challenges the position attained by the respondent, but claims the seat on the grounds set forth. It seems to me the legislature distinctly intended that a very large power of defence should be given when the petitioner claims a seat. It would be very unfortunate if a respondent were restricted too much in defending his seat when it is claimed by the petitioner. Sec. 108 seems to give him power to lay before the Court any evidence to prove that the election of the person claiming the seat was not a due election. The ballot paper belongs to the class of papers referred to in par. 9 of the petition. It is a voting paper recorded in favour of the petitioner, which respondent says is subject to the same objection as that mentioned in connection with other votes in par. 9 of the petition. It would be unduly trammelling respondent, already elected to a seat, to say that he cannot bring evidence because he has not particularly mentioned it amongst his particulars, when the same class of thing occurs in the petition. The petitioner says certain votes recorded in favour of respondent were subject to a certain irregularity. After examination of the papers, the respondent says exactly the same irregularity appears in connection with petitioner's votes, and, if these votes are not to count, the petitioner is not entitled to the seat. I do not think respondent should be prevented from taking advantage of such features, which appear at the inspection. The point raised is merely preliminary; I do not know what effect these two votes may have, or what the ultimate decision of the Court may be with regard to the matter, but I certainly think the respondent is entitled to raise any argument which he thinks fit in connection with them.

van Hees applied for the amendment of the replying affidavit, so as to include the two ballot papers.

de Waal opposed the amendment, and referred to *de Visser* v. *Fitzpatrick* (1907, T.S. 298).

van Hees replied.

WESSELS, J.: As pointed out in the case of *de Visser* v. *Fitzpatrick*, and as I have pointed out before, no rules have been prescribed for us, and the Court has held that it must prescribe rules for each particular case. Here the Court prescribed how the examination should take place and what information the respective parties were entitled to get out of the examination of the ballot. Whilst looking for this particular information, other facts came to the notice of Mr. *van Hees*, which he now wishes to make use of. After the order given, it appears that counsel should not have mentioned to the Court any new discoveries made. What they happen to discover when looking for a thing they have been allowed to look at, they are not entitled to bring before the Court. It would be illogical to hold that counsel were not entitled to inspect the ballot for that purpose, but that, having found that information, that they are entitled to bring it before the Court by way of an amendment; it would destroy the basis of all leave granted for the inspection of ballot papers. Under these circumstances, the amendment cannot be allowed.

MASON, J.: I concur. I think we are bound by the order under which we authorised the inspection. If at the time when the request for inspection was considered, application had been made to add particulars as the result of the inspection, we might have allowed them to be added, but, both parties having accepted the inspection on those terms, I do not think it would be just to depart from them.

GREGOROWSKI, J.: I take the view that leave should be given to the respondent to make this amendment. I do not think the special order given by the Court was so rigid or should be construed so strictly as to exclude information of this kind.

WESSELS, J.: The amendment is disallowed.

van Hees, for the respondent: The polling officer has spoilt 21 votes, 15 of which were in favour of the respondent. If these votes so spoilt affect the result of the election, the petitioner cannot be declared elected; he should have a clear majority above the 15 votes so spoiled. See *Woodward* v. *Sarssons* (44 L.J. 301). If applicant is not declared elected, the petition should be dismissed, as he claims to be declared elected. The six votes out of the 21 cannot in such a case be counted in favour of the petitioner, as he has not

mentioned them in his petition. See also Rogers (*ibid.*, p. 198). The 15 votes cannot be identified; there is no evidence that anyone knew who the voters were. A mere possibility that the voter can be identified is not sufficient: see *Reid* v. *Briggs* (*loc. cit.*).

Crosses outside the parallellogram are bad, and these votes are void for uncertainty. The words of the law are " a cross opposite," and the word " opposite " is as much binding as the word " cross." See also Government Notices Nos. 98 and 144 of 1907 as to how and where the ballot papers should be marked. See also *Medhurst* v. *Lough* (17 T.L.R. 210) and the *Weenen County Election Petition* (13 N.L.R. 284).

Counsel then argued on the particular ballot papers before the Court.

Tindall, in reply, referred to the *Buckrose* case (4 O.M. and H. 110).

WESSELS, J.: This is a petition based upon the results of the Waterberg election, the official return of which gives to respondent 997 and to petitioner 994 votes. The return is sought to be upset on various grounds: on account of the marks made upon the ballot papers, on the point whether certain papers ought or ought not to be rejected on account of the position of the marks, and such other matters. We have, therefore, to see what the law requires a voter to do, and to determine the general principles on which a decision of this kind should be based.

The first question is whether a cross is obligatory or not, and, in order to determine this, we have to look to schedule 2, sec. 49, sub-sec. 2, of the Letters Patent of 1906. This section reads as follows: " When the voter has received such ballot paper, on which shall be printed in alphabetical order the names of all the duly-nominated candidates at such election, he shall take the same to the compartment and desk provided for that purpose, *and shall signify the candidate for whom he desires to vote by secretly placing a cross opposite the name of such candidate.* He shall then fold the ballot paper so that the perforated mark shall be visible, and, after having held up the ballot paper so that the presiding officer can recognise the mark, shall drop the paper in the ballot-box placed in front of the presiding officer."

It seems to me, if we are to interpret an Act of Parliament so as to give the natural meaning to the words and to carry out the intention of the legislature, there can be only one interpretation of

this section, namely, that the voter is to signify for whom he votes, not by writing anything on the paper, not by expressing anything to anybody, but by placing a cross opposite to the name of the candidate for whom he wishes to vote. This was the view of the English law taken in the *Wigtown* case (2 O.M. and H.), but, in the later case of *Woodward* v. *Sarsons* (L.J., C.P., 1875, vol. 44, p. 293), the view, as expressed by the Scotch Lords, was not accepted. In *Woodward's* case, the Court held that the cross was not obligatory in an English ballot. Mr. *van Hees* has urged us to follow the latter case, and to say that our law in this respect is similar to the English law. He argues that, inasmuch as our Ballot Act has been copied mainly from the English Ballot Act of 1872, we should be guided by the decisions of the English superior Courts with regard to any question that arises under the Act. As a general proposition, when we find an Act has been taken over from an English statute, and we find an authoritative interpretation of the English statute by the higher English Courts, I consider it wise on our part to adopt a similar interpretation, unless the circumstances lead to a different conclusion. But, when we find that in our law there is a deviation from the English statute, we must consider why the legislature here has adopted language differing from that of the English Act, from which it has been manifestly taken. Looking at the case of *Woodward* v. *Sarsons*, it seems perfectly clear why the learned Judges held that the method of marking the ballot papers in England was directory and not obligatory. The English Ballot Act states that the forms contained in the schedule, or as nearly resembling the same as circumstances permit, shall be used in such cases where they are applicable, and, when so used, shall be sufficient in law. Then follows the form of a ballot paper, and, in reference to the directions as to the printing of the ballot paper, it says nothing is to be printed on the ballot paper except in accordance with the schedule. Then it goes on to say: "Form of directions for the guidance of the voter in voting, which shall be printed in large and distinguishing characters, and placarded outside every polling station and in every compartment of every polling station. The voter will go into one of the compartments, and, with the pencil provided in the compartment, place a cross on the right-hand side opposite the name of each candidate for whom he votes; thus:" The Ballot Act of 1872 says nothing about making a cross. Sec. 2 says: "At the time of voting, the ballot paper shall be marked on both sides

with an official mark and delivered to the voter in the polling station, and the number of such voter on the roll of voters shall be marked on the counterfoil, and the voter, *having secretly marked his vote on the paper* and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer," etc. Therefore, according to the English Act, all that it is necessary for a voter to do is to make a mark. Certain directions are given, but the Act does not state that those directions are obligatory; those directions are merely for the purpose of guiding the voter so that he may know, more or less, what he ought to do. That is the principle underlying the decision in *Woodward* v. *Sarsons*. Had sec. 2 provided that the voter should signify his intention by making a cross, then I have no doubt the Court would have followed the decision in the *Wigtown* case. The language used in the decision in that case is applicable to our present Act: "In these circumstances I think it essential to a good vote that the voter should make the cross thus pointed out, and that any mark materially different would be a deviation from what is prescribed, and a failure to fulfil the requirements of the statute. For anyone to put, instead of a cross, a circle, or an oval, or any other geometrical or anomalous figure, would not be a compliance with the law, independently of the consideration that such a plain and wilful departure from what was intended would suggest strongly the suspicion that some sinister purpose was intended." I think, therefore, that, according to the correct interpretation of our law, a cross is obligatory. Probably a cross was selected because the legislature was of the opinion—as it now appears, an erroneous opinion—that every voter would know how to make a cross. Apparently that is not so. Some voters find the greatest difficulty in making a cross; others find the greatest difficulty in knowing what to do with it. At any rate, a cross was apparently considered a simple thing, which everybody would know how to make, and it was selected as the means of expressing for whom the voter wished to vote.

The next question is what did the legislature mean by the word "opposite," when it provided that the voter should signify the candidate for whom he desired to vote by secretly placing a cross opposite the name of such candidate? When one speaks of a thing being "opposite," one means relatively to some other object. If a small circle be placed in the centre of a large circle, every point on the small circle is opposite

to any point on the larger circumference, from the point of view of where one stands. The word "opposite" is not a definite, but a relative, term. It is difficult to interpret. The law does not state, as in some American statutes, that the cross has to be made in a particular compartment; all that it says is that the voter shall place a cross "opposite" the name. If it is placed above the name, in relation to a person standing below the name, it is opposite; if it is placed below the name it still is opposite, if one looks from above the name. It is difficult to say exactly what the legislature meant by the word; therefore, in all fairness to voters, seeing that they experience a real difficulty in knowing where to put a cross, we have to interpret the word in as liberal a way as we possibly can. As long as we are satisfied, from inspection, that the cross is meant for a particular candidate, then, whether it is on the right, the left, above or below his name, makes no difference; in all these cases we think the cross ought to be considered as being "opposite."

With regard to the question of marks other than a cross, it is possible that the difficulty experienced by many voters in making a cross may be due to incapacity in making up the mind what to do, for one finds voters start by making a line, and, not being satisfied with the appearance of the line, its position, or clearness, they start another line and complete the cross elsewhere. Men with defective sight, men with palsied arms, old men, and men with infirmities may come to the polling booth and not be able to signify, by means of a clear-cut cross, how they intend to vote. Their crosses are sometimes shaky, sometimes wavy, sometimes indistinct; the two lines of the cross do not properly intersect, and so on. I think we should adopt the principle approved of by the American Courts—to my mind an eminently sensible one—that, where we are satisfied that the additional mark upon the paper is there by accident, in an attempt to make a cross, and not a mark *ex facie* intended to violate the secrecy of the ballot, then we ought not to allow such a mark to disqualify the ballot paper. It is the cross which records the intention of the voter, and any additional mark, which has not been put there for purposes of identification, ought not to spoil the paper. Of course, marks that appear to be an attempt at a cross may, with others, be in reality marks of identification, but it is impossible to provide for all cases. Where, in a thousand cases, 999 marks are manifestly accidental, we must not say that because, in one case, it was not accidental, therefore we ought to reject the 999 votes. The Court may judge for itself

whether the additional marks are accidental or of set purpose, and, if it comes to the conclusion they are there accidentally, it should not reject the ballot paper. It should be the policy of the Court not to reject a vote where it can be allowed to stand, because, by its rejection, the individual, who has attempted to signify to the best of his ability for whom he intends to vote, would be disfranchised.

We now come to the question of figures, initials, and marks placed there by others than the voter. In this particular case we have to deal with the figures placed there by the polling officer of station 323. He misunderstood his instructions. He had to deal with only 21 votes, and the numbers that he put upon the ballot papers were the numbers of the voters at his polling station. It is, therefore, clear that the papers can be identified. The polling officer said: "I can identify them; I can tell you exactly which voter voted on any particular ballot paper." Further, he said: "I misunderstood my instructions; I put them there for purposes of identification." When marks or figures are put upon a ballot paper for the purposes of identification, how can it be said that they cannot be identified? Mr. *van Hees* has argued that, when once the papers get to the returning officer, and when the scrutiny of the papers takes place, they are all mixed up, and one cannot tell who the particular voter is, because one does not know from the number on the ballot paper what particular ward it refers to, and one can only identify those particular ballot papers which have the No. of the ward as well as the No. of the voter. It is not, however, a question of whether a third party can identify the papers when mixed up. If that were the law there would be no question of rejecting a paper because of marks on it. It would be very difficult for the returning officer to know what the marks meant and thereby identify the paper. The question is not whether it can be identified by the returning officer or by one of the scrutineers, but whether it can be identified. Is there an individual who can identify it? I do not wish to suggest anything with regard to this polling officer; I have not the slightest doubt that he acted perfectly honestly and that he only made a mistake. But, supposing a polling officer is in league with a candidate and puts on these particular marks, each one of those papers can be identified by anyone looking at them. Under those circumstances, it is perfectly clear that the law has been violated; marks have been placed upon the paper by which that paper can be identified. Sec. 53 (3) states that the

returning officer shall reject, and not count, any ballot paper which bears any writing or mark by which a voter can be identified, other than is in this schedule prescribed. The returning officer is bound to reject ballot papers containing numbers placed upon them by an individual who can identify those numbers. It would be unfortunate if the returning officer, by following the implicit directions of the Act, should be doing wrong, and that we should say that he ought to have used his discretion in a matter in which the law gives him no discretion. Therefore, where such figures occur upon a ballot paper, I am of opinion that the returning officer is bound to reject them, and this Court is bound to uphold that view. Where an officer assisting in the conduct of an election makes a mistake, and it is proved that the mistake so made actually affects the result of the election, is the election void, or ought we simply to pay no attention to such ballot papers? Are we bound to say either one or the other candidate has been elected, disregarding the illegal act, or are we entitled to say that the whole election is void? This matter was discussed in *Woodward* v. *Sarsons*, and the Court there held that, apart from the Ballot Act, there were certain general principles with regard to elections that had always prevailed in England, and that, in judging whether an election was a proper election or not, the Court was entitled to take into consideration the manner in which it was carried out. But it seems to me that sec. 59 of our Act implies that the Court is entitled, in certain circumstances, to declare an election void. It provides: "No election shall be declared invalid by reason of any mistake or non-compliance with the terms of the schedule if it appears to the Court having cognisance of the matter, that the election was conducted in accordance with the principles laid down in the schedule, and that such mistake or non-compliance did not affect the result of the election." That, to my mind, clearly implies that the Court is entitled, when these conditions are not present, to declare that an election is void. If, therefore, it appears that the mistake of a polling officer does actually affect the election, the Court is entitled to say that that election is an improper election, one not conducted in terms of the Act, and therefore void. In some cases it becomes manifest that it ought to be so; in other cases it is less manifest. If the officer in charge of the booth refuses to open it or to hand ballot papers to the voters, or does something by which the secrecy of the ballot is impaired, he violates the fundamental principles of the Act and disfranchises a certain number of people entitled to

record their votes. If we know that an officer has by his wrongful act deprived persons from recording their votes for a particular candidate, and if we know how these votes would have affected the result of the election, the proper course for the Court to adopt is to declare the election void. That was the course adopted by the Natal Court in the *Weenen* and *Newcastle* elections.

Those I think are the general principles upon which we should consider these election petitions, for there are here virtually two, that of petitioner on the one hand, and the counter-petition of respondent on the other.

In order to facilitate the inquiry into these various ballot papers placed before us, we have placed them in envelopes numbered 1 to 12. Envelope 1 contains six cases in which Mr. *de Waal* contends there are no crosses. Of the six, four are allowed and two rejected. In the first case the figure 4 appears on the paper, but, after minute inspection, and after hearing the argument of Mr. *van Hees*, we are of opinion that the voter did not intend to mark for a 4, but for a cross. It appears to be what is known as a business mark which has been crossed, and so comes to resemble the figure 4. That might occur in many cases, and we have therefore admitted it. The next paper contains a line against the name of Van Niekerk, which might signify anything; there is no cross whatever, and we have rejected that. A paper which has given us a considerable amount of trouble is one on which there is manifestly some mark, but one which it is impossible to say approaches a cross, even after careful examination under the lens. There are two smudges and two little lines, as if the voter intended to do something and gave it up in despair; there is here not the faintest trace of a cross. All the others are allowed. Some of them are very shaky crosses, but they are all manifestly intended to be crosses, and where there is a manifest intention to make a cross the paper has been allowed.

The second envelope contains nine ballot papers on which are additional marks. These we have allowed on the principles I have stated. One mark which was made a good deal of in argument appears, on careful scrutiny, to be in the substance of the paper.

Envelope No. 3 contains six ballot papers which it is contended have bad crosses. These crosses are not skilfully made, but they are crosses, and we are not justified in rejecting them.

Envelope No. 4 contains 89 papers where the crosses are all inside the parallelogram, and, though I have personally some

doubt whether they fall within the petition and whether we ought to look at them, yet as we are all of opinion that none of the 89 ought to be rejected, this matter need not be further discussed.

Envelope No. 5 contains crosses outside the parallelogram of Nicholson, and it is claimed on his behalf that they should be allowed. No doubt when the officials concerned passed this ballot paper and had it printed they were under the impression that it was an easy matter for a man to make a cross opposite the name of the candidate for whom he intended to vote and that he would readily see there was a blank space left opposite the name, for the cross to be made in. But from these 200 papers it appears clear that the voter does not know when he enters the compartment what he is to do with his cross, and he has placed it in every possible position round the name of the candidate, so that it is impossible to say that the voter ought to know that he should place the cross behind the name of the candidate and in the compartment reserved for it. Are we to reject a paper because the voter has not placed the cross inside the parallelogram? Are we to consider solely the intersection of the lines of the cross and say if the intersection of the cross lies above the line of Nicholson that this is not a good vote for Nicholson, or are we to say that it manifestly is intended for him? Judging from the principles laid down, I cannot come to the conclusion that, merely because the intersection is above the line which separates Nicholson's name from the other part of the paper, it is for that reason clear that the voter did not intend to vote for him. In a case of this kind, to take the intersection of the lines as a criterion would be very arbitrary. It seems to me immediately we allow a cross to be made anywhere else than in the compartment behind the name of the candidate, we have to use our common sense and see whether, from the position of the cross on the paper, we can find out whether the voter intended to vote for the candidate whose name is nearest to where the cross is. Some difficulty is caused because a cross in the compartment of Nicholson, just above the name of van Niekerk, might refer to the name of the latter if a cross above the name of Nicholson is to be taken to refer to him. That difficulty must be faced, but it cuts both ways. A cross may be made above the line which separates Nicholson's name from the rest of the paper, or below the line which separates van Niekerk's name from the rest of the paper, and if we reject it in the one case we would have to reject it in the other also. We cannot allow

crosses made anywhere above the line of Nicholson to count for him; we have, therefore, to make some distinction. The distinction on the paper is obvious. On the right and left of the date there is an open space, not very unlike any other open space upon the paper. In the case of a cross upon that open space it seems obvious that the voter intended to vote for the candidate nearest to the open space; therefore, a cross in the open space above Nicholson's name, and reasonably near to it, should be given to him if from all the surrounding circumstances it appears that it really belongs to him. A cross in the open space below the name of van Niekerk shows an intention to a vote for van Niekerk, and ought to be taken as a vote for him. Apparently the people who devised the ballot paper had no idea of what pranks astigmatism might play. If I remove my glasses some of the dividing lines disappear completely, both because they are faintly drawn and because my astigmatism is such that I cannot see a thin line drawn in a certain direction. Others may have a similar defect, and may not be able to distinguish the lines clearly. It is advisable that the form of ballot paper be revised and a different form adopted, which should contain as little printing matter outside the names of the candidates as possible, and the dividing lines should be broad, black lines, such as those on a mourning envelope. Short of such a change we shall always have to contend with these difficulties. The perforated mark appears to have had a great attraction for many voters. Numbers of the crosses have been placed in the perforated mark just above the name of Nicholson, and from an inspection of the papers it is manifest that the crosses are intended for him. One cross is above the words "House of Assembly," placed there, doubtless, because the perforated mark was there, but for whom the vote is intended it is impossible to say. Another cross is found behind the word "volksraad"; another behind the word "Waterberg," where it first appears on the paper. We cannot allow a cross to be made anywhere upon the upper part of the paper. As it is not in the open space immediately above the line of Nicholson, as others are, we have rejected it, because the intention of the voter is not clear; he may have intended to signify that he belonged to the district of Waterberg. Under these circumstances we think that this paper was rightly rejected. As a result, 11 votes are allowed and 3 votes are rejected from this envelope.

Envelope 6 contains six ballot papers, marked by the polling officer for district 323. The result follows from what I have said about that part of the case.

Envelope No. 7 contains 94 votes, and the same remarks that I made with regard to the 89 apply to the 94 votes.

Envelope No. 8 contains ballot papers with crosses below the name. On the principles I have already enunciated it follows that these ought to be allowed.

Envelope No. 9 contains ballot papers said to be marked for Nicholson, with marks other than crosses. It is difficult to say what some of these represent: some are double crosses; others, crosses with a line added. Where we have found an attempt to make a cross we have given the vote to the candidate. Where we are really not in a position to say that there has been any attempt to make a cross we have rejected it. As the result, two of the votes are rejected. The first is the one which contains what is palpably a figure 1. We are asked to say there is an intersection of two lines, and, therefore, it is a cross, but manifestly that is not so. The voter intended to put a large Roman 1 opposite the name of Nicholson. That must be rejected.

The next has caused us great difficulty. We have examined it under the magnifying glass and have found it impossible to say it is a cross. There is a sort of wavy line, such as perhaps might have been made by a palsied hand in attempting to make a cross, but as it is impossible for us to say that it in any way resembles a cross, or that the voter intended to put a cross there, we have rejected it. The other votes are allowed.

Envelopes Nos. 10 and 12 are the two cases with which we dealt yesterday—papers which we will not consider, because they were unearthed at the inspection and were not in the original petition.

Envelope No. 11 contains 15 votes marked by the polling officer and rejected by the returning officer. Those I have already dealt with.

Petitioner's figures originally were 994. To that we add 11 votes and deduct 2 votes, leaving 1,003. The respondent originally had 997 votes. We have deducted 2, leaving him 995. In the circumstances, therefore, Nicholson's majority is one of eight. That, however, does not give him the seat, because van Niekerk lose nine votes—the difference between 15 and 6 votes, marked with the number of the station by the presiding officer—and, following the principles we have enunciated, as the matter stands now, we should have to declare the election void.

MASON, J.: I concur.

GREGOROWSKI, J.: I concur.

At the request of counsel on both sides, the Court granted an adjournment to enable parties to consult. After the adjournment, counsel informed the Court that the parties had agreed to abandon the allegations of double voting, and the Court was asked to give judgment on the case as it stood, each party agreeing to pay its own costs.

WESSELS, J.: Ordered that the Court declares that the respondent was not duly elected, and that no other person was or is entitled to be declared duly elected. The Registrar to certify forthwith to the Governor-General. Each party to pay his own costs. The papers examined to form part of the records. Court expresses a wish that, in making report of case the numbers of the ballot papers should be omitted, if possible.

Attorneys for Petitioner: *Ludorf & Strange.* Attorneys for Respondent: *Webb & Dyason.*

[G. v. P.]

REX v. RUBEN.

1915. *November* 29, *December* 7. DE VILLIERS, J.P., WESSELS and BRISTOWE, JJ.

Shop hours.—Ord. 11 *of* 1914, *sec.* 4 (1).—*Keeping dairy.—Shop open after hours.—Defence that it was a refreshment shop.—No licence.*

An occupier of a dairy shop, on being charged with contravening sec. 4 (1) of Ord. 11 of 1914, in that he sold bread on a certain day after the closing hours, set up the defence that he kept a refreshment shop. The magistrate, in convicting him, stated that the accused had admitted that he had no refreshment shop licence, or a licence to sell bread after hours. *Held,* on appeal (DE VILLIERS, J.P., *diss.*), that as the evidence of the accused that he kept a refreshment shop was apparently uncontradicted, and as the magistrate did not find as a fact that he had no such shop, that the conviction should be set aside.

Appeal from a conviction by the assistant resident magistrate at Johannesburg.