

Recount; Effect of official's failure to indorse ballot: Statutory provisions for setting aside improperly indorsed ballots on recount are consistent with case law and other statutes. Secs. 9.01 (1)(b) 3. and 4., Stats. (Issued to Ronald J. DeLain, July 21, 1976.)

Your two questions deal with certain provisions of the statute setting out procedures for conducting recounts. Section 9.01 (1)(b), Wis. Stats.

Your first question concerns the following provision in sec. 9.01 (1)(b)3., Stats.:

"When the number of ballots exceeds the number of electors, the board of canvassers shall proceed to place all ballots face down to check the ballot clerk's initials. Any ballots not properly initialed by 2 ballot clerks shall be laid aside, properly marked and carefully preserved."

The remainder of the statute indicates that those ballots will not be included in the recount total.

In your first question, you ask whether that statute is consistent with the case of Ollman v. Kowalewski, 238 Wis. 574, which suggests that voters cannot be disenfranchised because of the errors of election officials. Although not specifically included in your opinion request, your question could also be directed to sec. 9.01 (b) 4., providing that ballots "not properly initialed by 2 ballot clerks" should be set aside in a recount where the number of ballots and voters agree, or where the number of ballots is exceeded by the number of voters.

Before assessing these sections, we take note of two pertinent principles. First, statutes are given the benefit of a presumption of validity. Second, while every qualified elector has the right to vote, that right is subject to reasonable regulation by the state. Gradinjan v. Boho, 29 Wis. 2d 674 (1965).

Those two principles tend to support secs. 9.01 (1)(b) 3. and 4., Stats. In addition, there is an important distinction between the fact situation in Ollman and the facts to which those sections are applicable:

In Ollman, the court dealt with a challenge to ballots which were not initialed by both ballot clerks, as required by statute. One ballot clerk had placed his own initials and the initials of the other ballot clerk on the backs of each ballot. Because the backs of their ballots carried the initials of two ballot clerks, the voters in that case had no way of knowing their ballots had not been properly initialed by each ballot clerk. Given those facts, the supreme court upheld the ballots, saying that electors should not be deprived of the right to vote solely because of an election official's error.

Ollman indicates that a voter should not be disenfranchised for the error of an election official where the voter has no opportunity to detect such error. However, a ballot not properly indorsed by an election official may be set aside where the voter was accorded the opportunity to inspect the ballot and detect the improper indorsement. Gradinjan v. Boho, 29 Wis. 2d 674 (1965), State ex. rel. Symmond v. Barnett, 182 Wis. 114 (1923), Stanley v. Goff, 324 S.W. 2d 124 (Ky. 1959), and 29 C.J.S. Elections sec. 172.

A voter at the polls has the opportunity to inspect his ballot to ensure that it has been indorsed by the ballot clerks. Sec. 6.80 92)(b), Stats., reads:

"(2) METHODS OF VOTING.

(b) After preparing his ballot, the elector shall fold it so its face will be concealed and so the ballot clerks' printed indorsement and initials may be seen."

Sections 9.01 (1)(b) 3. and 4., Stats., direct the canvassers in a recount to set aside ballots "not properly initialed by 2 ballot clerks" after a face-down inspection of the ballots. The Board construes those sections to mean that the recount canvassers' inspection of the back of the ballot to determine whether a ballot is properly indorsed should be no more extensive than that which could have been made by a voter upon casting his ballot, as provided in sec. 6.80 (2), Stats. Any error in indorsement which could not have been discovered by a voter will not result in the setting-aside of his ballot.

Therefore, the statutes in question should be applied so as to result in the setting-aside of an improperly initialed ballot only where the voter had the opportunity to inspect the ballot and detect the improper indorsement before casting his vote. When applied in that manner, it is the opinion of the Board that secs. 9.01 (1)(b) 3. and 4., Stats., are consistent with the Ollman case.

In addition to the above-discussed grounds, the Ollman court's decision was based on the language of sec. 5.01 (1), Stats., providing:

"CONSTRUCTION OF TITLE II. Title II shall give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of its provisions."

In subsequent cases, the court has made it clear that the will of the voter may be required to yield to the legislature's right to regulate elections. As we have indicated, secs. 9.01 (1)(b) 3., and 4., Stats., represent a proper exercise of that right. Therefore, it is the Board's opinion that those sections can be applied consistently with sec. 5.01 (1), Stats.

In your second opinion, you ask why there is no provision in sec. 9.01 directing the canvassers in a recount to set aside defective ballots where there are more ballots than voters.

Because that question goes to the wisdom of the statute and does not require application or interpretation by the Board, it should be directed toward the legislature. The Board notes that sec. 7.51 (2), Stats., directs local canvassers at the initial canvass to set aside a ballot "which is so defective that it cannot be determined with reasonable certainty for whom it was cast."