Approved _____

MINUTES OF THE House COMMITTEE ON Select Committee on Election Contest.

The meeting was called to order by Chairman Bill Roy at 1:45 p.m. on January 24, 1991 in Room 254-E of the Capitol.

All members were present except: All present

Committee staff present: Pat Mah, Legislative Research
Arden Ensley, Revisor of Statutes
Nedra Spingler, Committee Secretary
Tony Rues, Speaker's Office

Conferees appearing before the committee:
Karlen Christensen-Jones, Contestant
Victor Miller, Attorney for Jones
Rep. Elaine Wells, Contestee
Ron Hein, Attorney for Wells

Others attending: See attached list

The Chairman opened the meeting at 1:45 p.m. Copies of Supreme Court decisions, cited in the Court's Memorandum Decision and Judgement, (Attachment No. 1), were distributed to members prior to the meeting and additional copies (Attachment No. 2) were provided at this meeting.

In response to a question from Mr. Miller, the Chairman replied there would be no further comments from the attorneys for either side at further meetings, unless requested by the Committee.

The committee considered action on the list of disputed ballots. Representative Sawyer moved that Ballots 59 and 166 be counted. The suggestion was made that the record should contain the specification for whom the count was cast. Rep. Sawyer included in his motion that the vote count be cast for Ms. Wells. The motion was seconded by Rep. Snowbarger. Following discussion, the motion carried by unanimous vote of the Committee.

A member noted that in the Judge's Memorandum Decision and Judgment, on page 33, a total of 3485 votes was listed for Ms. Wells and 3480 for Ms. Christesen-Jones. He suggested that these figures be used as a basis for adding or subtracting votes as the committee votes upon them. Following discussion, it was the consensus of the committee that this suggestion be followed. It was pointed out the vote on ballots 59 and 166 did not change these totals since the rebuttal ballots had already been counted. The effect rebuttal ballots would have on the totals was discussed. The point was made that voting on rebuttal ballots would make the committee report hard to understand, and these ballots offered only alternatives which were not accepted.

Rep. Snowbarger moved that ballot 552, relating to a readable, torn ballot that had been mended with tape, and the corresponding

reguttal ballots be continued as counted, and the vote cast for Ms. Wells. The motion was seconded by Rep. Sawyer. The vote on the motion carried five to one. For those members requesting that their vote be recorded, the vote was as follows; Reps. Shallenbarger, Sawyer and Roy voted in favor of the Motion.

The Chairman noted the votes on ballots 59, 166, and 552 did not change the total votes for either party.

The Chairman stated the next meeting of the committee would be at 8:00 a.m., January 25. He adjourned the meeting at 2:15 p.m.

GUEST LIST

COMMITTEE: Select Committee on Election Contests DATE: 1-24-91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
R Mutan	Topeka	KTCA
Eric Dafoe	Topeka	KSNT
Jim McBride	Topeka	Observer
Press		

Attachment 1

No. 46,922

ORVILLE KIMSEY, *et al.*, *Appellants*, v. BOARD OF EDUCATION, UNIFIED SCHOOL DISTRICT # 273 OF MITCHELL, OTTAWA and CLOUD COUNTIES, STATE OF KANSAS; WILLIAM EARLE, et al., *Appellees*.

(507 P. 2d 180)

SYLLABUS BY THE COURT

1. SCHOOLS—*Bonds—Necessity to Adopt Resolution—Purpose and Estimated Amount.* Before bonds may be voted by a unified school district under K. S. A. 72-6761 the board of education must adopt a resolution stating the purpose for which bonds are to be issued and the estimated amount thereof.
2. SAME—*Resolution Need Not be Published by Board—Nature and Purpose of Resolution.* There is no requirement that such a resolution be published, transmitted or otherwise communicated to anyone other than the members of the board of education. It is essentially an internal document, whose purpose is to ensure that a majority of the board favor the issuance of the bonds with full knowledge of the nature of the project and its estimated cost.
3. SAME—*Adoption to Resolutions—When Requirements Met.* The foregoing requirements are substantially fullfilled by the adoption of two separate resolutions, one establishing the purpose of the bonds and the other the amount—particularly where the board's minutes reflect extensive discussions of the project and the bonds over a year's time.
4. SAME—*Unified School District—Bonds in Excess of Debt Limit—Permission—Steps Preliminary to Election.* Where a unified school district proposes to vote and issue bonds in excess of its statutory debt limit permission of the board of school-fund commissioners is required before it may *hold* a bond election. However, such permission is not a prerequisite to calling the election, giving notice of the election, or taking any other steps preliminary to the election.
5. SAME—*Construction Facilities—Details Entrusted to Board of Education.* Discretion as to the details of the construction of school facilities is entrusted to a district's elected board of education, not to the electors of the district or to the courts.
6. SAME—*Determining Accomplishment of Project—When Such Determination May Be Made.* A school board is not required to determine before a bond election whether a single project is to be accomplished by building one building or by more than one building. That determination may be made after bonds are authorized and the relative costs of the alternatives are known.
7. SAME—*Proposition to Erect High School Buildings.* A proposition to erect "a building or buildings for junior high school purposes and for senior high school purposes" is not so obscure as to mislead the voters, and does not contain more than one proposition.

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8. SAME—*Bond Election—Election May Be Held on Saturday.* There is no statute which either expressly authorizes or expressly prohibits holding a school bond election on a Saturday.
9. SAME—*Bond Election Held on Saturday Valid.* A school bond election is not void because it is held on a Saturday.
10. SAME—*Voting Place to Serve Designated Area—Voting Place.* The election statutes contemplate that each voting place shall serve a single designated geographical area, and that each voter shall be entitled to vote at but one voting place, depending on the area in which he lives.
11. SAME—*Election Irregularity—Effect.* An election irregularity will not vitiate an election unless it is shown to have frustrated or to have tended to prevent the free expression of the electors' intentions, or otherwise to have misled them.
12. SAME—*Allowing Electors to Choose Voting Place—Effect on Bond Election.* Allowing some electors to choose their voting place does not vitiate a school bond election where it is not shown that any person voted who was not entitled to vote, or that any voter voted at more than one polling place, or that any voter was prevented from voting because of the irregularity.
13. SAME—*Election Held on Saturday—Refusing to Accept Absentee Ballot Applications.* Where an election was held on a Saturday, it was proper for the county election officer to refuse to accept absentee ballot applications after the preceding Monday noon, since that was the deadline for casting such ballots under former K. S. A. 1971 Supp. 25-1122 (*d*) and 25-1124.
14. SAME—*Application for Absentee Voter—Casting of Ballot—Effect.* Where an application for an absentee voter was made on behalf of an elector by a third person, as authorized by K. S. A. 1971 Supp. 25-1122, the subsequent act of casting the ballot constituted a ratification of the application even though no authority to do so had been granted at the time the application was made.
15. SAME—*Unfair Campaign Tactics.* Allegations of unfair campaign tactics will not vitiate an election where there is no showing that such tactics, even if improper, had any effect on the outcome.

Appeal from Mitchell district court; MARVIN O. BRUMMETT, judge. Opinion filed March 3, 1973. Affirmed.

Paul L. Aylward, of Ellsworth, argued the cause, and *Ron Svaty*, also of Ellsworth, was with him on the brief for the appellants.

James D. Waugh, of Cosgrove, Webb and Oman, of Topeka, argued the cause, and *Harry W. Gantenbein*, of Beloit, was with him on the brief for the appellees.

The opinion of the court was delivered by

FOTH, C.: This is a taxpayers' suit to enjoin the issuance of $2,334,000 worth of bonds by the defendant board of education of

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Unified School District No. 273, Beloit. The trial court refused to enjoin the bonds, and the plaintiff taxpayers have appealed.

In question is an election held February 26, 1972, at which the bond proposition carried by a vote of 1388 for, to 1163 against. Plaintiffs claim several procedural deficiencies and irregularities, some of which they assert are serious enough, standing alone, to invalidate the election, and some of which they concede must be shown to have affected the outcome. We accept this classification of their claims and shall treat them accordingly.

The first and primary contention is that the board of education never adopted a resolution stating "the purpose for which bonds are to be issued and the estimated amount thereof," as required by K. S. A. (then 1971 Supp.) 72-6761. That section provides in part:

"The board shall have authority to select a school site or sites. When a board determines that it is necessary to purchase or improve a school site or sites, or to acquire, construct, equip, furnish, repair, remodel or make additions to any building or buildings used for school purposes, or to purchase school buses, such board may submit to the electors of the unified district the question of issuing general obligation bonds for one or more of the above purposes, and upon the affirmative vote of the majority of those voting thereon, the board shall be authorized to issue such bonds. *The board shall adopt a resolution stating the purpose for which bonds are to be issued and the estimated amount thereof.*" (Emphasis added.)

(The balance of the section deals with notice of the election, contest actions, debt limitations and small exempt issues, and interim or short term financing.)

The trial court held that such a resolution was not only not a *prerequisite* to the holding of an election, but that it would more properly be adopted *after* the election. It noted the position of the requirement in the statute *after* the provisions authorizing the election and bond issue, and observed that "The statute provides for only one resolution." A resolution before the voters had spoken and the cost of the project ascertained would be "premature."

Our approach is a little different, because we are convinced the record shows substantial compliance with the statute, particularly in light of its purpose and function.

There is no requirement that this resolution be published; hence it is not intended to give notice to the taxpayers of the board's intended action. In this respect it is unlike resolutions adopted under K. S. A. 72-8211, where the board proposes to acquire teacherages, or under 72-8215, where a capital outlay levy is proposed.

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In each case the resolution reflecting the board's intended action must be published, thereby notifying the taxpayers that they may protest and force the issue to an election. Under the bond statute we are dealing with here, separate formal notice of the proposal is given by three publications, each containing specific information about the time and place of the election and the actual proposition to be voted on.

Neither is it required that the resolution be forwarded to the election officer in order to trigger action by him. This is in contrast to K. S. A. 72-1626, governing bond procedures for the former boards of education in first and second class cities, prior to unification. There, a certified copy of the resolution, signed by the clerk and countersigned by the president of the city board of education, was sent to the mayor. It thereupon became the duty of the mayor to issue a proclamation calling the bond election. There is no parallel provision in the acts relating to unified school districts.

Since the statute requires no publication and no transmittal of the resolution to anyone outside the board we conclude it is essentially an internal document. Its purpose, as we see it, is to ensure that the requisite majority of the board favors the issuance of the bonds, with knowledge of the nature of the project and its estimated cost. Although not embodied in any single, formal "resolution," we think this required and desirable state of knowledge and intent is amply reflected in the board's minutes.

The inadequacy of the district's facilities for secondary education had been a matter of long-standing concern in the community. In 1967 a citizens' committee had made a study and recommendations. A "master plan" to meet the educational needs of the district was prepared by an independent consultant and was adopted by the board in 1969; modifications to it were made in 1970. At least four prior bond proposals had been defeated, the last in January, 1971. The proposals were for a secondary school facility.

After the 1971 defeat the board contemplated its future course. On February 1, 1971, it resolved *not* to have another election in April of that year (which would have coincided with the regular school election).

On April 5, 1971, it adopted a resolution finding the present junior and senior high school facilities "inadequate" and expressing an intention to have an election at the earliest possible date to "request the patrons of the district to authorize funds for the erection

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of a new facility to house those youngsters who are presently inadequately housed."

On September 13, 1971, the board, with three of its seven members new since April, unanimously adopted a motion "that the board proceed with the present building plans and select a tentative voting date sometime in February and all commit ourselves to its support." It was also agreed to include in the building proposal vocational educational facilities.

An important motion was adopted unanimously on October 18, 1971, "that the board hold the school bond election on Saturday, February 26, 1972, for $2,334,000.00." There was considerable discussion at that meeting of the project and of means of promoting the election.

A second significant resolution was unanimously adopted on December 6, 1971:

"RESOLUTION

"BE IT RESOLVED by the Board of Education of Unified School District No. 273, Mitchell County, State of Kansas that said Board apply to the State School Fund Commission, pursuant to K. S. A. 75-2315, *et seq.*, for authority to call and hold an election to authorize the issuance of bonds of said District in excess of the amount which said District may now issue under the provisions of K. S. A. 72-6761, for the purpose of providing funds to pay the cost of purchasing and improving a site or sites, and constructing, furnishing, equipping and remodeling, and making additions to building or buildings for school purposes within said District.

"BE IT FURTHER RESOLVED that notice of the intent to file such application be given to the electors of said District by publication in The Beloit Daily Call a newspaper of general circulation in said District."

(This action, referred to in the bond fraternity as an "excess application," was required because the amount of bonds proposed would otherwise have put the district over its debt limit. Its effect will be discussed later.)

From the foregoing it is readily apparent that long before the election the board was thoroughly aware of and had formally determined the "purpose for which bonds are to be issued and the estimated amount thereof" as the statute requires. Even without the earlier, background motions and resolutions noted above, the resolution of December 6 established the *purpose*, and the motion of October 18, 1971, established the *amount*. Taken together, the two substantially meet the requirement of the statute, and certainly satisfy its intent and purpose.

It is of no consequence that the October action was by "motion"

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rather than by "resolution." For practical parliamentary purposes the two are synonymous. Thus, *Black's Law Dictionary* (4th ed. 1951) defines the terms:

"MOTION. Parliamentary law. The formal mode in which a member submits a proposed measure or *resolve* for the consideration and action of the meeting." (Emphasis added.)

"RESOLUTION. A formal expression of the opinion or will of an official body or a public assembly, adopted by vote; as a legislative resolution. . . .

. . . . . .

"Legislative Practice

"The term is usually employed to denote the adoption of a *motion*, the subject-matter of which would not properly constitute a statute; such as a mere expression of opinion; an alteration of the rules; a vote of thanks or of censure, etc." (Emphasis added.)

The second omission, which the plaintiffs claim was an essential prerequisite to calling the election, was the order of the board of school-fund commissioners permitting the district to exceed its statutory debt limit. This claim is based on the fact that the commissioners' order was entered on February 2, 1971, and mailed from their office on February 3, 1972. On the latter date the first notice of the bond election was published and the board had, of course, taken many steps prior to that time both to promote the bonds and to put the election machinery in motion.

After the resolution of December 6, 1971, quoted above, application was duly made pursuant to K. S. A. 75-2315 *et seq*. This section is part of a continuation of a 1911 act on the subject, and the operative section is 75-2316:

"The board of school-fund commissioners of the state of Kansas is hereby authorized and empowered to make an order *authorizing any school district to vote bonds* for the purpose of purchasing or improving a site or sites, constructing, furnishing, equipping, repairing, remodeling or making additions to schoolhouses or other necessary buildings or purchasing school buses to an amount to be determined by the board of school-fund commissioners, and in addition to, the amount of bonds which such district may be otherwise authorized to issue." (Emphasis added.)

It will be noted that under this section the commissioners' order authorizes a district to "vote bonds" in excess of its debt limit—it does not authorize the district to call an election.

The following section, 75-2317, provides that the commissioners' powers are to be invoked by the filing of an application "that the permission of the said board of school-fund commissioners be given *for the voting and issuance* of additional bonds as provided

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in the preceding section." (Emphasis added.) Again, no mention is made of the *calling* of the election.

From these statutes we conclude that the permission of the school-fund commissioners must be granted before a school district may either vote or issue bonds in excess of its debt limit, but that such permission is not a condition precedent to the steps preliminary to the election such as announcing it, campaigning, or giving the statutory election notices. Had the school-fund commissioners turned down the application the election would necessarily have been cancelled—but that did not happen.

It is not significant that the formal order of the school-fund commissioners was not mailed to the board, but went instead to its retained fiscal adviser or its bond counsel. The controlling fact was that, at the time the election was *held*, valid authority to hold it had been granted.

Plaintiffs' next objection goes to the wording of the proposition:

"A proposition to issue the general obligation bonds of Unified School District No. 273, Mitchell County, State of Kansas, in an amount not to exceed $2,334,000.00 for the purpose of providing funds to pay the cost of constructing, furnishing and equipping a building or buildings for junior high school purposes and for senior high school purposes within the District, pursuant to K. S. A. 72-6761, 75-2315 and 10-101 et seq."

Plaintiffs argue that the proposition is unclear in that it does not indicate whether one building is to be built for both junior and senior high purposes, a separate building is to be built for each, or some other combination is to be built. In support they cite our cases holding that "when a special proposition is submitted to a popular vote the recitals on the ballot shall clearly state the substance of the question the electors are to vote upon; and where that proposition is so obscurely stated that the electors may be misled thereby, the election is vitiated; . . ." *Kansas Electric Power Co. v. City of Eureka*, 142 Kan. 117, 45 P. 2d 877, Syl. ¶ 2. See also, *Wycoff v. Board of County Commissioners*, 189 Kan. 557, 560, 370 P. 2d 138; and *West v. Unified School District*, 204 Kan. 29, 33-34, 460 P. 2d 103.

There can be no quarrel with this general proposition—the elector is entitled to know what his money is going to be used for when he votes. In *Unified School District v. Hedrick*, 203 Kan. 478, 454 P. 2d 536 we noted that this test is applied to all bond propositions, regardless of the authorizing statute or the type of issuing municipality.

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One general category of cases where this court has held bond propositions "bad for obscurity" is where the scope and total cost of the project wasn't made known to the voters. The following are typical of this class. In *Board of Education v. Powers*, 142 Kan. 664, 51 P. 2d 421, the total cost of a proposed school building was $391,500, of which $176,175 was to come from the federal government; the voters were merely asked to vote $198,500 in bonds. In *Kansas Electric Power Co. v. City of Eureka*, supra, the proposal was merely to issue $65,000 in bonds to construct a power plant and distribution system; no mention was made of an additional required outlay of $99,974. Most recently, in *Unified School District v. Hedrick*, supra, the voters were asked to approve a $15,000,000 bond issue for a long term building program; no mention was made of the fact that the cost of the project was to be $27,000,000, with the balance of $12,000,000 coming from building funds and federal grants. In each of these cases the election was voided because of the failure of the ballot proposition to fully apprise the electors of the true nature of the proposed action of the governing body.

A second variety of invalid propositions comprises those where more than one proposition is submitted without the required separation. *Unified School District v. Hedrick*, supra, approached this issue, but whether the board's intent to build some fourteen different facility improvements could be submitted as one proposition was not necessary to the decision, and the court expressly declined to decide the question. The test there stated, however, was whether the projects were so connected as to be but one proposition. This was in line with *Robertson v. Kansas City*, 143 Kan. 726, 56 P. 2d 1032, where this court approved as one project "improving the public levee of the city by constructing flood protection works, raising the surface thereof, and the construction thereon of docks, wharves, river and rail terminals and a grain elevator terminal dock and wharf. . . ." (p. 727.)

Similarly, in *Pittsburg Board of Education v. Davis*, 120 Kan. 768, 245 Pac. 112, it was held to be one proposition to issue bonds "for the purpose of purchasing sites for school buildings, and for the purpose of constructing additions to school buildings, and for the purpose of constructing new school buildings in the city of Pittsburg, Kansas[.]" (pp. 769-70.) Of defendant's argument of "duality" we said:

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"If the argument of the defendant were correct, every proposition submitted for adoption would have to be separated into its last details. That is not the intention of the law. It intends that a single question as a whole shall be submitted as a whole. Here was a question of providing proper school facilities—one proposition, and it was properly submitted as such." (p. 770.)

In the *Pittsburg* case the court relied on *Thomas v. Covell*, 119 Kan. 684, 240 Pac. 574, where we held (p. 686):

". . . Procuring a site, erecting a building, and paying for site and building by bonds, are not tendered as disconnected subjects to be separately considered and voted on. They are tendered combinedly, as constituting one municipal project, to be approved or disapproved as a whole, . . ."

In none of these cases was the governing body required to spell out its plans in detail in the bond proposition. It was sufficient if one project was generally described, even if it entailed several phases or components.

As we see plaintiffs' complaint in this case, it boils down to the fact that they don't know whether the board will build one or more than one building—it is clear that whatever will be built will be for junior and senior high purposes. We had occasion to consider this type of complaint as recently as *Baker v. Unified School District*, 206 Kan. 581, 480 P. 2d 409. There the argument was that the school board proposed to vary from the building described in its pre-election brochures. We there took note of a school board's fiscal facts of life—until the bonds are authorized it has no funds to hire an architect, and until plans are drawn final details are necessarily uncertain. As we there said (p. 583):

"Discretion and responsibility for construction of the school building are vested by the legislature in the school board. Discretion and responsibility for construction of the building are not vested in the appellants and not in this court. (See *Warner v. City of Independence*, 121 Kan. 551, 558, 247 Pac. 871.)"

Here we are not surprised at testimony indicating that the board is not yet settled on one building or two—it will depend on what can be built within the money available. Apart from that, we may judicially note that many secondary school facilities today are built on a "campus" plan, with several detached buildings constituting one educational facility.

The choice is, as noted, to be exercised by the board. The voters were apprised of the nature of the project—one or more buildings "for junior high school purposes and for senior high school purposes." We think it was unnecessary for the board to determine at that time, or to submit to the electors, the question of whether

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the purpose would be accomplished through one building or more. As we said in *Pittsburg Board of Education v. Davis*, supra, "Here was a question of providing proper school facilities—one proposition, and it was properly submitted as such." Of course, should the board depart from its expressed intention of providing facilities for junior and senior high school purposes, a remedy is provided under K. S. A. 10-117. That fact would not invalidate the bonds.

Plaintiffs next argue that the election was void because it was held on a Saturday. They cite no authority for this proposition, nor can we find any; the parties agree that there is no statute which either expressly authorizes or expressly prohibits a Saturday election. Plaintiffs would have us find an *implied* prohibition from the fact that the timetable for absentee voting, as it then existed, was apparently geared to the ordinary Tuesday elections. That is to say, under former K. S. A. 1971 Supp. 25-1122 (*b*) (6), *applications* for absentee ballots at a special election had to be made by the Thursday preceding the election, whereas under the then K. S. A. 1971 Supp. 25-1122 (*d*) and 25-1124 the deadline for *casting* such ballots was the Monday noon before the election. It is apparent that this schedule works well for Tuesday elections—or Wednesday elections, which plaintiffs would also bar by negative implication—but not for elections on other days of the week. As to the latter, it would appear to authorize applications for ballots to be made after the deadline for casting them had passed.

We cannot for this reason hold a Saturday election void. The statutes give the board the right to fix the date, without any specific limitation. The mechanical problem noted above has been recognized and remedied by the legislature (Laws 1972, ch. 134). Absentee ballots cast by mail or otherwise transmitted will not be received until "the hour for closing of the polls." (K. S. A. 1972 Supp. 25-1124.) Those cast in person will now be received until noon "on the day preceding any such election." (K. S. A. 1972 Supp. 25-1122 [*d*].) We take this as legislative recognition of the common practice of holding special elections—and especially school bond elections—on days other than Tuesday. (See, *e. g.*, *West v. Unified School District*, supra, where the election was held on a Friday, and no contention was made that this was improper.)

In this case the election officer solved the problem by the simple expedient of accepting applications only up until the statutory Monday deadline for casting the ballots. The evidence indicates that possibly as many as, but not more than, thirty persons inquired about

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absentee ballots after that deadline and before the election. There was no showing as to whether any of these thirty were deprived of a vote, or whether some or all of them actually went to the polls. In any event their total vote would not have affected the outcome of the election.

The last issue on which plaintiffs claim we should declare the election void involves the designation of voting places by the county election officer, the county clerk. Four were designated within the city of Beloit, one for each ward, and one each in the towns of Simpson and Scottsville. Voters of the district residing outside the city limits of Beloit were authorized to vote at any of the six voting places.

K. S. A. 1971 Supp. 25-2701 provided (and still provides) that "The county election officer shall determine the area to be served by each voting place at every election. . . ." As used in that section the term "area" is defined in 25-2506 (*c*) as "territory served *by one voting place* and may include part or all of one or more precincts or voting districts." (Emphasis added.) That statute goes on to say that "In school, city and special district elections an area may include part or all of one or more wards or townships; and if the territory of such school, city or special district extends into more than one county, an area may extend into any such county."

Taken together the statutes afford a good deal of flexibility in designating polling places and the territory each is to serve; precinct, ward, township and even county lines may be ignored. But we do think the statutes contemplate that each voting place is to serve only one defined "area," and that each voter should have but one place at which he may vote, depending on the "area" in which he lives.

However, this does not mean that the election was void. We were confronted with almost the same situation in *West v. Unified School District*, supra, where three voting places were designated and the voters were free to vote at any of them. We quoted the following from *Stanhope v. Rural High-school District*, 110 Kan. 739, 205 Pac. 648:

> "We have often held that irregularities in elections, where there had been departures from directory provisions of the statute, did not vitiate such elections where such irregularities did not frustrate or tend to prevent the free expression of the electors' intentions, nor otherwise to mislead them." (p. 744.)

We went on to hold that the irregularity in failing to designate areas

ATTACHMENT #1 - 11

for the voting places did not affect the validity of the election, noting:

"Here, there is absolutely no showing that any person voted who was not entitled to vote, or that any voter voted at more than one polling place, or that any qualified elector was prevented from voting because of the irregularity." (*West v. Unified School District*, supra, 204 Kan. at 35.)

The same may be said of the record in this case, and we reach the same result.

The second broad category of plaintiffs' contentions includes those characterized by them as "irregularities" which void the election only if shown to have affected the outcome. (See 2 Hatcher's Kansas Digest, Revised Edition, *Elections*, § 13.) In determining these questions we bear in mind that the election carried by 225 votes.

They first complain of noncompliance with the absentee ballot laws. We have already discussed the fact that some thirty people were denied absentee ballots, and therefore *may* have been unable to vote. If this result did obtain it was the result of the statutory deadline, and not the result of any misconduct on the part of the election officer. We are unable to say that this was even an "irregularity."

Another aspect of the absentee voter complaint is based on an organized campaign by the board to "get out the vote," directed in particular at young residents of the district who were away at college. Some 81 requests were made on "behalf" of absentees. as was authorized by K. S. A. 1971 Supp. 25-1122. Of these 43 voted. Except as to seven sons and daughters of board members there was no prior authorization for the applications by the absentee voters. However, specific ratification of the application was later obtained from 35 of the 43 who voted. In addition, the mere act of casting the unsolicited absentee ballot would, in our opinion, constitute a ratification.

We conclude there were no illegal absentee ballots cast. Further, even if all those objected to were void, it would not change the result.

The balance of plaintiffs' complaints may all be put under the heading of "unfair campaign tactics." First, the editor of the local newspaper, having been threatened with a libel action as the result of printing the bond opponents' advertising at the last election, sought the advice of his attorney. He was advised to and did

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require an indemnity bond before he would print their ads on this election. They declined to give such a bond, and accordingly were refused newspaper space. Second, a city councilman on his own initiative spoke to two separate groups of city employees, pointing out the need for new school facilities and the probable effect on the city's population if they were not built. The ultimate effect, he said, might be a curtailment of the city's services and budget. Plaintiffs see this as a thinly veiled, coercive threat to the employees' jobs if they failed to vote for the bonds. Third, they complain that the board members took an open stand in favor of the bonds, signing brochures and organizing a block captain campaign. They should, plaintiffs insist, have maintained a detached neutrality—even about a matter entrusted to their official care by the electorate.

Whatever may be the merits of plaintiffs' position on these matters—and we would be hard put to find any substantial merit—there is no showing beyond mere speculation that any of them had any effect on the outcome of the election. Further, as we said of a similar contention in *Humphrey v. City of Pratt*, 93 Kan. 413, 416, 144 Pac. 197, "Unscrupulous campaign methods must be met in some other way than by an action to enjoin issuance and sale of bonds."

It follows that the election was not invalid for any of the reasons asserted, and the district court correctly refused to enjoin the issuance of the bonds. The judgment is affirmed.

APPROVED BY THE COURT.

FATZER, C. J., not participating.

ATTACHMENT #1-13

No. 57,643

IN THE MATTER OF THE ELECTION OF DANIEL A. LEVENS TO THE POSITION OF SHERIFF OF HAMILTON COUNTY, KANSAS. THOMAS M. LAMBETH, *Appellee*, v. DANIEL A. LEVENS, *Appellant*.

(702 P.2d 320)

SYLLABUS BY THE COURT

1. ELECTIONS—*Disabled Voter—Assistance for Disabled Voter.* K.S.A. 1984 Supp. 25-1124(b) allows any sick, physically disabled or illiterate voter who is unable to mark or transmit an absentee ballot to request assistance in marking or transmitting an absentee ballot. When a disabled voter, innocently depending on the assistance given, has his ballot marked, he is entitled to have it counted, in the absence of proof that his directions were not followed.
2. SAME—*Irregularity in Election—Invalidation of Election.* An election irregularity will not invalidate an election unless it is shown to have frustrated or to have tended to prevent the free expression of the electors' intent, or to have otherwise misled them.
3. SAME—*Challenge to Qualification of Voter's Right to Vote by Absentee Ballot.* Any challenge to the qualification of the voter's right to vote by absentee ballot must be made at the time the person offers to vote and not after the ballot has been cast.
4. SAME—*Illegal Vote—Effect on Validity of Election.* An illegal vote does not invalidate an election. An illegal vote may change the results of an election if it can be shown for whom the vote was cast. If it cannot be determined for whom the vote was cast, the election must stand.
5. SAME—*Voter Who Violates Election Laws Can Be Compelled to Disclose for Which Candidate He Voted.* K.S.A. 60-431 provides that "every person has a privilege to refuse to disclose the tenor of his or her vote at a political election unless the judge finds that the vote was cast illegally." While a legal voter cannot be compelled to disclose for which candidate he voted, the law does not protect those who violate the election laws.
6. SAME—*Void Election—Statutory Authorization Required.* An election cannot be declared void unless such relief is authorized by law since there is no inherent power in the courts to pass on the validity of elections. An election cannot be declared void where a statute otherwise limits and prescribes the duties of the court on the trial of a contest.
7. SAME—*Tie Vote—Statutory Provision for Breaking Tie Vote—Constitutionality.* K.S.A. 25-3108, which provides for the breaking of a tie vote by lot, is not a form of unconstitutional lottery.

Appeal from Hamilton district court, STEVEN P. FLOOD, judge. Opinion filed July 2, 1985. Affirmed in part, reversed in part and remanded for further determinations.

E. Edward Brown, of Calihan, Brown, Osborn, Burgardt and Wurst, of Garden City, argued the cause and was on the brief for appellant.

K. Mike Kimball, of Hathaway and Kimball, of Ulysses, argued the cause and was on the brief for appellee.

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The opinion of the court was delivered by

LOCKETT, J.: This is an appeal from the decision of the district court in Hamilton County in which the court found that the appellee had won the sheriff's race by one vote.

Thomas M. Lambeth was the incumbent Democratic candidate and Daniel A. Levens was the Republican challenger for the Hamilton County Sheriff's office in the November 1984 general election. Election results indicated 759 votes for Lambeth and 756 votes for Levens. Levens obtained a recount. On November 13, 1984, the special election board recounted and found a tie vote of 759 each. A coin was tossed and Levens was named the winner.

Lambeth filed a notice of election contest. Trial was set and a panel of three inspectors was appointed pursuant to K.S.A. 25-1447 to recanvass the vote. The three inspectors met on November 30, 1984, recounted the ballots, and determined that there were 758 votes for Lambeth, 756 votes for Levens, and three votes which were questionable. In addition, the inspectors for the first time identified and separated for the court's inspection 18 void and/or blank ballots.

Trial commenced on December 3, 1984. At trial, Mrs. Alta Lewis, a registered voter, testified that she cast absentee ballots in the election on behalf of both herself and her bedridden husband, William George Lewis. Mrs. Lewis marked her husband's ballot outside of his presence and marked it identically to her own ballot. Mrs. Lewis later either assisted her husband in signing the certificate on the outside of the absentee ballot envelope or signed it for him.

The district court found that (1) all three questionable ballots involved erasures and that the voters' intent was clear, that there were two more votes for Levens and one for Lambeth, bringing the total to 759 votes for Lambeth and 758 votes for Levens; (2) that it could not consider or rule on the validity or effect of the William Lewis absentee vote because "illegal votes of this nature must be challenged by election officials and cannot be challenged later in an election contest"; and (3) that any irregularity in the Lewis vote did not constitute grounds for a new election. The court then named Lambeth the winner of the election.

Levens contends that the district court should have considered

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the validity of the Lewis absentee ballot and, if it were illegal, should have excluded it from the final tally. Lambeth argues that the district court was correct in refusing to consider the legality of the vote.

William Lewis was a registered voter in Hamilton County and at the time of the election was a resident of a nursing home. Bob Gale, a party precinctman, obtained two absentee ballots, one for Lewis and one for his wife. Mrs. Lewis went to Gale's office and filled out both ballots in Gale's office. She took Mr. Lewis' ballot to him and signed for him or helped him sign the outside of the ballot. She testified as follows:

"Q. Had you discussed with your husband the vote before you marked the boxes?
A. Yes, sir. I told him that—whether he understood or not I don't know.
Q. What do you mean by that, whether he understood?
A. Well, he is kind of bad you know.
Q. Does he have difficulty in remembering things and making decisions?
A. Yes, sir.
Q. So, you're not certain he understood what you talked to him about on the ballot, is that right?
A. I think he did.
Q. Did you discuss with him the votes that you had cast?
A. I did.
Q. Do you think that he knew what you were talking about?
A. Well, he looked at me like he knew what I was talking about.
Q. And then you took these ballots and went where with them?
A. I took them to Mr. Gale's office and he brought them back up here I guess. He said he would."

K.S.A. 1984 Supp. 25-1124(b) allows any sick, physically disabled or illiterate voter who is unable to mark or transmit an absentee ballot to request assistance in marking or transmitting an absentee ballot. The county election officer must allow a person to assist the impaired voter in marking and transmitting an absentee ballot, if an affidavit is signed by the person who renders assistance and is submitted to the county election officer with the absentee ballot. The affidavit contains a statement from the person providing assistance that the person has not exercised undue influence on the voting decision of the impaired voter and that the person providing assistance has marked the ballot as instructed by the voter.

While there was no testimony as to whether Mrs. Lewis signed the affidavit required in 25-1124(c), failure to file it is not sufficient cause to invalidate the whole election.

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A substantial compliance with the law regulating the conduct of elections is sufficient, and when the election has been held and the will of the electors has been manifested thereby, the election should be upheld even though there may have been attendant informalities and in some respects a failure to comply with statutory requirements; mere irregularities should not be permitted to frustrate the will of the voters, nor should the carelessness of election officials. 29 C.J.S., Elections § 214(1). See also *Kimsey v. Board of Education*, 211 Kan. 618, 629, 507 P.2d 180 (1973); and *Brown v. Summerfield Rural High School Dist. No. 3*, 175 Kan. 310, 262 P.2d 943 (1953).

In *Hooper v. McNaughton*, 113 Kan. 405, 214 Pac. 613 (1923), an election was not annulled because of irregularities surrounding a vote by a disabled voter. The court said that "when a disabled voter, innocently depending on the assistance given, has his ballot marked, he is entitled to have it counted, in the absence of proof that his directions were not followed. There is no evidence that any voter who was not entitled to it received assistance, that any ballot was not marked as directed, or that the judges and clerks acted otherwise than in good faith." 113 Kan. at 408-09.

An election irregularity will not invalidate an election unless it is shown to have frustrated or to have tended to prevent the free expression of the electors' intent, or to have otherwise misled them. Mrs. Lewis' failure to sign the affidavit did not frustrate, prevent free expression or mislead others thereby invalidating this election. There is no evidence of intentional or willful violation of the statute. The failure to sign the affidavit was a minor irregularity and should not prevent Mr. Lewis' vote from being counted or cause the annulment of the election if Mr. Lewis' vote was legally cast.

The district court concluded that even if the Lewis vote were irregular or illegal, it could be challenged only by election officials at the time it was cast and not later in an election contest. The court erroneously based its decision on *Burke v. State Board of Canvassers*, 152 Kan. 826, 107 P.2d 773 (1940). *Burke* involved an original proceeding in mandamus brought to determine whether or not the persons executing the affidavits were qualified electors of the state. Burke concerned the interpreta-

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tion of statutes pertaining to the right of electors absent from the state to vote.

At common law there was no right to contest in court any public election. All election law is created either by the constitution or by statute. K.S.A. 25-1135 establishes the procedure for verifying eligibility of absentee voters. K.S.A. 25-1136 provides that a challenge of the vote of any absentee voter may be made in the same manner as other votes are challenged, and that "[i]n all such cases, the judges shall endorse on the back of the envelope the word 'challenged' and the reason for sustaining the challenge." The law contemplates a challenge at the time the person attempts to vote, not at some subsequent time and not when the vote is being counted. No provisions are made for challenging a voter's right to vote after the ballot has been cast.

All of the statutory language implies that any challenge to the qualification of the voter's right to vote by absentee ballot must be made before the ballot is opened, not afterwards. K.S.A. 1984 Supp. 25-2908 provides in part that "[i]f any person desiring to vote at any election shall be challenged, the person shall not receive a ballot until the person shall have established the right to vote. . . ." The qualifications of the voter cannot be challenged later, because once the ballot is opened and commingled with the others, there is no way of identifying which one is the challenged voter's ballot.

The district court was incorrect in determining that the legality of Lewis' vote could be questioned only at the time it was cast, because it is only the voter's right to vote which must be challenged at that time.

Levens contends that the district court should have found that Mr. Lewis' vote was illegal and void, and since the invalidation of a single vote would place the outcome of the election in doubt, the court should have ordered a new election. Lambeth contends that the vote was not illegal and could not have been the basis for a new election.

K.S.A. 25-2416(b) makes it illegal to vote or attempt to vote more than once at the same election. Whether Mrs. Lewis actually cast two votes has not been determined. From her testimony it is unclear whether she discussed for whom to vote with her husband or if she filled out his absentee ballot according to his wishes.

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Even if it is determined that Mr. Lewis' vote was illegally cast by his wife, an illegal vote does not invalidate an election. An illegal vote may change the results of an election if it can be shown for whom the vote was cast. If it cannot be determined for whom the vote was cast, the election must stand. *Olson v. Fleming*, 174 Kan. 177, 254 P.2d 335 (1953); *Talbot v. Sughrue*, 36 Kan. 225, 12 Pac. 935 (1887).

Levens argues, however, that he cannot ascertain how Mrs. Lewis marked her husband's ballot, because if she were to reveal this she would reveal how she voted on her own ballot which she marked identically to her husband's. He maintains that she has a right to the secrecy of her ballot above any other rights.

K.S.A. 60-431 provides that "[e]very person has a privilege to refuse to disclose the tenor of his or her vote at a political election unless the judge finds that the vote was cast illegally." Generally the law protects voters in maintaining the secrecy of their ballot. However, the public policy which protects the secrecy of the ballot may yield to the greater public policy to have in office individuals who were properly and legally elected. A voter is presumed to have been qualified and cannot be compelled to disclose how he voted until this presumption is overcome. While a legal voter cannot be compelled to disclose for which candidate he voted, the law does not protect those who violate the election laws. When it has been established that a voter was not qualified to vote, any person having requisite knowledge may testify for whom such voter cast his ballot or the unqualified voter may be compelled to disclose for whom he voted. See *Campbell v. Ramsey*, 150 Kan. 368, 92 P.2d 819 (1939).

Levens relies on *McCavitt v. Registrars of Voters of Brockton*, 385 Mass. 833, 434 N.E.2d 620 (1982), to support his argument that Mrs. Lewis should not have to reveal how she marked her husband's ballot. In that case, an unsuccessful candidate for mayor challenged the determination by the board of registrars of voters that another candidate had won the election. The trial judge found that eleven absentee voters had failed to follow the material procedures set out in the statute for voting an absentee ballot. Consequently, the judge ruled that the absentee ballots cast by those voters were invalid and had to be rejected. The judge then compelled the voters who cast the invalid ballots to

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disclose the candidates for whom they had voted, and those votes were subtracted from the appropriate candidate's total. The Massachusetts Supreme Court determined, however, that the court had erred in compelling the absentee voters to disclose for whom they voted. The Massachusetts court declined to burden the good faith absentee voter with the possibility that a technical mistake in the execution of an absentee ballot may require the voter to reveal for whom the voter had cast a ballot.

McCavitt does not support Levens' argument that Mrs. Lewis should not have to reveal how she marked her husband's ballot. The absentee ballots in *McCavitt* were invalid because of a technical error, similar to Mrs. Lewis' failure to sign an affidavit that she had assisted her husband in voting his ballot. If Mrs. Lewis' marking of her husband's ballot is found to be illegal, it was not because of an irregularity in procedure, but because she violated a statute which prohibits her from voting twice. It would be more reasonable to have her reveal how she voted on her husband's ballot and have that ballot disqualified, than not to have her testify as to how she marked her husband's ballot and throw out the whole election.

Since the district court never determined that Mr. Lewis' vote was illegally cast by his wife, it is necessary for the court to first determine whether Mr. Lewis' vote was illegally cast. If Mr. Lewis' vote was illegal, then Mrs. Lewis will be required to testify as to how she marked her husband's ballot for sheriff of Hamilton County, and that vote should then be subtracted from the total votes certified for that candidate.

Levens contends that an illegal vote should be sufficient grounds for allowing a new election. He cites *State v. Tipton*, 166 Kan. 145, 199 P.2d 463 (1948), in which this court said that elections must be invalidated where there has been a violation of statutory provisions.

K.S.A. 25-1448 provides that where a contestant to an election prevails on the grounds stated in subsection (a), (b) or (e) of K.S.A. 25-1436, the court may order another election to be held within 30 days. Those subsections allow a new election when:

(a) The person to whom a certificate of election was issued was ineligible to hold such office at the time of the election;

(b) where qualified voters are deprived of the right of voting and the deprival could change the result of the election; or

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(e) the person to whom the certificate of election was issued offered or gave, or caused to be offered or given, a bribe to any person charged by law with any election duty, for the purpose of procuring such person's election.

Ordinarily an election should not be declared void unless it is shown that the result is not in accordance with the will of the electorate or that such will cannot be ascertained because of uncertainties. Public policy requires courts to uphold the validity and declared results of elections which have been properly and fairly conducted or which do not clearly appear to have been illegal. The courts should go to extreme lengths to preserve the validity of all elections, and be slow and reluctant to override the clear intent and purpose of the electorate. An election should not be declared a nullity if on any reasonable basis such a result can be avoided.

An election cannot be declared void unless such relief is authorized by law since there is no inherent power in the courts to pass on the validity of elections. An election cannot be declared void where a statute otherwise limits and prescribes the duties of the court on the trial of a contest. Since the legislature has determined when the courts may order a new election, the courts are limited to those remedies. The district court correctly found that only violations of K.S.A. 25-1436(a), (b) or (e) constitute grounds for a new election.

Levens contends that one of the ballots in Lamont Township was tampered with, and that the motive for the tampering was to eliminate one vote for Levens, so that the inspectors on the recount would find that Lambeth had won by one vote. Levens' theory is that someone obtained a key to the county clerk's office following the first recount, entered the office and added Joe Shorter's name to one of the ballots so that when the inspectors counted the ballots, a Levens vote would be disqualified. No evidence was presented to show that the cans had been opened and the seals removed at any time between the recount and the inspection by the court-appointed inspectors.

The only real evidence that Levens has that the ballot was tampered with is that members of the election and recount boards did not remember seeing the ballot at the times they counted the ballots. The tally sheets signed by the board members, however, show that such a vote was recorded.

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The district court found that "the Joe Shorter ballot existed in its present form on the day of the election, no ballot tampering is indicated, the ballot is void, and was probably miscounted as a Levens vote by the special election board."

When a verdict or judgment is attacked for insufficiency of the evidence, the duty of the appellate court extends only to a search of the record for the purpose of determining whether there is any competent substantial evidence to support the findings. The appellate court will not weigh the evidence or pass upon the credibility of the witnesses. Under these circumstances, the reviewing court must review the evidence in the light most favorable to the party prevailing below. *Craig v. Hamilton*, 221 Kan. 311, 313, 559 P.2d 796 (1977); *Prince Enterprises, Inc. v. Griffith Oil Co.*, 8 Kan. App. 2d 644, 648, 664 P.2d 877 (1983) quoting *Marcotte Realty & Auction, Inc. v. Schumacher*, 229 Kan. 252, Syl. ¶ 1, 624 P.2d 420 (1981). Upon appellate review this court accepts as true the evidence and all inferences to be drawn therefrom which support or tend to support the findings in the trial court, and disregards any conflicting evidence or other inferences which might be drawn therefrom. *Marcotte Realty & Auction, Inc. v. Schumacher*, 229 Kan. 252, Syl. ¶ 2, 624 P.2d 420 (1981); *Robles v. Central Surety & Insurance Corporation*, 188 Kan. 506, Syl. ¶ 1, 363 P.2d 427 (1961); *Prince Enterprises, Inc. v. Griffith Oil Co.*, 8 Kan. App. 2d at 648.

The court's finding that no ballot tampering occurred is supported by substantial competent evidence.

Lambeth argues that K.S.A. 25-3108, which provides for the breaking of a tie vote by lot, is unconstitutional because it is a form of lottery which is prohibited by the Kansas Constitution. The district court determined that the statute does not create a lottery and is not unconstitutional. Determination of this issue is vital only if the court finds that Mr. Lewis' vote was illegal and was cast for Lambeth. Such a finding would tie the election vote count, resulting in a Levens victory.

Where a vote results in a tie, and there is no provision made for determining who shall be declared elected, there is no winner declared. However, legislatures in many states have provided by statute that if two or more persons have a tie vote, the election shall be determined by lot. If 25-3108, which allows tie elections

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to be determined by lot, is a lottery and therefore unconstitutional, a new election must be held if the election results in a tie.

Article 15, Section 3 of the Kansas Constitution provides: "Lotteries and the sale of lottery tickets are forever prohibited."

Lottery is defined in K.S.A. 21-4302(2) as "an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance." K.S.A. 21-4302(3) defines consideration to mean "anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant." Lambeth claims that the "consideration" is the amount of money a candidate must spend campaigning for election to an office; the prize is the job which pays a salary; and the flipping of a coin to determine the winner provides the element of chance.

Neither the constitution nor the statutes imply that campaign expenses are included in the definition of consideration. A candidate is not required by law to expend money in campaigning for office. Here too, while government is the promoter, it receives no commercial or financial advantage by the expenditure of the campaign funds. The government does not receive any benefit from the election other than the filling of the position sought by the candidates. K.S.A. 25-3108, which provides for the breaking of a tie vote by lot, is not a form of unconstitutional lottery.

This case is remanded back to the district court to determine:

(1) whether or not Mrs. Lewis discussed for whom to vote with her husband and whether or not she filled out his absentee ballot according to his wishes;

(2) if the court determines that Mrs. Lewis cast an illegal ballot, then Mrs. Lewis should be required to testify for which candidate for sheriff she cast Mr. Lewis' ballot, and that vote should then be subtracted from the total votes certified for that candidate; and

(3) if the illegal vote was cast for Lambeth and the election then results in a tie, Levens shall be declared elected sheriff of Hamilton County having been previously selected by lot.

Affirmed in part, reversed in part and remanded for further determinations.

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take it out then he consented to its being there. One of the difficulties with that contention is the witness, Roush, was not permitted to testify concerning the instructions he received from defendant in that regard.

The judgment is reversed with directions to grant a new trial.

No. 34,693

H. M. HANSEN, *Appellant*, v. HARRY LINDLEY, *Appellee*.

(102 P. 2d 1058)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Review of Findings.* In an election contest one issue made by the pleadings was whether certain people who had mailed their ballots to the county clerk from outside the state were residents of the precincts in the county to which their ballots were sent so as to constitute them qualified electors of that precinct and county. *Held*, that the finding of the trial court was sustained by substantial, competent evidence, and will not be disturbed on appeal.

2. ELECTIONS—*Ballots—Irregularities.* In an election contest the contestor contended that the ballots of certain voters who were outside of the state on election day, voted outside the state and mailed their ballots to the county clerk, should not be counted on account of certain defects appearing on the face of the accompanying affidavits. The ballots and accompanying affidavits were introduced in evidence before the trial court and are before us. They are examined, and it is held that where the irregularities were mere clerical errors or formal mistakes they were not sufficient to render the ballots invalid.

3. SAME—*Absentee Ballots—Irregularities.* In an election contest where contestor contended that the ballots of certain people who were within the state but away from their precinct on election day and mailed their ballots to the county clerk should not have been counted on account of irregularities and deficiencies in the affidavits required by the statutes, the affidavits are examined, and it is held that where the irregularities were clerical errors or formal mistakes and the affidavits contained all the essential information required by the statute the ballots were valid and should be counted.

4. SAME—*Absentees' Ballots—Requirements.* In an election contest case four people who were absent from their precincts, but within the state on election day, cast their ballots before a judge of election and they were mailed to the county clerk, but the affidavits provided by G. S. 1935, 25-1002, were not mailed to the county clerk, as provided by the above section. The four voters took the stand before the trial court and testified that they each did in fact go before a judge of election and make the affidavits required. *Held*, that the ballots were valid and should be counted.

5. APPEAL AND ERROR—*Review of Evidence—Written Documents.* In an election contest the contestor contends that certain ballots should not be

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counted on account of erasures, defacements and marks appearing thereon. There was no oral testimony before the trial court with reference to these defacements, erasures and marks and no contention that these ballots had been tampered with. The original ballots are before us. *Held*, this court should examine these ballots and reach its own conclusion as to whether the ballots were valid.

6. ELECTIONS—*Ballots—Erasures—Voters' Marks.* In an election contest the contestor contends that certain ballots should not be counted because of certain erasures appearing on them; the ballots are examined and it appears that the erasures were of marks put on the ballot by the voter himself. *Held*, the ballots are not invalid and should be counted.

7. SAME—*Ballots—Distinguishing Marks.* In an election contest contestor contends certain ballots should not be counted for contestee because of marks and defacements on them. These ballots are examined and it is held that it appears that the marks about which contestor complains were inadvertent marks and not put on the ballots as a means of identification and the ballots should be counted.

8. SAME—*Absentee Ballots—Affidavits—Sufficiency.* In an election contest the affidavits accompanying the ballots mailed in by people from within the state who were absent from their precinct on election day did not state clearly of what precinct the voter was an elector. *Held*, that the ballots should not be counted.

9. SAME—*Ballots—Defaced Ballots.* In an election contest one ballot showed that it had been torn by the voter. *Held*, that the ballot is invalid and should not be counted.

Appeal from Graham district court; WILLIAM K. SKINNER, judge. Opinion filed June 8, 1940. Affirmed.

C. E. Birney, of Hill City, *James E. Smith* and *E. H. Hatcher*, both of Topeka, for the appellant.

Jerry E. Driscoll, *Harold W. McCombs*, both of Russell, *W. L. Sayers* and *Casey Jones*, both of Hill City, for the appellee.

The opinion of the court was delivered by

SMITH, J.: This is an election contest. Lindley was declared elected to the office of county clerk of Graham county by the board of canvassers. Hansen contested the election. The contest court found Hansen to have been elected. Lindley appealed to the district court. That court found Lindley to have been elected. Hansen has appealed to this court.

The statement of intention to contest the election charged that among the ballots mailed in illegal votes were received and legal votes rejected in four precincts, sufficient to change the result of the election.

The answer of Lindley first stated that the statement of intention

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to contest failed to state sufficient facts to constitute grounds for a contest and that mistakes and errors were made by counting votes for Hansen that were cast for Lindley and by counting illegal ballots for Hansen and in failing to count legal ballots for Lindley.

The probate judge called two disinterested persons to sit with him as a contest court in compliance with G. S. 1935, 25-1413. This court proceeded to hear evidence on the issues and found for the contestor Hansen.

Lindley appealed to the district court pursuant to G. S. 1935, 60-3301.

When the contest reached the district court Lindley filed a demurrer to the statement of intention to contest on the ground that it did not set forth sufficient facts to entitle contestant to the relief sought and because it showed on its face that it was void under G. S. 1935, 25-1415. This demurrer was overruled. Thereupon the contestee filed a motion to strike certain allegations from the statement. When this motion came on to be heard Hansen stated that he desired to file an amended statement. He was given permission. Accordingly he filed an amended statement in which he set out errors and irregularities having occurred in four precincts in more detail than had been set out in the original statement. He also alleged errors of the board of canvassers in counting the ballots of voters who mailed their ballots to the county clerk, both from within and without the state. Before this amended statement was filed Lindley appealed to this court from the order of the trial court overruling his demurrer to Hansen's statement of intention to contest. This appeal was dismissed by this court without an opinion. Subsequently Lindley filed a motion in the trial court to strike certain allegations from the statement. This motion was overruled. Lindley then filed an answer to the amended statement of Hansen. This answer pleaded that about the same types of errors had been made in favor of Hansen and against Lindley as the statement alleged had been made in favor of Lindley and against Hansen. To this answer Hansen filed a reply in which he alleged that the answer of Lindley pleaded new matter as a ground of contest. Finally, on August 21, 1939, the issues were made up and the case came on to be heard in the district court. A little more attention than was absolutely necessary has been paid to the preliminary steps taken by the parties in framing the issues. The statutes providing for election contests do not contemplate that the technical rules with

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reference to pleadings should be strictly followed. The idea is that the whole affair should be finally adjudicated as speedily as possible. Some reference is made in the briefs to *Campbell v. Ramsey,* 150 Kan. 368, 92 P. 2d 819. This was a contest which grew out of the same election as this case.

There is a distinction between this case and the case of *Campbell v. Ramsey,* supra. That case was tried upon the transcript of the evidence made before the contest court, including the exhibits. No other evidence was introduced before the district court. In view of that situation this court had the same opportunity to examine the record and reach a conclusion as to the facts that the trial court had. We examined the record and made our own findings of fact. In this case, however, the case was tried *de novo* in the district court. That court heard witnesses and examined exhibits and reached its own conclusion as to the facts. Under such a situation we are bound by the same rule that obtains in any case tried in a district court and appealed. We cannot weigh conflicting testimony. If there was substantial evidence to support a finding of fact, then it will not be disturbed by this court on appeal. There is another rule, however, to the effect that this court will examine written documents, and where the evidence on a particular point is uncontradicted will examine the record and may reach a different conclusion as to that fact than was reached by the trial court. In this case the ballots, and in the case of mailed-in ballots, the accompanying affidavits, were submitted to the trial court with no oral testimony in some cases and we have as good an opportunity to examine these ballots and affidavits and to reach a conclusion as to the facts as the trial court had. Neither party charges any fraud and neither party questions but what the ballots were in the same condition when they were produced in district court that they were in when they were counted at the polling places. In such a case the question to be decided is which candidate received the most legal votes. (See *Campbell v. Ramsey,* supra.)

The contest court gave Hansen a majority of three. The trial court found that Lindley had received 1,394 legal votes and Hansen 1,383, or a majority of eleven to Lindley. For the purpose of presentation to this court the ballots about which question is raised are divided into three groups. These are the ballots cast outside the state and mailed in to the county clerk, as provided in G. S. 1935, 25-1101 to 25-1113; those cast by voters within the state but

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absent from their precinct on election day and mailed in, as provided by G. S. 1935, 25-1001 to 25-1008; and ballots cast at the various precincts but which are claimed by Hansen to be void under some provision of G. S. 1935, 25-416, or G. S. 1935, 25-419. Most of these were ballots that were counted for Lindley and which Hansen argues here were void and should not have been counted. There were four ballots, however, which Hansen argues should have been counted for him but which the trial court held to be void ballots and refused to count.

The first ballots we shall consider are those of Al and Sallie Richmeier, husband and wife, Joseph P. Richmeier and Sylvester Richmeier, his son, and Dorothy Lee Gillette and Blanche Gillette, her mother. These ballots were cast by the above-named persons who were absent from the state on election day. Such people are allowed to vote by the terms of G. S. 1935, 25-1101 to 25-1113. The first provision of G. S. 1935, 25-1101, reads as follows:

"It shall be lawful for any qualified elector of this state, who is to be absent from the state upon the day of any primary or general election and who is actually so absent during all of the time that polls are open on such day, to vote for county, district and state officers. . . ."

The succeeding sections then set out the procedure to be followed.

The objection of Hansen to the group of ballots we are now considering is that the persons who cast them were not actually residents of the state, hence could not be qualified electors of the state. The qualifications for electors are fixed by article 5 of the state constitution. Section 1 provides as follows:

"Every citizen of the United States of the age of twenty-one years and upwards—who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he or she offers to vote, at least thirty days next preceding such election—shall be deemed a qualified elector."

It will be noted that the question of whether one is a qualified elector turns, among other things, on a question of residence. The question of residence is about as difficult a fact question as the courts have to consider. The books are full of cases where some voter has been gone from some place, usually an old home, and has insisted that his residence for voting purposes was still at the old home precinct. We are not without help in this situation, however. G. S. 1935, 25-407, provides as follows:

"The judges of election, in determining the residence of a person offering to vote, shall be governed by the following rules, so far as they may be applicable:

"*First.* That the place shall be considered and held to be the residence of a

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person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

"*Second.* A person shall not be considered or held to have lost his residence who shall leave his home and go into another state or territory, or county of this state, for temporary purposes merely, with an intention of returning.

"*Third.* A person shall not be considered or held to have gained a residence in any county of this state, into which he shall have come for temporary purposes merely, without the intention of making said county his home, but with the intention of leaving the same when he shall have accomplished the business that brought him into it.

"*Fourth.* If a person remove to any other state, or to any of the territories, with the intention of making it his permanent residence, he shall be considered and held to have lost his residence in this state.

"*Fifth.* The place where a married man's family resides shall be considered and held to be his residence.

"*Sixth.* If a person shall go into another state or territory, and while there exercise the right of suffrage, he shall be considered and held to have lost his residence in this state."

The above section refers to the judges of election when a vote is challenged and was intended as a guide to them. There is no reason why the above section should not be a guide to the contest court, and on appeal to the district court and to this court. After all these provisions are examined, it becomes clear that the question of whether a particular person is a resident so as to make him a qualified elector is one of fact. It was so treated in this case. As has been pointed out heretofore, the trial court heard evidence on this question as to each of the ballots about which this argument is made. The court found in effect that the persons who cast these ballots were residents of the precincts of which they claimed to be residents. We have examined the record, including the transcript, and have concluded that the above finding of fact was proved by substantial, competent evidence in regard to each ballot about which the question is raised.

The next ballots we shall consider are those of Richard Briscoe and Nell Briscoe. They are not out-of-state ballots. Richard and Nell Briscoe offered themselves and tendered their ballots at the polling place in Hill City. Their votes were challenged on the ground of nonresidence. The challenge was sustained. The election board determined that they were not residents as did the trial court and did not count their ballots. Hansen argues that the trial court erred in this respect and that the ballots should have been

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counted. The ballots show that the voter in each case voted for Hansen. Lindley argues here that the failure of the election officials to comply with G. S. 1935, 25-408, is a bar to the matter of the rejection of these two ballots being considered in a contest of the election. He also argues that the statement of intention to contest did not comply with the provisions of G. S. 1935, 25-1416, in that it did not state that Richard and Nell Briscoe ever appeared and offered to vote, and hence the failure to count these two ballots cannot be considered by us. On account of the conclusion we have reached as to the finding of the trial court on the question of residence, it is not necessary for us to deal with those two questions. On the question of whether the trial court erred in finding that these two people were not qualified electors on account of nonresidence, the same rule governs as has been heretofore stated with reference to the electors who mailed their ballots in. The finding was sustained by substantial, competent evidence and may not be disturbed on appeal.

We shall now pass to the consideration of another group of ballots. This is a group of ballots mailed from out the state, each of which was voted for Lindley and about each of which Hansen argues there was such irregularity that it should not have been counted. Before proceeding with the discussion of these ballots we shall examine the pertinent statutes. The subject is covered by G. S. 1935, 25-1101 to 25-1113. These sections provide for the preparation of ballots with a stub attached containing a number which shall be the same number as the ballot. The section then provides that this stub shall contain a form of affidavit so that the voter may state clearly under oath his place of residence, including the election precinct and whether or not he has been duly registered, his post-office address at the time of election, and that he personally has marked the ballot to which the stub was attached and personally removed the stub after marking the ballot and that no other person placed any mark upon the ballot. The act then provides that between thirty days and two days before any primary or general election any persons qualified to take advantage of the act may file with the county clerk an affidavit in duplicate executed before any officer qualified to administer oaths for general purposes. In this affidavit he shall state the precinct in which he is an elector, his correct post-office address, and that he is necessarily absent from the state or will be absent from the state on election day. The stat-

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ute then makes it the duty of the county clerk upon receiving such an affidavit to determine whether or not the person named therein is a duly qualified elector of his county and to make a record of it and send the copy of the affidavit to the secretary of state. The statute then provides that the county clerk shall transmit to each person who has made such an affidavit whom he finds to be a duly qualified elector one county ballot with the stub attached, as has been described, and with printed instructions and an identification envelope bearing on the outside of it the same number as the ballot and stub. The statute then provides that any person having the qualifications may upon receiving the ballot, as described, cast his vote by making a cross mark with ink or black lead pencil in the squares opposite the names of the candidates for whom he desires to vote; that he shall then fill out in full the affidavit upon the stub, and sign it before any officer authorized by the laws of the state of Kansas or of the United States to administer oaths and swear to it in the presence of the officer who shall attach to it his certificate; that the voter shall then remove the stub from the ballot and place it in the identification envelope bearing the same number as the ballot and stub and seal this envelope and enclose it in an envelope or package duly sealed and addressed to the county clerk; that such ballot shall be marked and mailed on election day and shall reach the county clerk on or before the tenth day following the election.

It will be noted that these statutes provide for two affidavits, one upon which the ballot is given or sent to the elector, and the other to be signed when the ballot is marked and mailed in on election day.

The first ballot we shall consider under this head is that of Ernest Sandlin. This is exhibit No. 21. Both the affidavits and the ballot are furnished us. There was no oral testimony. The ballot was voted for Lindley. Hansen points out an irregularity in the affidavit filed with the county clerk upon the authority of which the county clerk issued the ballot. The irregularity is that the affiant did not sign on the line provided, but instead, by mistake, signed on the line provided for the signature of the notary. The notary then signed his name just underneath the name of the voter and affixed his seal. This affidavit is required so that the county clerk may consider the information furnished and determine whether or not the affiant is entitled to a ballot. All this information is furnished in this affidavit and it is clear that the voter treated the document as

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though it were an affidavit. The trial court was correct in counting this ballot.

The next ballot we shall consider is that of Vernon Higer, No. 15. This ballot was cast for Lindley and the trial court counted it for him. Hansen argues that on account of irregularities in the affidavit made on election day that this ballot should not have been counted. The irregularity is that when the notary took the acknowledgment, put his seal on it, and completed his certificate he at first stated "My commission expires February 17, 1938," then someone scratched out the figures "38" and wrote over them the figures "40." This appears to be a correction of a clerical error. In the absence of proof to the contrary such should be the presumption. The trial court did not err in counting this ballot.

The next ballot we shall consider is that of Isador Rohr, No. 13. This was mailed in from Minnesota. It was cast for Lindley and counted for him by the trial court. Hansen argues here that it should not be counted because of certain irregularities in the affidavit upon which the ballot was sent to Isador Rohr. The irregularity is that the venue of the affidavit is laid in Graham county, Kansas, while it is sworn to before a notary at Park Rapids, Minn. The notary in Minnesota would not have any authority to administer an oath or to take an acknowledgment in Kansas. Clearly what happened was that someone filled out the blank spaces in the affidavit and wrote in "State of Kansas, Graham county," inadvertently. The purpose of the affidavit is to enable the county clerk to determine whether the affiant is entitled to a ballot. The affidavit in this case was sufficient in that respect. The trial court did not err in counting this ballot. (See *Teutonia Loan and Building Company v. Turrell*, 19 Ind. App. 469.)

The next ballot we shall consider is that of Katheryn Stewart, No. 53. This vote was cast in the state of Michigan and was voted for Lindley. Hansen argues here that it should not be counted because the affidavit filed with the county clerk, upon which the ballot was sent to her, does not state that she is a legal elector of any precinct or township. This affidavit does contain the statement that Katheryn Stewart is a resident on a specified street in Hill City. This information was sufficient so that the county clerk was able to ascertain whether she was entitled to a ballot. The trial court did not err in counting that ballot.

The next one we shall consider is that of Ethel Spencer, No. 47.

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This vote was cast in Colorado and was counted for Lindley. Mr. Hansen argues that it should not have been counted because it appears that the affidavit of the voter, upon which the ballot was issued to her, shows that the venue was laid in Graham county, Kansas, while it was sworn to before a notary public of Adams county, Colorado. What has been said with reference to ballot No. 13 applies with equal force to this ballot. The trial court did not err in counting it.

This completes the discussion of the ballots that were voted outside of the state, mailed in to the county clerk and counted for Lindley.

The next group discussed by Hansen is that of ballots that were cast within the state, but by voters absent from Graham county. Before we proceed to a discussion of this we must notice the statute that gives people within the state, but absent from their county, the right to vote. The subject is covered by G. S. 1935, 25-1001 to 25-1008. It provides that any qualified elector who is unavoidably absent from his township or ward because his business requires him to be elsewhere outside of the county in which he resides may vote for county officers, or others, in any voting precinct where he may present himself for that purpose. The act then provides that the voter so entitled shall present himself at the polls in any precinct where he may be on such election day and make an affidavit as follows:

"STATE OF KANSAS, ... COUNTY, ss.
"I, ..., do solemnly swear that I have resided in the state of Kansas more than six months, and in the township of ..... (or in the ..... ward of the city of .....), in the county of ....., in said state, more than thirty days next preceding this date, and am in all respects a duly qualified elector of said.....; that I am a ....., and that because of my duties (or occupation or business) as such ..... I am required to be absent from my township (or ward) on this day, and have had or will have no opportunity to vote there; and that I have not voted elsewhere at this election." (G. S. 1935, 25-1002.)

Any judge of election is authorized to administer the oath and make the affidavit. He is then given a blank official ballot which he must mark the same as any resident voter and must fold it and hand it to the judges, but the ballot is not deposited in the ballot box nor entered on the poll books, but is put in an envelope upon which on the back thereof one of the judges must write "The ballot of ....., an absent voter of ..... township (or ward, or

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precinct of the ..... ward, of the city of .....), in the county of .....," which one of the judges must sign. All such envelopes must be filed with the county clerk of the county where such vote was cast not later than the day following such general election, and the county clerk shall immediately mail them to the county clerks of the respective counties where such votes belong. The statute then provides for the canvass of the ballots and for penalties for swearing falsely.

The first vote we shall consider under that head is that of Edna Swank. That ballot is designated as PA in the record. This ballot was cast for Lindley, and Hansen argues here that the vote should not be counted because the affidavit she made in Logan county did not state that she was an elector of any precinct. This affidavit is before us and it appears that she did say she was an elector of Graham county. A careful examination of the affidavit form in the statute, which has been heretofore set out, shows that the voter must swear that he was a resident of the state of Kansas more than six months and in a certain township or in a certain ward or precinct of a certain ward or in the city and county more than thirty days next preceding the election day. The affidavit form then provides that he shall state he is a duly qualified elector (the statute does not state that she shall state she is a duly qualified elector of some precinct, but does say she shall give her residence as to township or ward and state that she is an elector of .....). Hansen argues that where the last blank appears she should have written in her precinct as well as Graham county, but we hold that the statute is not clear enough that this should be done so that we could say the ballot was invalid because she did not do that. She did say she was a resident of Wildhorse township in the first part of the affidavit. This ballot was properly counted for Lindley.

The next ballot we shall discuss under this head is that of Ed Ashcroft, which is designated as PE in the record. This ballot was cast for Lindley, and Hansen says it should not be counted because the affidavit which he made when he voted does not give his reasons for being absent from his precinct. The trouble about that argument is that the affidavit is before us and it shows that he said he was a worker at Fort Riley and because of his duties as such worker he was required to be absent from his city. That seems to us a sufficient reason. Hansen also argues that the vote should not be counted because the affidavit shows he was absent from his city and

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he should have said he was absent from his township or ward. If he was absent from Hill City he certainly was absent from any township or ward in Hill City, and the court was correct in counting the ballot for Lindley.

The next ballot which we shall consider is that of Vivian Inlow, No. 4. This ballot was cast for Lindley, and Hansen says it should not have been counted because she said in her affidavit she was a duly qualified elector of the city (that would be the city of Hill City) and did not give any ward or precinct of which she was a voter. The difference between this ballot and that of Edna Swank is that Edna Swank said she was a resident of Wildhorse township in the county of Graham before she stated of what place she was a voter. In the affidavit of Vivian Inlow she does not say she resides in any township or ward or city but that she is a resident of Hill City, which contains two precincts. On this account it cannot be held that the fact that the affidavit form does not provide in the blank space for her to state of what city, township or ward she is an elector meets the situation. Hence this vote should not be counted.

The next ballot we shall discuss under this head is that of Dale U. Loyd, No. 11. This ballot was cast for Lindley, and Hansen argues that it should not have been counted at all because it appears that it was sworn to before a judge of election in a ward called absentee ward at Lawrence, Kan. The statute says that the voter shall appear before the judge in any precinct, and the judge of election of any precinct in the state may administer the oath. It does not appear from this record that there was not an absentee ward in Lawrence to which all absentee voters were sent on election day. In the absence of such a showing we will presume that the person before whom this affidavit was made was a judge of a regular election board.

The next ballot we shall consider under this group is that of LeRoy VanDuvall, designated in the record as PD. We shall consider that in connection with that of Grace VanDuvall, designated in the record as PL. (She appears to be the wife of LeRoy VanDuvall.) These two votes were cast and counted for Lindley. Hansen argues that these ballots should not be counted because they both stated that they were residents of Delaware township in Lansing precinct in the county of Graham and were duly qualified electors of Graham county. What happened here is that when they filled out their affidavits, apparently they were confused about resi-

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dence and thought when they were asked to give their residence they should tell where they were actually living and they thought they should write something about Graham county, so they said they were residents of Delaware township in Lansing precinct in the county of Graham, then went ahead and stated they were electors of Graham county. Further on in the affidavit they said they were required to be absent from Nicodemus township, which we all know is the precinct in Graham county. Lindley apparently did not make any effort to show that these two people were residents of Graham county or that they had any right to vote in Graham county. If the statements in the affidavits are to be given any weight at all we must say that neither one of these people had a right to vote in Graham county and these two votes should not be counted.

The next ballot we shall consider in this group is that of Paul Wuchter, designated as No. D or DB. This ballot was cast for Hansen, but was not counted for him because in his affidavit he did not give any reason why he was absent from his township and for the further reason that he did not write the full name of Hansen on the ballot but wrote it "Hanson." Hansen argues here that this ballot should have been counted. The argument is good. The statute giving the electors absent from the county, but in the state, the right to vote provides they shall have this right if unavoidably absent from their township or ward because their duties or occupation or business require them to be absent. The affidavit form provides for this information to be given. Wuchter took the stand in the trial court and testified. The trial court heard this testimony and found in effect that there had been substantial compliance with the statute. The ballot should have been counted.

The next ballots we shall consider are those of Seraphine Brungardt, Gwendolyn Richmeier, Martin Boxler and Mike Rome, Nos. Ce 74, Ce 75, Ce 76 and PC. These ballots were all sent in from Garden City, but none of them had the affidavit that has been referred to so many times in discussing this subject. The trial court permitted the electors in each case to take the stand and testify that they had made an affidavit and handed it to the judge of the election. If their story is correct it would appear that the judges of the election board neglected to send the affidavits in with the ballot, as is provided by the statute, which says that the affidavit shall be sent with the ballot. After the court had heard the evidence, as stated above, it counted these four ballots. They were all cast for

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Lindley. Hansen claims that this was error and that the ballots should not have been counted. Lindley argues that this case falls within the rule announced in the case of *Campbell v. Ramsey*, 150 Kan. 368, 92 P. 2d 819, with reference to the voters who were helped mark their ballots when they did not have any physical defect. This court held that failure of the election board to do its duty and hand these illiterate people ballots and let them spoil them if they wanted to or take their chance marking them correctly did not have the effect of making these ballots void. This court said:

"They [the voters] cannot be disfranchised altogether because the election board neglected to do its duty. . . . It is true that the section first quoted above [G. S. 1935, 25-416] requires the voter to 'retire alone' to the voting booth. Here again we have a failure of the election board to do its duty." (p. 385.)

We have concluded that this case comes within that rule. (See, also, *Bullington v. Grabow*, 88 Colo. 561.)

The next question we shall consider has to do with a group of ballots which were cast for Lindley at the polling places in Graham county, but which Hansen argues should not have been counted for various reasons, which will be noted as each ballot is discussed. These ballots are before us and there was no oral testimony offered with reference to them. There is no argument made but what these ballots are in the same condition they were in when counted by the election board. No question is raised as to fraud.

The first one we shall consider is exhibit C 1. Hansen argues that it should not be counted because it is clear that the voter first put an X mark in the square opposite the name of the democratic candidate for county attorney, then erased that mark and put one in the square opposite the name of the Republican candidate. Hansen argues that this is a means of identification. It is clear that this is an erasure. The assumption is that it is an erasure made by the voter. The subject is covered in part by G. S. 1935, 25-419 and 25-416. Section 25-419 provides, in part, as follows:

"Any ballot upon which there shall be found a cross mark outside any voting square, or upon which there shall be found any other mark than the cross mark used for the purpose of voting, or upon which the names have been written otherwise than as heretofore provided, or any ballot which has been defaced or torn by the voter, or from which there shall have been erased any figures, letter or word, or any ballot which shall have been marked by or written upon with other than a pencil, shall be wholly void, and no vote thereon shall be counted. Whenever a cross X mark shall be made in the square at the right of the name of more than one . . ."

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G. S. 1935, 25-416, provides, in part, as follows:

"It shall not be lawful . . . to erase any printed figure, letter or word therefrom . . . or for any person other than the voter to erase any mark or name written thereon by the voter."

The language upon which Hansen relies is "or from which there shall have been erased any figures, letter or word." We have heretofore construed G. S. 1935, 25-419 and 25-416, together and held these provisions to mean anything printed on the ballot rather than any mark the voter had made on the ballot. (See *Boddington v. Schaible*, 134 Kan. 696, 8 P. 2d 314.) Following the rule laid down in that case we have concluded that ballot C 1 was valid and should have been counted.

The next ballot we shall consider is C 3. Hansen argues that this ballot should not be counted because the voter wrote in the name of Paul Turner for township treasurer and put an X mark in the square and also wrote the name of Paul Turner as a candidate for constable and put an X mark in the space provided. This appears to be an honest effort on the part of the voter to vote for the same man for two different offices. This is not forbidden by any statute and was not done to identify the ballot. The ballot should have been counted.

The next ballot we shall consider is C 4. Hansen argues here that this ballot should not have been counted because in making the X mark in the square opposite the name of one of the candidates for probate judge the voter extended the pencil mark through the lower right-hand corner of the square for about half an inch. This mark could have been intended for a means of identifying the ballot, but it seems to us the more reasonable view is that it was made by a slip of the voter when attempting to make the cross. An examination of the mark with a magnifying glass indicates that the mark is a continuation of the downward stroke of the cross mark. Conclusion No. 10 of the commissioner in *Wall v. Pierpont*, 119 Kan. 420, 240 Pac. 251, is as follows:

"'Stray lines, lines made by a slip of the voter when attempting to make the cross, and other accidental lines, do not invalidate the ballot.'" (p. 443.)

The ballot should be counted.

The next ballot we shall consider is C 50. Hansen argues that this ballot should not be counted because of two ink spots which appear along the right-hand margin of the ballot. The crease in the ballot and the relative position of the two spots show clearly

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that a drop of ink fell on the ballot, and when it was folded the ink blotted the paper pressed against it, thus making two spots. There was evidence that the election officials used pen and ink when counting. While these spots could have been used as a means of identification, a much more reasonable explanation is that one of the judges spilled a drop of ink and it was blotted.

The next ballot we shall consider is C 51. Hansen argues that this ballot should not be counted because the voter marked the cross in the square opposite the name of Hansen and then erased that cross mark, not very neatly, to be sure, and made a cross mark in the square opposite the name of Lindley. What has been said already with reference to C 1 applies with equal force to this ballot. The court was correct in counting it.

The next ballot we shall consider is C 52. Hansen argues that this ballot should not be counted because down in the lower right-hand corner are two brown spots. It is difficult to tell whether they are defects or imperfections in the paper or are the result of the paper being scorched. At any rate, they are too minute to constitute a reason for holding the ballot invalid, since there is no evidence that they were put there by the voter. The trial court was correct in counting it.

The next is C 53. Hansen argues that this ballot should not be counted because in the square opposite the name of the only candidate for probate judge on the ticket the cross mark extends about a quarter of an inch outside the upper right-hand corner of the square. The same rule applies to this ballot as we have stated should apply to C 4. The mark appears to be the result of an inadvertent slip by the voter. G. S. 1935, 25-420, provides as follows:

"No ballot shall be invalidated and thus thrown out because a cross within the square is not made with mathematical precision. The intent of the voter must be first considered, and if in the opinion of the judges the cross is not an identifying mark the ballot shall be counted."

This mark is not an identifying mark, and the ballot should be counted.

We shall now consider a group which consists of ballots C 74, also marked P 42, C 75, C 77 and C 78. These are ballots which were cast for Lindley by persons who were given aid in marking them because they requested it even though they were not entitled to it on account of some physical disability, as provided in G. S. 1935, 25-416. The record is not clear about just what happened in these

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cases and is not clear that the particular ballots in question were cast by people who were not entitled to help. However, the entire question is settled by what we said in *Campbell v. Ramsey*, supra, a quotation from which has already been set out in this opinion. The trial court was right in counting the ballots.

The above group of ballots were considered at this point in the opinion because it is treated at that place in the brief of appellant. We shall return to a consideration of the alleged defective ballots.

The next one is C 80. Hansen argues that this ballot should not be counted because it shows erasures and smudges. The voter wrote in the name of George Nickelson in the blank space provided for candidates for township trustee and put a cross in the square opposite his name. Then he wrote in the name of Everett Kohart in the blank space provided as a candidate for township treasurer. Where the complaint about erasure comes in is that each one of these names appears to have been written over a place where another name had been erased. There is just enough of the erased name visible in each case so that it appears that what happened was that the voter wrote the name of Everett Kohart in as a candidate for township trustee and that of George Nickelson as a candidate for township treasurer and realized after he had done this that he wanted it the other way around and erased the names and wrote them in the way he wanted them. At any rate, what has already been said in a consideration of C 1 is a sufficient answer to Hansen's argument on this point. The court was right in counting this ballot.

The next one is C 81. On this ballot the voter evidently made a cross mark in the square opposite the name of Hansen, then erased his mark in the square opposite the name of Lindley. This mark is peculiar in that the mark from the upper left-hand corner to the lower right-hand corner is heavy and black, while the other mark of the cross is so faint and light it can hardly be seen. The same thing seems to have happened in the case of the two candidates for county treasurer. At first glance this would seem to come under the same head as C 1 and C 80, but the trouble is, when the voter erased the cross mark he had made after the name of Hansen he tore the ballot. The tear is about half an inch one way and an inch the other. G. S. 1935, 25-419, provides, in part, "any ballot which has been defaced or torn by the voter . . . shall be wholly void and no vote thereon shall be counted." There can be no doubt that this ballot was torn by the voter. Either the language quoted means

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what it says or it does not. There is very little for a court to say as to such a question. The ballot should not have been counted.

The next one we shall consider is C 99. Hansen argues that this ballot should not be counted because the voter made just half a cross mark after the name of one of the candidates for superintendent of public instruction. If this were the whole picture he would be right, but an examination of the ballot shows that the voter made half of the cross mark after the name of one of the candidates, then erased that half line and made a good cross mark after the name of the other candidate. The court was correct in counting this ballot.

The next ballot we shall consider is C 45. Hansen argues that this ballot should not be counted because of what he refers to as a red mark on the back of it. There is a mark of some kind on the ballot, all right, about in the middle of it and a third of the way from the top. It is right on the crease where the ballot was folded. There is no evidence that this was put on as an identifying mark. The ballot should be counted.

The next ballot we shall consider is C 54. Hansen argues here that it should not be counted because the voter wrote in the name of Delbert Worcester just below the blank space provided for candidates for township treasurer and put a cross mark in what he evidently thought the proper square. Then he wrote the same name in the blank space provided for candidates for township treasurer and put a cross mark in the proper square. What happened, evidently, was that this voter wanted to vote for Delbert Worcester for township treasurer, but he wrote the name just above the title of the office where it appeared on the ballot and put a cross mark in the square that follows the blank space that was provided. We say this is what happened because the name is not written in the line provided, but just below it, and for the further reason that he had already voted for one candidate for township trustee and if this name should be considered a vote for township trustee then he voted for two men for the same office, one whose name was printed on the ballot and one whose name he wrote in. Then, after he discovered his mistake, as he must have done, he wrote the name in the proper place as a candidate for township treasurer, for which office there was the name of no candidate printed on the ballot. This is clearly not an attempt to identify this ballot and it should be counted.

The next ballot we shall consider is C 97. Hansen argues that

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this ballot should not be counted. It has a triangular piece torn off a corner about an inch in length along the hypothenuse of the triangle. G. S. 1935, 25-419, provides in part:

"Any ballot which has been . . . torn by the voter . . . shall be wholly void, and no vote thereon shall be counted."

The trouble with this argument is that there is no testimony that this tear was by the voter. We cannot indulge any such presumption. The court was correct in counting this ballot.

This completes the discussion of the ballots voted in Graham county for Lindley and which Hansen says should not be counted for the reasons urged. There remains a group of ballots which were voted for Hansen and which the trial court did not count.

The first one is Ce 45. The trial court did not count this ballot because there was a cross mark in the square opposite the blank space under heading "Township Treasurer." All the cross marks on this ballot are small and light, but there is such a mark in this particular square after the blank space. Hansen argues that there has been an attempt to erase this mark, but an examination under the microscope does not disclose any attempt to erase it. This ballot should not be counted. (See Conclusion of Law No. 1 in the report of the commissioner in *Wall v. Pierpont*, supra.)

The next one we shall consider is Ce 59. The trial court did not count this ballot because there is a cross mark about a half inch to the right and a half inch above the square opposite the name of the candidate for judge of the district court. All the rest of the cross marks on this particular ballot are in the proper squares. It is clear that the voter intended to vote for the only candidate for judge of the district court. Here is the statute, however:

"Any ballot upon which there shall be found a cross mark outside any voting square . . . shall be wholly void and no vote thereon shall be counted." (G. S. 1935, 25-419.)

The ballot should not be counted.

The next ballot we shall consider is Ce 64. This ballot was not counted because there is a cross mark in the square opposite the blank line under the heading "County Treasurer." What has been said with reference to Ce 45 applies with equal force here. The ballot should not be counted.

The next one is L 26. This ballot was not counted because on the blank line provided under the heading "Justices of the Peace" the voter had placed the letters "T. W." Hansen advises us that

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the voter undoubtedly intended to vote for Tim Wagner, who was a candidate for and was elected justice of the peace at this election, and placed his initials on the ballot instead of writing in the full name. The statute makes provision for writing in the names of candidates, but makes no provision for voting for them by placing only their initials on the ballot. Naturally this must be the rule. These initials were nothing more than a mark. The ballot was void and the trial court was right in not counting it.

It will be seen that the trial court erred in its ruling as to five ballots. Since the judgment was that Lindley was elected by a majority of eleven these errors are not sufficient to require a reversal of the judgment.

The judgment of the trial court is affirmed.

DAWSON, C. J., not sitting.

No. 34,741

JOSEPH F. PEDROJA, Individually and as Trustee under the Last Will and Testament of Joseph A. Pedroja, Deceased, *Appellee* and *Cross-appellant*, v. MARY J. PEDROJA, a Widow, et al., *Appellees;* LYDIA FRANCES SIMPSON and MARY LOUISE WAYMIRE et al., *Appellants* and *Cross-appellees.*

(102 P. 2d 1012)

SYLLABUS BY THE COURT

WILLS—*Construction—Life Estate and Contingent Remainders—Appointment of Trustee.* A testator devised and bequeathed one-half of his real and personal property to his wife and one-eighth to each of his four children. It was provided that the shares of the two daughters were to be held in trust for them, the income to be paid to them during their natural lives, and at their death the remainder was to go to their heirs—the interests of the grandchildren to be held in trust until they should attain the age of twenty-one years. In an action to construe the will and appoint a trustee to execute oil and gas leases, the record is examined, and *held,* no error was committed in the construction of the will, in the appointment of a trustee, in the order removing the testamentary trustee, and in the judgment allocating the royalties from the mineral leases.

Appeal from Greenwood district court; ALLISON T. AYRES, judge. Opinion filed June 8, 1940. Affirmed.

Robert Stone, James A. McClure, Robert L. Webb, Beryl R. Johnson, Ralph W. Oman, all of Topeka, *Thomas C. Forbes* and *Harold G. Forbes,* both of Eureka, for the appellants and cross-appellees.

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the last day was Sunday; that under our various statutes and decisions declaring our public policy with respect to Sunday, it may not be said Sunday was a proper day on which a notice or claim should be served, and it should therefore be held that when the last day for service fell on Sunday, the claimant had the next secular or business day in which to make service.

The contention that the claim for compensation was served too late is not sustained. The judgment of the trial court is affirmed.

No. 35,118

WILLIAM H. BURKE, *Plaintiff*, v. THE STATE BOARD OF CANVASSERS OF THE STATE OF KANSAS, consisting of PAYNE RATNER, Governor, FRANK J. RYAN, Secretary of State, GEORGE ROBB, Auditor of State, WALTER E. WILSON, Treasurer of State, and JAY S. PARKER, Attorney General, *Defendants*. (MRS. R. P. EVANS, ELLA WOOD, DAVID M. BODDINGTON, ELLA BODDINGTON, CHARLES F. MCCAMISH, H. BREWSTER POWERS, GRANVILLE M. BUSH, HELEN BUSH, JOSEPH B. BREICHLEIN, LAVERN ALBERT BAMBERG and DR. C. MART MONTEE, *Interveners*.)

(107 P. 2d 773)

SYLLABUS BY THE COURT

1. MANDAMUS—*When Writ May Issue—Discretionary Nature.* Before a writ of mandamus may issue against a public officer to compel performance of any act, it must appear the applicant for the writ has the clear legal right to compel the act and that such act is one which the law specially enjoins as a duty resulting from the office held by the officer sought to be coerced.
2. ELECTIONS—*Absentee Voters' Statute—Construction.* Under the provisions of G. S. 1935, 25-1101 to 25-1113, both inclusive, any qualified elector who is to be absent from the state upon the day a general election is held, and who is actually so absent, may vote for state officers upon compliance with the statute, and his qualification so to do is determined by the county clerk of the county where the voter resides and evidenced by the certificate which the county clerk delivers to the secretary of state.
3. SAME—*Time for Absentee Voting.* Under the above statute, the voter casts his vote on election day.
4. SAME—*Absentee Voters' Statute—Identifying Affidavits.* The affidavit form attached to the ballot when sent out by the secretary of state, and executed, detached and placed in the identification envelope, and returned with the ballot to the secretary of state, is for the purpose of identifying the voter as being the same person who was certified by the county clerk to the secretary of state and is not for the purpose of showing the voter's qualifications otherwise.

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5. SAME—*Ballots of Absentee Voters—Duties of State Canvassing Board.* At the canvass of the votes returned to the secretary of state under the above statute, it is the duty of the state board of canvassers to determine that the person whose vote is to be counted is the same person who was certified by the county clerk as a qualified elector, but the board has no power or discretion to otherwise determine qualification of the voter; its power and discretion is to determine identity of the voter, and that the ballot has been marked and transmitted as required by law, and then to count the ballots so properly marked and transmitted.
6. SAME—*Absentee Voters' Statute—Constitutionality.* The provisions of the above statute for determining qualifications of a voter are a valid exercise of the power conferred on the legislature under article 5, section 4, of the state constitution. The fact there is no provision for challenging the right of an elector to vote does not render the act unconstitutional.
7. SAME—*General Election Laws—Effect on Absentee Statute.* The provisions of the general election laws with respect to the right to challenge are not applicable to a person voting under the provisions of the above statute.
8. SAME—*Absentee Voters' Statute—Right to Secret Ballot.* A person voting for a state officer under the provisions of the above statute waives his right of secrecy of his ballot only insofar as the state board of canvassers is concerned.
9. SAME—*Crimes—Violation of Secrecy of Ballot.* A member of the state board of canvassers may not disclose to anyone, except as may be ordered by any court of justice, the contents of any ballot cast under the above act as to the manner in which the same may have been voted or by whom the same was voted, without subjecting himself to the penal provisions of G. S. 1935, 25-1720.
10. SAME—*Right of Candidate to Inspect Absentee Identifying Affidavits.* A candidate for a state office and his representatives have no right at a meeting of the state board of canvassers to inspect and examine the affidavit of any person returned with his ballot to the secretary of state under the above statute, and they may not examine and inspect the same at any other time except under the lawful order of a court of justice in a proper proceeding then pending.

Original proceeding in mandamus. Opinion filed December 7, 1940. Writ denied.

Jerry Driscoll, of Russell, *D. C. Hill*, of Wamego, *George H. West*, of Kansas City, *George B. Collins*, of Wichita, and *E. R. Sloan*, of Topeka, for the plaintiff.

Jay S. Parker, attorney general, *C. Glenn Morris*, assistant attorney general, and *Chester Stevens*, special assistant attorney general, for the defendants.

Hal E. Harlan, of Manhattan, for Mrs. R. P. Evans; *J. H. Brady* and *Ernest H. Yarnevich*, both of Kansas City, for Ella Wood; *Edward M. Boddington, Wm. H. McCamish, Edward H. Powers*, all of Kansas City, and *W. C. Jones*, of Olathe, for David M. Boddington, Ella Boddington, Charles F.

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McCamish, H. Brewster Powers, Granville M. Bush, Helen Bush and Joseph B. Breichlein; *Hart Workman*, of Topeka, for Lavern Albert Bamberg; and *C. A. Burnett*, of Pittsburg, for Dr. C. Mart Montee, interveners.

The opinion of the court was delivered by

THIELE, J.: This is an original proceeding in mandamus brought by plaintiff against the state board of canvassers to compel that board to permit plaintiff to examine certain affidavits returned to the secretary of state in connection with absentee ballots, and as more specifically referred to hereafter. Upon the filing of the application, we made a rule to the defendant to show cause why a peremptory writ should not issue. The defendant has filed its combined motion to quash and answer, and a number of electors have been permitted to intervene.

The application for the writ sets forth the status of the defendant and its official composition; that plaintiff was the Democratic candidate for the office of governor and his name appeared on the official ballot at the election held on November 5, 1940, and that Payne Ratner was the Republican candidate for that office; that prior to that election and by virtue of G. S. 1935, ch. 25, art. 11, ballots were sent by the secretary of state, on application of persons claiming to be electors of Kansas, to divers places outside of Kansas; that about 7,500 of such ballots were mailed out and about 7,000 were voted and returned; that the defendant board is now canvassing such ballots; that the affidavits attached to the ballots, as provided by statute, have by that board been segregated from the ballots, and plaintiff, through his representatives, has demanded opportunity to inspect the affidavits to determine whether or not they are in accordance with the statute; that the defendant has refused to permit plaintiff or his representatives to examine or inspect the affidavits and it is necessary for plaintiff to examine the affidavits to determine whether or not the persons executing the same and returning the ballots are qualified electors of the state of Kansas; that there is no valid excuse for the refusal of the defendant board to permit examination of the ballots (probably "affidavits" was the word intended), and this plaintiff has no other adequate remedy than through proceedings in mandamus. The prayer is for a writ of mandamus to compel the defendant board to permit plaintiff, or his duly authorized representatives, to examine the affidavits.

The motion to quash and the answer of the defendant board may be summarized: (1) The court is without jurisdiction of the parties

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or of the subject matter. (2) The motion for the writ shows on its face insufficient facts to constitute the basis for a writ of mandamus. (3) The plaintiff is not entitled to the writ for the reason he has a plain and adequate remedy at law. (4) That the defendant board, under the statute, possesses right, power and discretion to determine validity of any ballots cast by electors of the state under the above-mentioned statute, and in connection therewith the defendant alleges that the statutes do not authorize or require the board to admit any candidate or his representative to witness either the count of the ballots or the qualifications of the electors who cast such ballots, and that under the statute the county clerk of each county is vested with the absolute power to determine the qualification of any resident elector for the purpose of casting an absentee ballot, and his decision is final and conclusive and binding on the secretary of state and the defendant board. It was further alleged the board is vested with power of discretion to determine whether such an elector has made his affidavit and marked his ballot in accordance with the statute, and the decision of the board is final and there is no appeal therefrom except by reason of the statutes providing for a legal contest of the election; that the board cannot be sued without consent of the state and there has been no such consent; that there is a presumption the board has performed its duties in a lawful manner and there is no allegation it has acted otherwise in counting the out-of-state absentee ballots; that if the writ issue it would render nugatory provisions of statute relative to secrecy of the ballot; that the purpose of the affidavit is to enable the board to identify the voter with the person certified by the county clerk as a qualified elector, and that the board is vested with a sound discretion to determine whether the affidavit is in the form prescribed by law and such discretion cannot be controlled by mandamus.

The various applications to intervene set forth the reasons why, and where the interveners voted, and that each is entitled to have his vote kept and maintained secret from all persons other than the state board of canvassers, and that his right to such secrecy should be protected.

For our purposes, the statute, with reference to the issuance of a writ of mandamus, reads:

"The writ of mandamus may be issued by the supreme court . . to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station; but though it may require an inferior

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tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion." (G. S. 1935, 60-1701.)

Under the statute, it has been frequently held that the applicant for the writ must show a clear legal right to have the thing done which is asked for, and it must be the clear legal duty of the party sought to be coerced to do the thing he is called upon to do. (*Swartz v. Large*, 47 Kan. 304, 27 Pac. 993; *National Bank v. Hovey*, 48 Kan. 20, 28 Pac. 1090; *Hughes v. Parker*, 63 Kan. 297, 65 Pac. 265; *State v. Cloud County Comm'rs*, 148 Kan. 626, 84 P. 2d 405.) And in some of the above cases, as well as in *Drainage District v. Wyandotte County et al.*, 117 Kan. 369, 232 Pac. 266, it was held that no writ should issue in doubtful cases or to enforce a right which is in substantial dispute.

In *Sharpless v. Buckles*, 65 Kan. 838, 70 Pac. 886, it was held:

"The only purpose of a writ of mandamus is to require the person to whom it is issued to perform some act which the law enjoins as a duty. The writ itself confers no power and creates no duty, and its only office is to command the exercise of a power already possessed, or the performance of a duty already imposed.

"The duty of a county canvassing board is ministerial only. If the election returns made to the county clerk are genuine and regular, the board has no other duty to perform than to make the footings and declare the result. Mandamus will not lie to require a county canvassing board to recanvass returns and exclude from the count certain votes because cast and returned under a law that is claimed to be unconstitutional, since the determination of such question is not a duty imposed on the board, nor within its power." (Syl. ¶ ¶ 1, 2.)

A similar situation to that considered in the above case was considered in *Lemons v. Noller*, 144 Kan. 813, 63 P. 2d 177, where absentee ballots had been counted and an application for a writ to prevent was entertained, but where in the second paragraph of the opinion it was stated that our action in so doing was not to be considered as a precedent that proceedings in mandamus may be substituted for a proceeding to contest an election or other proper remedy. In the present case, we do not choose to deny the writ upon the technical ground that some other remedy may be available. The question presented requires an answer for the guidance of public officials, and possibly would be difficult to raise if a different remedy were pursued.

It appears that under our statute pertaining to mandamus, and under our decisions treating the statutes and the general right to the writ, that before the writ may issue, it must appear the plaintiff

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has a clear right to compel the performance of an act which it is the lawful duty of the officer or board sought to be coerced to perform, and so we proceed to an examination of our statutes pertaining primarily to the right of electors absent from the state to vote, with especial attention to their qualification, manner of voting, return of ballot, counting of votes, and to such provisions of the general election laws as may be applicable, to determine what the right of a candidate for a state office may be to inspect the affidavit returned with the ballot.

As a preliminary to an intelligent discussion, it is necessary that a review be made of the particular statute with reference to the right of electors absent from the state to vote at a general election, the same being G. S. 1935, chapter 25, article 11. Except as otherwise necessary, we shall refer only to such ballots as are cast for state officers and returned to the secretary of state, but otherwise the summary is quite complete. As all statutory references hereafter made refer solely to chapter 25 of the General Statutes of 1935, to avoid repetition we shall refer only to the section number.

Under section 1101, a qualified elector who is to be absent from the state upon the day of a general election and who is actually so absent may, upon having complied with the law in regard to registration if applicable to him, vote for state officers. The concluding sentence of the section reads: "The votes of such electors shall be cast and received and canvassed as in this act provided."

Section 1102 refers to the county clerk's duties in the preparation of ballots for county offices. Section 1103 makes it the duty of the secretary of state to procure ballots for state officers, and that attached to each ballot shall be a stub with a perforated line allowing it to be easily torn from the ballot. The ballots shall be consecutively numbered and the stubs shall contain the same numbers as the ballot. The stub shall contain a printed form of affidavit, to enable the voter to state his place of residence, election precinct and place of residence therein, whether he is duly registered and that he personally marked the ballot to which the stub was attached and personally removed the stub after marking the ballot. It is here noted that it is these particular affidavits which are to be removed from the ballots which plaintiff desires to inspect and examine. We shall hereafter refer to them as identifying affidavits to distinguish them from another and different affidavit required by the following section. Section 1104 requires that in a specified time preceding an

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election, any person described in section 1101 may file with the county clerk of the county of which he is a resident an affidavit in duplicate duly executed. We shall hereafter refer to these affidavits as the qualifying affidavits. These qualifying affidavits shall state the precinct in which the elector is a resident and his correct post office address, and that he will necessarily be absent on election day. The statute then reads:

"It shall be the duty of the county clerk at once upon receiving such affidavit to ascertain and determine whether or not the person named therein is a duly qualified elector of such county, and to enter upon a record kept by him such name, and thereupon he shall mail to the secretary of state one copy of each such affidavit and file the other in his office, and certify to the secretary of state the name of such person named therein to be a duly qualified elector of his county." (25-1104.)

Under section 1105 it is the duty of the secretary of state, upon receiving the certificate from the county clerk with a copy of the qualifying affidavit, to forward to the voter named in the certificate one of the state ballots with stub attached and with printed instructions and an identification envelope having the same number outside as the number of the ballot and stub which he sends the voter. Section 1106 provides that the voter, upon receipt of the ballot, may cast his vote by placing his cross mark with ink or black pencil opposite the name of each person for whom he wishes to vote and that he shall make no other mark and allow no other person to make any marks on the ballot, and he shall then fill out the identifying affidavit upon the stub, execute it in the manner provided, and shall then personally remove that affidavit and place it in the identification envelope bearing the same number as his ballot and stub (affidavit), seal the identification envelope and enclose the same with his ballot in an envelope duly sealed, addressed to the secretary of state. The statute states: "Such ballot shall be marked and mailed on such election day," etc.

Section 1107 requires the secretary of state to keep a record of the ballots sent out by him. Section 1108 pertains to the place of residence for registration purposes and is not presently involved. Section 1109 provides for canvass of all state ballots by the state board of canvassers at a time fixed and "No ballot shall be counted unless marked and transmitted as required by this act."

Section 1110 provides that if any person make or cause to be made and delivered a false affidavit to be used under the act, etc., upon conviction he shall be punished by fine not exceeding $1,000 or by

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imprisonment not to exceed one year or by both fine and imprisonment. Section 1111 makes it unlawful for a voter to vote more than once. Section 1112 provides that if more than one affidavit giving different addresses of the same voter be filed with the county clerk, it shall be his duty to determine the correct address. Section 1113 states that the provisions of the general election law which are in their nature applicable shall apply to all transactions under this act.

It will be observed the above statute contains no provision whatever for the challenge of any voter, but that it does specifically provide the votes "shall be cast and received and canvassed as in this act provided." There is no allegation in the motion for the writ that this provision of statute was not literally followed. In plaintiffs' oral argument and brief that provision is ignored, his contention being that under the general election laws he is entitled to challenge each person offering to vote and that he can only do so by inspecting and examining his identifying affidavit.

Article 5, section 1, of our state constitution fixes the qualifications of electors; section 2 provides who are disqualified; section 3 makes provision as to gaining or losing a residence, etc., while section 4 states:

"The legislature shall pass such laws as may be necessary for ascertaining by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established."

Under authority there granted, acts for registration of voters in certain instances have been passed. The general election laws also provide that any person desiring to vote shall give certain information to the judges of election, and for the challenge of the right of such person to vote, by any person (sec. 415) or by one of the judges of election (sec. 408), and machinery is provided for determining his right (sec. 408, *et seq.*), and if a challenged person's vote be received, appropriate reference is made on the poll book and his ballot is numbered (sec. 413). These provisions were enacted long prior to the absentee voters' act under consideration. They contemplate a challenge at the time the person offers to vote and not at some subsequent time and not when the vote is being counted. At the time the count is made, all ballots are counted whether of challenged voters or not, and the only usual purpose of the challenge and the numbering of the ballot is for the purposes of identification in the event of a contest.

The act now under consideration was passed at a much later date

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and, as noted, contains a provision that the votes shall be cast, received and counted as *provided in it.* Under section 1106 the vote is cast when the ballot is marked, the identifying affidavit executed and removed, and the two placed in envelopes and mailed on election day. The sections of the general election law applicable to challenge refer to challenge before the vote is cast. They are obviously inapplicable to out-of-state absentee voters, and in conflict with the provisions of the act under consideration. It is true there are provisions for representatives of a candidate to be present during the time of receiving and counting votes at the polling places (sec. 421) and to permit them to inspect ballots when the vote is counted (sec. 419), but neither of these sections gives any right to challenge. There is no provision of any kind permitting a challenge of a voter after his vote is cast.

Under the specific act, any person desiring to vote as an absentee is required by section 1104 to file the duplicate qualifying affidavits, and it is specifically made the duty of the county clerk to determine qualification and to certify that fact to the secretary of state. Lacking that certificate, no ballot and identifying affidavit would be sent to the proposed voter. No reason has been advanced why this portion of the statute is not a valid exercise of the power conferred by the constitution. And it may here be observed that, so far as the statute is concerned, if a challenge were at any time proper, it might just as well be filed with the county clerk on or before election day and lodged against the qualifying affidavit made when the proposed voter initiates his right to vote, as to his identification affidavit the only purpose of which is to show he is the same person as the one who was certified by the county clerk to the secretary of state as a qualified elector and which identifying affidavit is not made until after he has marked his ballot. The statute, however, contains no provision for challenge in either instance.

The defendant board contends that to display the identifying affidavits would violate the secrecy of the ballot with consequent results. The plaintiff contends that under our decision in *Lemons v. Noller,* supra, we held that an absentee voter waived his right of secrecy, and to sustain that contention, he directs attention to one or two sentences which he reads separate and apart from the context of the opinion. In that case, the constitutionality of the statute here involved was under consideration, it being contended the act was bad because secrecy of the ballot was not preserved. We need not

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review what was said there. All that was under consideration was right of secrecy as against the canvassing board of the county, not as against candidates or the public generally. By way of parallel, see section 417, providing that clerks and judges of election shall give no information as to how the ballot of a person requiring physical assistance was marked. If it be assumed the defendant board in opening the envelopes returned to the secretary of state, performed duties comparable to those performed by an election board in receiving and counting votes, it would follow that provisions of the general law as to the conduct of its members would be applicable, and if they made disclosure, they would be subject to the provisions of section 1720, reciting:

"Any public officer . . . who shall disclose to anyone except as may be ordered by any court of justice, the contents of any ballot as to the manner in which the same may have been voted, shall upon conviction be punished by a fine of not less than fifty dollars nor more than one thousand dollars, or by imprisonment in the penitentiary for not less than one year nor more than five years, or by both such fine and imprisonment."

It is to be remembered that the identifying affidavit and the ballot bore the same number—there is no provision for eliminating the number, and if plaintiff may examine the identifying affidavit and inspect the ballot, he will know how each absentee voter cast his ballot for any particular office. Certainly he has no such right in the absence of a clear statutory declaration to that effect.

Further, if the general election laws are to be considered as applying, we note that the statute pertaining to absentee voters within the state, passed prior to the statute under consideration, expressly provides for return of the ballot in an envelope, the face of which discloses the voter's name, and that when the board of county commissioners shall open the envelope and ballot, they are required to—

"Keep the fact of such vote and the person for whom the same is recorded and the contents thereof secret and shall not reveal or divulge the same." (Sec. 1005.)

And further that any candidate or his authorized representative may be present at the canvass, but neither shall be permitted to see the notations on the envelopes in which the ballots were returned from other counties. (Sec. 1008.) If the above section is in any manner applicable, or if any analogy may be drawn as to state policy with respect to secrecy, it is that the candidate may not know how any absentee voter cast his vote. Failure of the election offi-

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cials to observe the above requirements would subject them to the penalties of section 1720, quoted above.

Another matter persuasive to us is this: The statute under consideration expressly provides that only upon certification of qualification by the county clerk is the secretary of state to send out any ballots, and it provides explicitly the manner in which the voter shall cast his vote and return his ballot, and that "no ballot shall be counted unless marked and transmitted as required by this act." (Sec. 1109.)

There is no allegation in the motion for the writ charging that this section was not literally observed, no allegation that any ballot was sent to or voted by an unqualified elector, nor is it charged there was any fraud or corruption or dereliction of any kind, either by a voter, a county clerk, the secretary of state or the defendant board, and this court may not assume the public officials did not perform fully the duties incumbent upon them under the act.

Election laws are liberally construed to permit exercise of the right of suffrage conferred by the constitution and laws of the state. To protect that right it is equally as important to preserve the voter's right to cast his vote freely and as secretly as circumstances under which he votes may permit, as it is that some other person has a right to protest that he is not a qualified elector. If he is unlawfully deprived of his right to vote, or, if having voted, his right of secrecy be invaded, he may do nothing further than invoke the criminal laws. The protestor, however, is not limited to his right to challenge. He may forego that entirely, but in an election contest case may have reviewed fully whether any person who voted for the particular office in controversy was a qualified elector. (See sec. 1426 and *Hansen v. Lindley*, 152 Kan. 63, 102 P. 2d 1058.) In the opinion in the case last mentioned, as reported in our advance sheets, the statute is quoted with reference to the duty of judges of election in determining residence (sec. 407), and it is stated the section refers to the judges of election when a vote is challenged and intended as a guide for them. Then follows this statement:

"The first opportunity a candidate has to challenge a mailed-in vote, however, is when the board of canvassers is considering it. Hence there is no reason why the above section should not be a guide *to the board of canvassers,* to the contest court, and on appeal to the district court and to this court." (Italics ours.) (p. 68.)

The action considered in that case was an election contest proceeding. The statement above quoted was made *arguendo*. It was

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foreign to the issue tendered, in the nature of *dictum*, and is not any part of the law of the case as stated in the syllabus. As a statement of law, it is not correct and is disapproved. It has been eliminated from the opinion and that portion printed in italics will not appear in the permanent bound volume of our reports.

It is to be borne in mind the present proceeding is not an election contest where ballots and affidavits may be introduced in evidence for the purpose of determining their sufficiency. (See *Hansen v. Lindley*, supra.) The present proceeding is one in which no relief of any kind is sought further than to ask this court to compel permission for an examination to determine sufficiency. In effect, plaintiff is seeking to learn how each absentee ballot was cast, before he determines to file a contest. In the absence of some statute so authorizing, and there is none, that may not be done.

The matters raised by the interventions and presented in the briefs of the interveners are sufficiently discussed in what has been said.

We conclude the motion for the writ of mandamus should be denied, and it is so ordered.

WEDELL, J. (concurring): I concur in the conclusion of the majority. I disagree entirely with petitioner and the minority opinion that no secrecy of the ballot was intended for the absentee voter. This court has never so held and, if it should so hold, I would definitely dissent.

It is common knowledge that Democrats and Republicans alike, consistently have been solemnly assured they possessed the right of secrecy in their ballot. It is common knowledge the voter has been informed again and again by Republicans when they desired Democratic votes and by Democrats when they sought Republican votes, that his ballot was secret. These absentee voters who have intervened and appeared in this case to assert their right to have the secrecy of their ballot protected will receive that protection at my hands, irrespective of their political faith, to the extent I can legally protect that right.

Strange as it may seem, the solemn promise, assurance and pledge of secrecy suddenly appears to have been completely forgotten by the petitioner and also by some others. It also appears it has been completely forgotten that such assurance to the voter was based upon the law of this state. Candidates and their representatives may suddenly and conveniently forget or ignore those laws,

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but courts are not permitted to do so. I refuse to deliberately set myself to the task of discovering some apparently plausible excuse or pretext whereby the true purpose and intent of the lawmakers may be evaded and the secrecy of the absentee ballot completely destroyed. I refuse by mandamus, or otherwise, to compel election officials to do that which the lawmakers have seen fit to designate as a crime and have made punishable by fine or imprisonment in the state penitentiary, or both.

Now, how does the petitioner propose to answer the penal provision of our law designed to safeguard the secrecy of the ballot? Curious as it may seem, he makes no attempt to meet that clear expression of the legislative will. The provision and its intent is too clear to admit of argument. Instead of attempting to meet it frankly the provision is completely ignored. This court, however, is not permitted to ignore the plain intent and purpose of the lawmakers. On the contrary, courts are required to give expression to and to make effective the legislative will.

What would have happened to the secrecy of the ballot in the instant case had petitioner or his representatives been permitted to examine the affidavits in question? I refuse to discuss a purely abstract question. The issue now before us is whether secrecy would have been violated, *in the instant case,* if petitioner's request for inspection of the affidavits had been allowed at the time it was made and in the circumstances under which it was made. Petitioner's contention that permission to examine the affidavits would not have destroyed the secrecy of the ballot, is simply idle talk and worthy of little, if any, serious consideration. Before pursuing that subject further, however, it is well to note if petitioner's contention that the law does not provide for any secrecy in case of absentee ballots be correct, then obviously there would be no need of petitioner's insistence that an examination of the affidavits would not have destroyed the secrecy of the ballot. A mere statement of essential facts, however, is itself proof conclusive that the granting of permission to petitioner or his representatives to examine the affidavits as well as the ballots would have destroyed completely all secrecy of the absentee ballots and would have constituted a plain violation of the penal provisions of our law. It is not contended, in the instant case, petitioner's representatives had not been permitted to examine the *ballots* or that they were not in fact examining the *ballots* at the time they requested permission to examine the affidavits. In any event there

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does not appear to be any question concerning the fact that petitioner's representatives were permitted to examine the ballots. Incidentally, I may also say that since our decision was announced in the instant case petitioner has filed a second original proceeding in mandamus in this court touching the same election and the state canvassing board, in which he sets forth the *ballots* by number which he claims were illegally counted for reasons other than those pertaining to the affidavits. (Case No. 35,124.) Since petitioner does not contend, in the instant case, that his representatives were not permitted to examine the ballots or that they did not in fact examine them, it may of course be assumed in the instant case without reference to the averments contained in the second proceeding in mandamus, that the ballots were examined by petitioner's representatives.

The ballots bore the same number as the identifying affidavits. The affidavits, of course, contained the name of the voter. Had petitioner's representatives been permitted to examine also the affidavits, then manifestly the manner in which each elector had cast his vote could no longer have been a secret. These are the plain facts upon which this court is asked to compel the canvassing board to do that which the law says it shall not do, namely, disclose how the elector cast his vote. It should not be forgotten the petitioner did not seek an order of this court directing the canvassing board to first clip the number from the affidavits (or ballots), and then permit examination of the affidavits. What petitioner did ask this court to do was to compel the canvassing board to permit him or his representatives to examine the affidavits transmitted to the secretary of state. It is obvious it was not preservation of the secrecy of the ballot with which petitioner was concerned. If it was only the right of challenge with which petitioner was actually concerned the affidavits might have been challenged, if such right of challenge then existed, as well without the number being retained upon the affidavits (or ballots), as with it. Irrespective, however, of what the motive for permission to inspect the affidavits may have been, the result would have been exactly the same, namely, the complete destruction of the secrecy of the ballot.

I know of no individual or group of individuals who hold a monopoly upon the sincere desire for fair and honest elections. That such elections must be preserved and maintained is readily conceded and, of course, is the deep conviction and ardent desire of every good

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citizen. The decision of the majority in nowise infringes upon the right of petitioner to contest the instant election in the manner provided by law if grounds for contest exist. The decision of the majority, however, preserves the secrecy of the absentee ballot as far as the law permits it to be preserved. I find myself wholly unable to agree with the contention of the petitioner and the minority view that permission to examine the affidavits as transmitted to the secretary of state would not have destroyed the secrecy of the ballots in question. The affidavits, of course, remain subject to proper challenge in a contest action with the result that petitioner has suffered the loss of no substantial right necessary to the preservation of free and honest elections. The writ which the petitioner seeks, however, cannot issue in a mandamus proceeding.

There are other phases of this proceeding which might be discussed, but in view of the thorough and exhaustive manner in which they have been treated in the majority opinion, I deem it entirely unnecessary to dwell upon them further.

ALLEN, J. (dissenting):

1. *Right of Secrecy.*

In *State, ex rel., v. Beggs*, 126 Kan. 811, 271 Pac. 400, it was held as stated in the syllabus:

"Whatever secrecy may be guaranteed a voter by the constitution in that the voting shall be by ballot (art. 4, sec. 1) is as to the vote actually cast by him, and does not apply to or include his prior political leaning or party affiliation nor the inference that may be drawn from his expressed party affiliation." (Syl. ¶ 3.)

I agree with the evident view of the majority in that case that the constitution requires secrecy of the ballot. Secrecy is implied from the express provisions in the constitution.

In *Lemons v. Noller*, 144 Kan. 813, 63 P. 2d 177, as I construe the decision, it was held that even though it be conceded that election by ballot means a secret ballot, yet the out-of-state voter, by the very act of voting, waived the right of secrecy. I think it is a fair conclusion that the waiver was out and out. I find no limitations, express or implied, in the opinion.

In the Lemons case the constitutionality of the absentee ballot statute was challenged on the ground it did not preserve the secrecy of the ballot. It was held as stated in the syllabus:

"Such right of secrecy as may be granted or preserved under article 4, section 1, reading: 'All elections by the people shall be by ballot,' is a right per-

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sonal to the elector and may be waived by him where such waiver is not prohibited by statutory enactment." (Syl. ¶ 5.)

In the opinion it was said:

"It is also argued that the statutes under consideration cannot be upheld because they do not preserve the secrecy of the ballot. It should be observed that the requirement of article 4, section 1, of our constitution is that 'all elections by the people shall be by ballot,' and *not by secret ballot,* and the matter of secrecy is one for legislative determination. The securing of secrecy in voting has been the result of gradual growth in the statutes, even though it be conceded that an election by ballot means a secret ballot.... In the act permitting absentee voting within the state, it is provided that 'the board of county commissioners and the county clerk of each county wherein any vote of any absent voter is received as herein provided shall keep the fact of such vote and the person for whom the same is recorded and contents thereof secret and shall not reveal or divulge the same.' (R. S. 25-1005.)

"In the act permitting absentee voting without the state, there is no provision with respect to secrecy.

"From the above it is clear that the terms 'secrecy' and 'absolute secrecy,' as applied to voting, must be considered not alone as being included in the constitutional provision for voting by ballot, but in view of statutory provisions subsequently enacted. It would seem the first election laws went no further than to secure to the voter a right of secrecy—it was not until the enactment of the Australian ballot law that extensive measures were taken to prevent the voter from voting openly as distinguished from secretly or that tended to prevent his waiving his right to secrecy.... If it be said that the constitutional provision of vote by ballot means a secret ballot, does that mean that any ballot not cast in absolute secrecy is void? If so, what of our statutes with reference to preserving identity of challenged votes? And what of our statutes with reference to the physically disabled voter? And of what effect is article 5, section 4, conferring on the legislature the right to pass laws for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage? Or is it a more rational conclusion to say that the secrecy is a right granted to the citizen, which, like many other rights, may be waived? If the latter be true, then it was within the legislative power to provide that certain classes of voters, by the mere act of voting, could waive their right of secrecy. We are aware that courts of other states have arrived at contrary conclusions, but at least in some cases it is because of constitutional provisions. . . . We are of opinion that the constitutional right of a voter to cast his vote in secrecy is a right which, where he is not prevented therefrom by positive statutory enactment, he may waive, and that provisions of statutes for absentee voting by certain classes of voters may not be stricken down as unconstitutional if, by fair interpretation, it may be said the voter, in casting his ballot under them, has waived his right of secrecy. So considered, the provisions of our absentee-voters laws are not unconstitutional." (pp. 828, 830, 832.)

The court directs attention to the provision preserving secrecy of the ballot as to the absentee voter within the state, and then states

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that: "In the act permitting voting without the state, there is no provision with respect to secrecy." The opinion then declares that it is within the legislative power to provide that certain classes of voters "by the mere act of voting, could waive their right of secrecy." Why was the act not declared unconstitutional? The answer is found in the last paragraph of the opinion above quoted—that the statutes for absentee voting by certain classes of voters *"may not be stricken down as unconstitutional if, by fair interpretation, it may be said the voter, in casting his ballot under them, has waived his right of secrecy. So considered,* the provisions of our absentee voters' laws are not unconstitutional." (Italics inserted.)

I submit that this is a clear and plain declaration that the out-of-state voter by the very act of voting waived his right of secrecy.

That freedom of ballot is just as essential to the perpetuity of our institutions as freedom of speech, freedom of the press and freedom of religion, few will deny.

Secrecy of the ballot must be kept inviolate—otherwise, the elector will not express his choice between candidates; otherwise, personal, political and economic pressure will corrupt the election.

In the present case it is held, as stated in the syllabus:

"The affidavit form attached to the ballot when sent out by the secretary of state, and executed, detached and placed in the identification envelope, and returned with the ballot to the secretary of state, is for the purpose of identifying the voter as being the same person who was certified by the county clerk to the secretary of state and is not for the purpose of showing the voter's qualifications otherwise." (Syl. ¶ 4.)

It seems fair, then, to state that in the Beggs case a majority of this court held the opinion that secrecy of the ballot was protected by the constitution; that in the Lemons case we held secrecy was not within the shield of the constitution, but that by the exercise of the right to vote, the out-of-state voter waived the right of secrecy, and that in the present case the court has determined the waiver is only partial and not absolute.

With deference I think the absentee ballot statute violates the letter and spirit of the constitution, and that we should at this time so declare.

2. *The Privilege to Challenge.*

Secrecy of the ballot only applies to those persons qualified to vote. The disqualified have no such claim.

To protect the ballot and to insure honest elections there must be an opportunity to challenge the unqualified voter.

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The constitution of the state of Kansas specifies the qualification of voters:

"Every citizen of the United States of the age of twenty-one years and upwards—who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he or she offers to vote, at least thirty days next preceding such election—shall be deemed a qualified elector." (Art. 5, sec. 1.)

Our statute, G. S. 1935, 25-407, provides:

"The judges of election, in determining the residence of a person offering to vote, shall be governed by the following rules, so far as they may be applicable:

"*First.* That place shall be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

"*Second.* A person shall not be considered or held to have lost his residence who shall leave his home and go into another state or territory, or county of this state, for temporary purposes merely, with an intention of returning.

"*Third.* A person shall not be considered or held to have gained a residence in any county of this state, into which he shall have come for temporary purposes merely, without the intention of making said county his home, but with the intention of leaving the same when he shall have accomplished the business that brought him into it.

"*Fourth.* If a person remove to any other state, or to any of the territories, with the intention of making it his permanent residence, he shall be considered and held to have lost his residence in this state.

"*Fifth.* The place where a married man's family resides shall be considered and held to be his residence.

"*Sixth.* If a person shall go into another state or territory, and while there exercise the right of suffrage, he shall be considered and held to have lost his residence in this state."

This statute was passed in 1868. For more than seventy years it has stood as the legislative standard by which to determine and protect the qualified voter, and to detect and exclude those not qualified. If this court lays down a rule whereby it becomes impossible to determine the fact of residence of the proposed voter, what becomes of this statute and the above provision of the constitution? If the privilege of challenge is gone, is there any virtue in the constitutional provision which specifies the residential qualification of the voter, or in the statute which declares who is, and who is not a resident?

Such is the grave question with which we are confronted.

The question here presented is whether a candidate or his authorized representative has the right to examine the identifying affidavit

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accompanying the ballot for the purpose of challenging the qualification of the person offering to vote.

The facts are not in dispute. The secretary of state on application mailed to persons claiming to be electors of Kansas ballots and identifying affidavits, and about 7,000 of these ballots and affidavits have been returned to his office. The canvassing board has convened and opened the envelopes, examined the identification affidavits and segregated them from the ballots. The plaintiff, through his authorized representatives, has demanded the right to inspect these affidavits for the purpose of determining whether the voter is a qualified elector of the state. The canvassing board has refused to permit such examination, and the plaintiff has brought this action asking the court to issue a writ directing the board to permit such examination under reasonable rules and regulations.

To answer the question here presented it is necessary to read the general election laws in connection with the absentee-voter statute.

In our statute, G. S. 1935, 25-1113, it is provided that the provisions of the general election laws of this state which are in their nature applicable, shall apply to all transactions under this act.

The general election laws provide that when a voter presents himself at the voting place, that any member of the board or any elector shall have the right to challenge the qualification of such voter to cast his ballot (§ 25-408), and that upon such challenge the judges of the election, under certain procedure, shall determine his right to vote. (§ 25-411.) The statute also provides that the candidates, or their friends, may be present during the time of receiving and counting of the votes. (§ 25-421.) This is regarded as a sacred right and the court in commenting on this right guaranteed by the statute, in *State, ex rel., v. Malo*, 42 Kan. 54, 22 Pac. 349, said:

"The refusal of an election board, composed exclusively of the partisans of one town, in a county-seat election, to permit representatives of the opposing town to be present in the polling room during the reception of the vote, is evidence of a corrupt and dishonest purpose in the conduct and result of the election." (Syl. ¶ 1.)

In the opinion the court said:

"It seems clearly established, also, that the refusal of the Cimarron people to allow Ingalls, and the candidates for county offices on the Ingalls ticket, to have representative friends in the polling rooms of Foote and Cimarron precincts, was because they intended to conduct the election in these townships in a corrupt and fraudulent manner. They denied to all those inter-

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ested in Ingalls, and to all others who thought that for any reason the permanent county seat of Gray county ought to be located in that town, and to all those persons who were candidates for office on what was known as the 'Ingalls ticket,' a right clearly given them by the statutes of this state. We consider this denial as a strong circumstance clearly indicating a fraudulent intent on the part of the Cimarron managers to dishonestly and corruptly conduct the election. And if there were no other facts pointing in the same direction, and this fact stood alone, we should require a strong showing to relieve it of that irresistible inference of bad faith and dishonest conduct that is inseparable from a refusal to let all see what was going on in the polling room. If an honest election was intended, the adverse party would be invited to inspect every act. It is an unmistakable badge of fraud, and stamps every election board that refuses inspection, with a flagrant violation of the law at the threshold of its duty, and I believe ought of itself to be sufficient to cause the rejection of the returns of any township whose board of election pays no regard to the mandates of a law framed and passed for the express purpose of preventing and exposing dishonest practices at an election." (p. 61.)

This case has been consistently followed in this court. (*State, ex rel., v. Comm'rs of Kearny Co.*, 42 Kan. 739, 749, 22 Pac. 735; *State, ex rel., v. Fulton,* 42 Kan. 164, 22 Pac. 378.)

It has always been a fundamental principle of the election laws of this state that voting, receiving and counting ballots and all incidents in connection therewith shall be public and that the candidate, or any elector, shall have the right to challenge the qualification of any person presenting himself to vote or the correctness of the counting of any ballot. Under the Lemons case the elector has the right only to secrecy in the marking of his ballot and, as shown above, this is a right that he may waive.

In other words, underlying the principle of free elections is the right of the candidate or any elector to challenge the qualification of another to vote and the burden is on the person offering to vote to meet the constitution and statute. When the question of the right to vote arises upon a challenge duly made, secrecy vanishes, and the least that the board can do when challenge is made is to identify the ballot and permit the elector to vote. (§ 25-413.)

With these fundamental principles in mind, the absentee statute must be examined.

The legislature conferred upon the qualified electors of the state who are actually absent from the state on election day the right to vote under certain well-defined procedure. (§ 25-1101.) If such elector finds that he will be actually absent from the state on election day he must, between and including thirty days and two days

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preceding such election, make an application to the county clerk of the county in which he is an elector for a ballot to be mailed to him at the post-office address at which he expects to be on election day. Such application shall be in the form of an affidavit and shall state the precinct in which such person is an elector, his correct post-office address and that he will be necessarily absent from the state on election day. Upon the receipt of such application it is the duty of the county clerk to determine whether such person is a qualified elector of such county and entitled to receive the ballot. If he finds that the applicant is entitled to receive the ballot he certifies that fact to the secretary of state and the secretary of state is authorized to mail to such elector, at the address given, a ballot, together with an identification affidavit. (§ 25-1104.)

The city clerk follows the same procedure in certifying to the election boards the registration record. (§ 12-913.) This, however, is not conclusive.

Our statute, G. S. 1935, 12-909, provides:

"No person shall be entitled to vote at any election in any such city who is not registered according to the provisions of this act. The registration shall not be conclusive evidence of the right of any registered person to vote, but said person may be challenged and required to establish his right at the polls in the manner now required by law."

Upon the receipt of the ballot and identification affidavit attached thereto in the form of a stub, the elector shall on election day prepare his ballot and affidavit in accordance with the following procedure:

(*a*) He shall place his cross mark with ink or black pencil in the square opposite the name of each person for whom he desires to vote. He shall make no other mark and shall allow no other person to make any mark upon such ballot. (§ 25-1106.)

(*b*) He shall then fill out in full the affidavit upon the stub attached to such ballot, sign the same in the presence of an officer authorized by the laws of Kansas or of the United States to administer oaths and swear to the same in the presence of such officer, who shall attach thereto his certificate in due form as required by law. (§ 25-1106.)

(*c*) The affidavit attached to the ballot, as aforesaid, shall state clearly the place of his residence, including the election precinct and place of residence therein, and whether or not he has been duly registered, his post-office address at the time of the election, and that he personally has marked the ballot to which the stub was

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attached, and personally removed the stub after marking such ballot, and that no other person has placed any mark on such ballot. (§ 25-1102.)

(*d*) The voter shall then personally remove said stub from said ballot and place the same in the identification envelope bearing the same number as the ballot and stub and seal said identification envelope and enclose the same, together with the ballot, in an envelope duly sealed, addressed to the secretary of state. (§ 25-1106.)

(*e*) Such ballot shall be marked and mailed on election day and shall reach the secretary of state on or before ten days following such election. (§ 25-1106.)

All ballots transmitted to the secretary of state under the provisions of the act shall be canvassed by the state board of canvassers at their first regular session following such general election. "No ballot shall be counted unless marked and transmitted as required by this act." (§ 25-1109.) This is mandatory. The board has no discretion. (*Hooper v. McNaughton*, 113 Kan. 405, 214 Pac. 613.)

It will be observed that there is no provision in this statute for the secrecy of the ballot and this court so stated in the Lemons case, *supra*, where it said:

"In the act permitting absentee voting without the state, there is no provision with respect to secrecy." (p. 830.)

The only suggestion of secrecy in the statute is the requirement that the identification affidavit shall be put in a separate envelope. This implies that when the canvassing board canvasses the ballot they shall first examine the identification affidavit. This affidavit is the constructive appearance of the elector offering to cast his ballot. From this affidavit the canvassing board must determine whether the person making the same is a qualified elector. It stands in the same position as does the person when he presents himself to the election board in his precinct.

In *Lemons v. Noller*, supra, the court had before it the question of the constitutional requirement that the elector vote in the township or ward in which he resides, and said:

"That it was within its constitutional power for the legislature to provide that an offer to vote in the township or ward in which the elector resides, could be made by subscribing to the affidavit prescribed in the statutes." (p. 827.)

Under these circumstances, the identification affidavit being a constructive appearance of the voter, *the general election laws must*

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necessarily apply and any elector, candidate or friend of the candidate has the right to examine the affidavit and challenge the right of the person making the affidavit to vote. If the affidavit should show that the elector has ceased to be a resident of the state of Kansas or the ward or precinct in which he is registered, then in that case he has no greater right to vote than if he appeared in person in such ward or precinct, and it is the duty of the board to reject his ballot. This procedure in no sense disturbs the secrecy of the ballot. The objector bases his objection upon the affidavit or such other information as he may have and in making such challenge he does not know for what persons the ballot is cast. His objection goes to the qualification of the person appearing constructively to vote.

The facts in this case are undisputed. The affidavits which plaintiff desires to examine have been and are segregated from the ballots. An examination of those affidavits will in no manner violate the secrecy of the ballot, if under the Lemons case it can be said that an absentee out-state ballot is a secret ballot. If, upon examination of an affidavit, objection is made to the qualifications of an elector, that objection will necessarily be made without knowledge of what the ballot discloses.

It would seem that the constitutionality of the absentee-voter law in this state was decided by this court in the Lemons case on the theory that the affidavit which accompanies the absentee ballot was the constructive appearance of that voter in the voting precinct and before the election officials. A candidate or his representative certainly has the legal right to challenge the qualifications of an elector when he thus appears, whether such appearance be actual or constructive.

This question was before this court in our recent case of *Hansen v. Lindley*, 152 Kan. 63, 102 P. 2d 1058. In the syllabus of that case it was stated:

"In an election contest the contestor contended that the ballots of certain voters who were outside of the state on election day, voted outside the state and mailed their ballots to the county clerk, should not be counted on account of certain defects appearing on the face of the accompanying affidavits. The ballots and accompanying affidavits were introduced in evidence before the trial court and are before us. They are examined, and it is held that where the irregularities were mere clerical errors or formal mistakes they were not sufficient to render the ballots invalid." (Syl. ¶ 2.)

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In the opinion it was said:

"The objection of Hansen to the group of ballots we are now considering is that the persons who cast them were not actually residents of the state, hence could not be qualified electors of the state. The qualifications for electors are fixed by article 5 of the state constitution." (p. 67.)

After quoting section 1, article 5 of the constitution, also section 25-407 (hereinabove quoted), the opinion then stated:

"The above section refers to the judges of election when a vote is challenged and was intended as a guide for them. *The first opportunity a candidate has to challenge a mailed-in vote, however, is when the board of canvassers is considering it. Hence, there is no reason why the above section should not be a guide to the board of canvassers, to the contest court, and on appeal to the district court and to this court.* After all these provisions are examined, it becomes clear that the question of whether a particular person is resident so as to make him a qualified elector is one of fact. It was so treated in this case. As has been pointed out heretofore, the trial court heard evidence on this question as to each of the ballots about which this argument is made. The court found in effect that the persons who cast these ballots were residents of the precincts of which they claimed to be residents. We have examined the record, including the transcript, and have concluded that the above finding of fact was proved by substantial, competent evidence in regard to each ballot about which the question is raised." (Italics inserted.) (p. 68.)

In the majority opinion in the present case, it is stated that the affidavit is "for the purpose of identifying the voter as being the same person who was certified by the county clerk."

But identification is not the test of the right to vote. Under the constitution the qualified voter must have lived in the state six months and in the township or ward at least thirty days next preceding the election. Identification is important in determining the question of residence, but does not qualify the person identified to vote. The candidates for governor may be known to every election judge and voter in the state, but can vote only at their place of residence. It would seem, therefore, that if the only office or function of the affidavit is to identify the voter, the requirement of the affidavit is void of meaning.

It is submitted that under this ruling the privilege to challenge the unqualified voter ceases to exist. American democracy has developed under a two-party system. When at an election the watchful eye of the opposite party is averted either by force, by fraud or by rule of law, freedom of election is destroyed.

I think the writ should be allowed.

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G. S. 1935, 60-1701.) It is not allowed to require them to avoid a statute. (*In re Insurance Tax Cases*, 160 Kan. 300, syl. ¶ 3, 161 P. 2d 726.)

The result is the writ prayed for should be denied. It is so ordered.

No. 37,570

THE STATE OF KANSAS, ex rel. SHELLEY GRAYBILL, County Attorney of Morton County, *Appellee*, v. MAGGIE TIPTON, County Clerk of Morton County, *Appellant*.

(199 P. 2d 463)

SYLLABUS BY THE COURT

1. ELECTIONS—*"Write-in" Nominee.* Enrollment or official listing, under the statute, of an elector as a member of a political party does not prevent his being chosen, by "write-in" votes at the primary election as the party nominee of another party, in cases where such "write-in" votes are permitted under the statute.
2. SAME—*Candidate for Party Nomination—Nomination by "Write-in."* Although a person may not, under our statutes, become the nominee of more than one political party, the fact that his name appears upon a party ballot at the primary election as a candidate for that party's nomination does not in itself prevent his nomination by another party by "write-in" votes where such votes are permitted under the law.
3. SAME—*Action to Place Name on Ballot—Limitation as to Time—Against Whom Available.* The provision of G. S. 1935, 25-308, that mandamus proceedings to compel an officer to certify and place upon the general election ballot any name or names must be commenced "not less than twenty days" before the election, was not intended to apply to proceedings brought by the state, in the public interest.
4. ELECTIONS—*Proceeding in Mandamus—Nomination by "Write-in."* Record examined in a mandamus proceeding to require a county clerk to have printed on a general election ballot the name of a person nominated by "write-in" votes at a primary election as a party nominee for the office of county commissioner, and held, that under the facts and circumstances stated in the opinion, the action was properly brought.

Appeal from Morton district court; FRANK O. RINDOM, judge. Opinion filed November 13, 1948. Affirmed.

Charles Vance, of Liberal, argued the cause, and *H. Hobble, Jr.*, of Liberal, and *L. L. Morgan*, of Hugoton, were with him on the briefs for the appellant.

Shelley Graybill, county attorney, argued the cause, and *Edward F. Arn*, attorney general, *Harold R. Fatzer*, assistant attorney general, and *Oscar F. Perkins*, of Elkhart, were with him on the briefs for the appellee.

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The opinion of the court was delivered by

HOCH, J.: This was a proceeding in mandamus, on behalf of the state, to require a county clerk to place on the general election ballot as a Republican nominee for county commissioner the name of a person who had received "write-in" votes at the August primary sufficient to give him the nomination. Judgment was for the state, and the county clerk appeals. In view of the public interest involved, the appeal was heard as an emergency matter soon after it was filed on October 30, 1948, and was then promptly considered and announcement made that the judgment would be affirmed, with formal opinion to follow. The appeal is here upon findings of fact by the trial court.

At the regular August, 1948, primary election in Morton county, the names of John M. Hardwick and Jim Kelly appeared on the printed Democratic ballot as candidates for the Democratic nomination as county commissioner from the third commissioner district of the county. No one had declared as a candidate for the Republican nomination for the office and consequently no printed name appeared on the Republican ballot as a candidate for such nomination. However, in conformity with the statute, there was printed on the Republican ballot at the appropriate place the title of said office, followed by a blank line with a square, in order that Republican voters might have a chance to make a nomination by "write-in" votes. At the primary election Kelly defeated Hardwick for the Democratic nomination. But enough Republican voters wrote in Hardwick's name to give him the Republican nomination.

On August 6, the county commissioners met and canvassed the vote, and determined the number of votes received by the various candidates for nomination for the different offices. The county clerk recorded in the journal a tabulation of the votes received by each candidate. The canvassing board announced the number of votes received by each candidate. This procedure had been followed in the county in the canvass of votes in all primary elections by the present county clerk and by her predecessor in the office. No objection was at any time filed with the county clerk, clerk of the district court, or county attorney, to the nomination of Hardwick as the Republican nominee for county commissioner, nor did Hardwick make application to the defendant for a certificate of nomination, prior to October 13, 1948. On October 16, 1948, the

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county clerk wrote a letter to the printer who was to print the ballots saying that "you may print John M. Hardwick's name on the ballot providing he makes a personal statement that he wants on the ticket as the Republican nominee." On October 18, 1948, Hardwick wrote to the county clerk advising her that he saw no reason why his name should not be placed on the ballot, since he had received the requisite number of votes, and instructing her to place his name on the ballot. Sometime between the 13th and 15th of October, 1948, the county attorney called the county clerk and told her that Hardwick's name should go upon the ballot and she stated "If that is the law, to put it on." At that time the county attorney read to her an excerpt from a case decided in this court in support of his view in the matter, and the county clerk then wrote the letter to the printer hereinbefore referred to. However, the county clerk later examined the opinion in the case to which the county attorney had referred her and decided that the holding in that case was not what she had understood it to be and she thereafter made known her intention to leave Hardwick's name off the ballot. On October 20, she wrote to the printer instructing him to disregard her previous communication and stating "I feel that the law does not authorize his (Hardwick's) name to go on the ballot and I hereby instruct you not to place the same on the ballot, and if such name is placed on the ballot, it is my intention to remove it." What method she intended to use in removing a printed name from a printed ballot, the record does not disclose.

This mandamus action in the district court followed. An alternative writ was issued, directing the county clerk to place Hardwick's name on the ballot or to appear on October 26, 1948, and show cause why that should not be done. In an answer the county clerk alleged that since Hardwick had been duly enrolled, pursuant to G. S. 1935, 25-225, as a member of the Democratic party and had been a candidate for the Democratic nomination as commissioner and had filed no change of party affiliation, he was ineligible for the nomination on the Republican ticket; that no written determination that Hardwick had received the greatest number of Republican votes at the primary election had been signed by the commissioners or presented to her for attestation, filing or attachment to the abstract of votes; that she had issued certificates of nomination to other persons who had been nominated for county offices at the primary, but had issued no certificate to Hardwick and he had made

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no application for issuance of such certificate; and asserting that it would be contrary to law to place his name upon the general election ballot. The matter was duly heard and on October 26, 1948, the trial court made findings of fact and issued a peremptory writ directing the printing of Hardwick's name on the ballot. In addition to the findings of fact hereinbefore noted, the court found that the county clerk based her refusal to place Hardwick's name on the ballot "solely on his prior affiliation with the Democratic party," and that she had no objection to the canvass of the votes on the ground of any irregularity; that the omission of Hardwick's name from the ballot "would be arbitrary, illegal and oppressive"; and that the state of Kansas was the real party in interest in the action.

Appellant's first contention is that Hardwick was not eligible for the Republican nomination, and in support of that contention invokes the provision of G. S. 1935, 25-306, to the effect that "no person shall accept more than one nomination for the same office." But Hardwick did not do that. He failed to get the Democratic nomination and only seeks to accept the nomination given by Republican voters. In support of her contention that the provision of section 25-306, *supra*, bars Hardwick from having his name on the general election ballot, she argues that the word "nomination" includes "nominations" of candidates for primary elections. We find nothing to support that construction of the word "nomination" as used in this connection. It does not refer to the methods prescribed for an elector to get his name printed on a party primary ballot (G. S. 1935, 25-205), but clearly refers to party nominations (G. S. 1935, 25-301, 302) made at the primary, or to "independent nominations" (G. S. 1935, 25-303, see Supp.). Appellant calls attention to the provision of G. S. 1935, 25-306 that "whenever any person shall receive *two or more nominations for the same office at different dates*," etc. (italics supplied), and argues from that that the word "nomination" must include a "nomination" to become a nominee since all party nominations at the primary are made "at the same time." But all nominations at the primary are *not* made at the same time. "Independent nominations" under section 25-303, *supra*, are not necessarily made at the same time as "party nominations" under section 25-302.

The primary election statutes expressly provide for blank lines for "write-in" votes on the primary ballot *in cases where there are*

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no nomination or declaration papers on file for the particular office (G. S. 1935, 25-213). We find nothing in the statutes which prevents electors of one party, in such cases, from writing in on their ballots the name of a person who is enrolled or officially listed as a member of another party and giving him their party nomination if such person is otherwise eligible and receives the most votes and the requisite number as provided by statute (G. S. 1935, 25-213). In other words, the primary election statutes do not say that an elector, entitled to vote in the primary as a member of a particular party, may not be "nominated" for an office in the primary by the voters of another party. There may be those who doubt the fairness or soundness of permitting this to be done, but that is a question of public policy for the legislature and not for judicial determination.

In further support of her first contention, appellant calls attention to the annotation in 143 A. L. R. 603. That annotation deals generally with the constitutionality, construction, and applicability of state statutes which preclude a candidate who has been defeated for nomination for an office from having his name printed on the general election ballot as a candidate for that office. The cases cited in that annotation are not applicable here since we have no such statute.

Appellant next contends that there was no determination by the canvassing board that Hardwick had received the Republican nomination and that therefore the action should have been brought against the canvassing board and was improperly brought against the county clerk. The argument might have greater persuasion under facts or findings different from those now before us. It is apparent from the findings here, which are not attacked, that the procedure in this case was the same procedure which had been followed generally both in this and in previous primary elections in Morton county. If the failure to have a formal certificate of nomination in the instant case constituted a fatal defect, then candidates for other offices both in this and prior elections—under the court's findings of fact—were likewise not entitled to have their names printed upon the general election ballot, and the validity of election results generally in Morton county would be placed in doubt. In the instant case there *was* a finding that Hardwick received the most and the requisite number of votes. That finding was not questioned in the court below and is not assailed here. Furthermore, the county

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clerk did not rest her refusal to place Hardwick's name on the ballot, on the absence of a formal finding that he had been nominated or upon any irregularity in the procedure. Her only contention was the one heretofore stated. In this situation we are not called upon to examine every procedural step contemplated by the primary election laws. The statutes should be carefully followed and no laxness in their observance is to be condoned. But under the findings of fact in this case, and in the absence of a contrary statutory mandate, we are unwilling to deny to the appellee the right to which the votes received entitled him. Still more important are the rights of the general public. It appears from this record that candidates for other county offices at the primary received no formal certification of nomination. In other instances as well as this one, there was nothing more than the determination that they had received the most votes. To permit the county clerk, however proper her motive may have been, to discriminate between candidates in such a situation would in effect permit her to impair substantial election rights of the electors.

Elections must be invalidated where there has been violation or nonobservance of statutory provisions which are mandatory, either expressly or by clear implication, or which directly affect the merits of the election. But the general rule is that unless mandatory provisions compel a contrary result election statutes, like other statutes, are to be liberally construed to accomplish their essential purposes (29 C. J. S. 27, 310; *Burke v. State Board of Canvassers*, 152 Kan. 826, 836, 107 P. 2d 773).

It is true, as stressed by appellant, that the statute (G. S. 1935, 25-308) provides that when a certificate of nomination has been filed, it shall be deemed valid unless objections thereto are filed within three days thereafter. From this it is argued that since no certificate of nomination was filed, objectors were given no opportunity to be heard. If parties were here asserting that votes for Hardwick were improperly counted, or attacking the validity of the determination and finding that he had received the most votes, requisite in number to give him the nomination, we might well have a different question before us. But no such contentions are here made. It is not contended that the appellant or anyone had any objections in the trial court except on the grounds of eligibility. Under the practice which had been followed, interested persons had a reasonable right to assume that Hardwick's name would go upon

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the ballot. It was not until October 18 that the county clerk indicated otherwise. She was hardly in a position to urge, at that late date, that mandamus would not lie for the reason that a certificate had not been filed, especially in view of the fact that names of other candidates who also had no formal certificates were being put on the ballot.

State, ex rel., v. Comm'rs of Pratt Co., 42 Kan. 641. 22 Pac. 722, involved an election to vote upon a proposed tax assessment to provide funds for purchase of a county poor farm. The validity of the election was attacked on the grounds that the abstract of votes made by the canvassing board had not been certified and signed by the county clerk as required by law. It was held that this failure did not invalidate the election.

Lastly, appellant contends that this action was brought too late. In support, she calls attention to the provision of G. S. 1935, 25-308, that "the certificate of nomination and nomination papers being so filed, and being in apparent conformity with this act, shall be deemed to be valid, unless objection thereto is duly made in writing within three days from the date said papers are filed with the proper officers. . . . All mandamus proceedings to compel an officer to certify and place upon the ballot any name or names, and all injunction proceedings asking that said officers be restrained from certifying and placing upon the ballot any name or names, *must be commenced not less than twenty days before the election.*" (Italics supplied.)

Was this provision intended to apply to the state? To so hold would bring an intolerable result. By the simple process of withholding action until less than twenty days remained until the election, a county clerk could keep the name of some candidate or candidates off the ballot. We think the statute should be construed in the light of the general rule relating to statutes of limitation that makes them inapplicable to the state, unless expressly provided otherwise (*City of Osawatomie v. Miami County Comm'rs*, 153 Kan. 332, 110 P. 2d 748, and cases cited on page 335). Certainly it cannot be said that a general election is not a matter of fundamental public concern.

We find no error and the judgment is affirmed.

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Steve G. ERICKSON, Plaintiff-Appellee,

v.

Michael S. BLAIR and the Avon Metropolitan District, Defendants-Appellants.

No. 82SA351.

Supreme Court of Colorado, En Banc.

Oct. 11, 1983.

Rehearing Denied Oct. 31, 1983.

Candidate for metropolitan district board of directors brought action challenging election. The District Court, County of Eagle, William L. Jones, J., declared plaintiff the winner, and another candidate and the metropolitan district appealed. The Supreme Court, Quinn, J., held that where there is neither claim nor proof of fraud, undue influence, or intentional wrongdoing in an election, the appropriate standard in determining the validity of absent voter ballots is whether the absent voter affidavits substantially complied with statutory requirements for absentee voting.

Affirmed in part, reversed in part, and remanded.

1. Elections ⇐227(8)

Where there is neither claim nor proof of fraud, undue influence, or intentional wrongdoing in election, appropriate standard in determining validity of absent voter ballots is whether absent voter affidavits substantially complied with statutory requirements for absentee voting. C.R.S. 32–1–821(4).

2. Elections ⇐227(8)

To hold that failure of absent voter to execute affidavit invalidates his or her ballot does not necessarily mean that any deviation whatever from absentee voting legislation should likewise be fatal to absentee ballot. C.R.S. 32–1–821(4).

3. Elections ⇐1

Right to vote is fundamental right of first order.

4. Elections ⇐216.1

Absentee voting legislation should not be construed in manner that unduly interferes with exercise of fundamental right to vote by those otherwise qualified to vote.

5. Elections ⇐216.1

Rule of strict compliance with statutory conditions for absentee voting, especially in absence of any showing of fraud, undue influence, or intentional wrongdoing, results in needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit. C.R.S. 32–1–821(4).

6. Elections ⇐227(8)

Substantial compliance standard is appropriate to determine validity of absentee ballots for municipal district elections under statute which expressly states that courts reviewing controversies arising out of elections shall decide issues with view to obtaining substantial compliance with election provisions of the Special District Act. C.R.S. 32–1–830(1).

7. Elections ⇐227(8)

Where there is neither claim nor showing of fraud, undue influence, or intentional wrongdoing, a district court resolving a special district election controversy must apply a standard of substantial compliance rather than strict compliance in determining the validity of absent voters' ballots. C.R.S. 32–1–101 to 32–1–1307.

8. Elections ⇐216.1

Substantial compliance with statutory requirements for absentee ballots in metropolitan district elections means that absent voter has affixed his or her signature to affidavit and has provided sufficient information in the affidavit to establish elector's qualifications to vote in special district election. C.R.S. 32–1–821(4).

9. Elections ⇐227(8)

Affidavits of two absentee voters, who failed to mark one of voter qualification

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boxes but did write name of county in one category of voter qualification, who failed to write addresses on form, and who did not fill in election date, nevertheless met standard of substantial compliance with statutory requirements for absentee ballots. C.R.S. 32–1–821(4).

10. Elections ⇐227(8)

Affidavits of three absentee voters, who filled in appropriate voter qualification category but did not fill in residence and election date, met standard of substantial compliance with statutory requirements for absentee ballots. C.R.S. 32–1–821(4).

11. Elections ⇐227(8)

Affidavit of absentee voter, who claimed residency as basis for his right to vote but who wrote immediately above his signature that he resided at address outside district, did not meet standard of substantial compliance with statutory requirements for absentee ballots, since affidavit was patently contradictory as to his residency. C.R.S. 32–1–821(4).

12. Elections ⇐227(8)

Affidavit of voter who, after writing her name on first line of affidavit and placing appropriate mark in taxable property category as basis of her qualification to vote, failed to sign her affidavit, did not reach standard of substantial compliance with statutory requirements for absentee ballots, since without signature, there was in reality no affidavit. C.R.S. 32–1–821(4).

13. Elections ⇐305(9)

District court properly rejected two of seven challenged absentee ballots but erred in rejecting the five other ballots; therefore, matter had to be remanded for determination of what effect, if any, the five incorrectly invalidated ballots had on outcome of election. C.R.S. 32–1–830.

Kelly & Stovall, Lawrence J. Kelly, Eagle, for plaintiff-appellee.

George Rosenberg, Avon, Davis, Graham & Stubbs, Thomas S. Nichols, Margaret G. Leavitt, Denver, for defendants-appellants.

QUINN, Justice.

Michael S. Blair and the Avon Metropolitan District appeal from a judgment of the District Court of Eagle County declaring Steve G. Erickson the winner of an election for a seat on the Avon Metropolitan District Board of Directors (Board). The election judges had certified Erickson as the winner of the election, but the Board, after canvassing and recounting the votes, included seven additional absentee ballots rejected by the judges in the final tally and declared Blair the winner. The district court, applying a standard of strict statutory compliance for absentee voting, held that the seven absentee ballots should not have been counted and accordingly reversed the decision of the Board and declared Erickson the winner of the election. Concluding that the district court applied an unnecessarily strict standard of electoral review, we affirm in part, reverse in part, and remand for further proceedings.

I.

The Avon Metropolitan District (District), located in Eagle County, Colorado, is a special metropolitan district organized pursuant to the Special District Act.[1] Sections 32–1–101 to 32–1–1307, C.R.S.1973 (1982 Supp.). On May 4, 1982, the District held a regular election to fill four vacancies on its Board of Directors. Seven candidates, including Erickson and Blair, were vying for three four-year terms on the Board, and one candidate was running uncontested for a two-year term.

1. A "special district" means "any quasi-municipal corporation and political subdivision organized or acting pursuant to the provisions of this article" of the Special District Act. Section 32–1–103(20), C.R.S.1973 (1982 Supp.). A "metropolitan district" is a special district which provides for its inhabitants two or more of the following services: fire protection, mosquito control, parks and recreation, safety protection, sanitation, street improvement, television relay and translation, transportation, or water. Section 32–1–103(10), C.R.S.1973 (1982 Supp.).

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Although formal voter registration is not necessary for special district elections, the Special District Act requires in-person voters to sign an affidavit at the polling place on the day of the election and absent voters to sign an affidavit on the return envelope for their ballot.[2] An elector may apply either orally or in writing for an absent voter's ballot not earlier than thirty days before the election or later than 4:00 p.m. on the Friday immediately preceding the election.[3] Section 32-1-821(4), C.R.S.1973 (1982 Supp.), provides, in this respect, as follows:

> "The return envelope for the absent voter's ballot shall have printed thereon an affidavit containing a statement of the qualifications for an elector, and it shall contain a space for the person's name, address, and signature, and the date of election. The voter shall sign the affidavit stating that he is an elector of the district and that he has not previously voted at said election."

An elector is defined in section 32-1-103(5), C.R.S.1973 (1982 Supp.), as follows:

> "(a) 'Elector' means a person who, at the designated time or event, is qualified to vote in general elections in this state and:
>
> (I) Who has been a resident of the special district or the area to be included in the special district for not less than thirty-two days; or
>
> (II) Who, or whose spouse, owns taxable real or personal property situated within the boundaries of the special district or the area to be included in the special district, whether said person resides within the special district or not.
>
> "(b) A person who is obligated to pay taxes under a contract to purchase taxable property situated within the boundaries of the special district shall be considered an owner within the meaning of this subsection (5)."

In the instant case, the following form of affidavit was contained on the return envelopes issued to those applying for an absent voter's ballot:

"STATE OF COLORADO)
) ss
County of _____)

RECEIVED BY SECRETARY
_____ o'clock ___M.
_____ 19__
Delivered by
Name _____
Address _____

"I, _____
of lawful age, being first duly sworn, upon my oath, depose and say:

"That I am a person qualified to vote at a general election in the State of Colorado, and (Indicate applicable phrase by placing a cross ☒ in the box preceding the appropriate words.)

☐ "I have been a resident of the _____ District, _____ County, Colorado or the area to be included in the district for not less than thirty-two (32) days.

☐ "I (or my spouse) own taxable real or personal property within the _____ District, _____ County, Colorado, or the area to be included in the district.

☐ "I am obligated to pay general taxes under a contract to purchase real property within the district.

"That I reside at _____; and that I have not previously voted at the election of Directors held on _____, 19 ___.

_____
Elector's Signature"

Immediately after the polls closed on May 4, 1982, the election judges proceeded to count the votes cast.[4] The judges rejected

2. Section 32-1-103(5)(c), C.R.S.1973 (1982 Supp.), states that "[r]egistration to vote pursuant to the general election laws or any other laws shall not be required" to vote in a special district election. Section 32-1-804(2), C.R.S. 1973 (1982 Supp.), requires in-person voters to sign an affidavit which must be "on a form that contains the qualifications for voting at the election, a space for the person's name, address, and signature, and a space for the date of election" and which must also state that the voter "has not previously voted at said election."

3. Section 32-1-821(3), C.R.S.1973 (1982 Supp.).

4. Prior to a special district election, the Board appoints three or, in its discretion, four election judges for each precinct. Section 32-1-808(1), C.R.S.1973 (1982 Supp.). These election judges receive the voter affidavits, maintain a poll book of electors, supervise the actual voting, count the votes upon completion of the election, and issue a certificate of returns to the Board certifying the results of the election. Sections 32-1-812 and 32-1-816, C.R.S.1973 (1982 Supp.).

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the seven absentee ballots in question here because, in their view, some part of the affidavit had not been properly completed. The election judges then issued a certificate of returns declaring that Erickson had received 81 votes and Blair 73 votes for the third Board seat.

Under the Special District Act, the Board oversees "the conduct of all . . . regular and special elections of the special district" and "render[s] all interpretations and make[s] all decisions as to controversies or other matters arising in the conduct of such elections." Section 32–1–803(1), C.R.S.1973 (1982 Supp.). Pursuant to statutory authorization, the Board conducted a canvass and recount on May 7, 1982. After examining the ballot envelopes, the Board concluded that eleven additional absentee ballots, including the seven ballots rejected by the election judges, should be counted in the final tally. The Board added these eleven votes to the previous totals and certified that Blair, an incumbent member of the Board, had received 83 votes to 82 votes for Erickson.

On June 7, 1982, Erickson filed a timely statement of intent to contest the election in the District Court of Eagle County on the ground that the eleven absentee ballots did not comply with the statutory requirements for absentee voting.[5] Blair and the District filed an answer and counter-statement, and the matter was set for trial. Prior to trial the parties stipulated that the eleven absent voters were in fact qualified to vote in the district and had properly submitted an absentee ballot application, which required a listing of the voter's address and the date of election for which the ballot was sought. It was undisputed that no person involved in the election had engaged in fraud or other wrongdoing.

The evidence at trial was basically undisputed. Four of the contested affidavits were those of two married couples—Ronald D. and Joyce A. Allred and Forrest H. and Maria F. Faulconer—who had voted on numbered ballots which had been issued to the respective spouses instead of the numbered ballots issued to them individually. The district court held that the Board correctly counted these four ballots because the corresponding envelope affidavits had been completed in compliance with the statutory requirements for absentee voting in section 32–1–821(4), C.R.S.1973 (1982 Supp.). The seven absentee ballots ultimately rejected by the court fell into various groupings.[6] Two voters, David and Diane E. Doyle, failed to write the election date and address on the affidavit form. In addition, the Doyles failed to check one of the three boxes designating the basis upon which they were entitled to vote, although they did write in the word "Eagle" in the following qualification category: "I (or my spouse) own taxable real or personal property within the _____ District, Eagle County, Colorado, or the area to be included in the district." Three voters—April R. Nottingham, Brian L. Nottingham, and Duane Piper—placed an "X" in the taxable property category of voter qualification and

The trial evidence indicated that on the day of the election the election judges noticed considerable voter confusion in completing the in-person voter affidavits. One election judge testified that nearly three quarters of the voters required assistance in filling out the forms. Another election judge felt that at least one-half of the voters needed help. Blair introduced over twenty in-person affidavits allegedly containing errors or erasures. Although these difficulties with the in-person voter affidavits do not affect in any way the integrity of the in-person votes, especially since the election judges were satisfied that all in-person voters were qualified to vote, these difficulties do attest to the ambiguous and confusing nature of the affidavit form.

5. The Special District Act requires that a verified petition to contest an election be filed within thirty days of the canvass by the board of directors. Section 32–1–828(1), C.R.S.1973 (1982 Supp.). Blair filed his petition on June 7, 1982, after the May 7, 1982 canvass. Although filed on the thirty-first day after the canvass, Blair's petition was timely because the thirtieth day after the canvass, June 6, was a Sunday. *See* section 32–1–801(3), C.R.S.1973 (1982 Supp.).

6. Each of the seven affidavits bore sealed acknowledgements by a notary public which read as follows: "Subscribed and sworn to before me this ___ day of _____, A.D. 19___."

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filled in the blank lines in that category, but failed to complete the address and election date blanks on the affidavit form. Another voter, James J. Collins, had checked the residency box as a basis for his qualification to vote, but listed a Vail address, outside the district, in the appropriate space at the bottom of the affidavit. Finally, Barbara Koch had crossed out entries made in the blank lines for her address and date, and although she signed her name on the first name identification line on the affidavit form, she failed to sign her name on the line at the bottom of the affidavit designated "Elector's Signature."

The court rejected the seven ballots because the absent voter affidavits did not comply with those statutory provisions in section 32-1-821(4) relating to "a statement of the qualifications for an elector," "a space for the person's name, address,[7] and signature, and the date of election," and the voter's signed statement "that he is an elector of the district and that he has not previously voted at said election." Since the court upheld the Board's decision to count four of the absentee ballots, a ruling not challenged on this appeal, the court assumed that Blair had received these four absentee votes. Proceeding from this assumption, the court then determined that Blair[8] could only have received 77 votes and that Erickson, who was assured of 81 uncontested votes, was the winner of the election.

[1] Blair and the District claim that the trial court erroneously applied a strict compliance standard in holding that the defects in the seven affidavits required automatic disqualification of the absent voter ballots. We find their claim meritorious and conclude that where, as here, there is neither claim nor proof of fraud, undue influence, or intentional wrongdoing in the election, the appropriate standard in determining the validity of absent voter ballots is whether the absent voter affidavits substantially comply with the statutory requirements for absentee voting.

II.

[2] The rule of strict compliance has its origin in *Bullington v. Grabow*, 88 Colo. 561, 298 P. 1059 (1931). In that case the court upheld a 1929 absentee voting law against a claim that it contravened the "purity of elections" clause of Article VII, Section 11 of the Colorado Constitution and then, noting that absentee voting legislation should be strictly construed, rejected the ballots of absent voters who apparently had failed to execute their absent voter affidavit.[9]

7. In the course of its ruling the district court concluded that the address space at the bottom of the affidavit was "grossly ambiguous" in that it did not specify whether the voter was to list his address within the district or his permanent residence. If a voter had merely omitted filling in the address line but had correctly completed the affidavit in all other respects, the court was not inclined to invalidate the ballot on that basis alone. The court, however, then went on to mention the "address" omission along with other irregularities in invalidating several of the seven ballots at issue here. Since the court, therefore, ultimately did attribute some significance to the "address" omission, we discuss it later in the context of those affidavits which did not include the voter's address.

8. The statutory procedures for voting with paper ballots, which were used in this case, are necessarily structured toward preserving the secrecy of the voter's individual ballot. *See generally* section 32-1-814, C.R.S.1973 (1982 Supp.). The district court's reliance on an assumption, therefore, is quite understandable in view of the statutory scheme. The only figures available to the district court were the results certified by the election judges (81 votes for Blair and 73 votes for Erickson) and the figures certified by the Board after the recount (83 votes for Erickson and 82 votes for Blair). Since the ballots must be preserved for purposes of an election contest, the district court has an adequate basis on remand to enter any appropriate orders with respect to the ultimate resolution of the election controversy. Section 32-1-830(1), C.R.S.1973 (1982 Supp.), authorizes the court in resolving an election controversy "to make and enter orders and judgments and issue the writ of process of such court to enforce all such orders and judgments."

9. Subsequent to *Bullington* this court in *City of Aspen v. Howell*, 170 Colo. 82, 89, 459 P.2d 764, 767 (1969), and in *Jardon v. Meadowbrook-Fairview Metropolitan District*, 190 Colo. 528, 533, 549 P.2d 762, 766 (1976), repeated the rule of strict construction but did not expressly rely upon it as the controlling principle in either case.

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While *Bullington* was a proper decision on the facts before the court, we believe that the opinion should not be read to imply that *any* irregularity in an absent voter affidavit requires automatic disqualification of the absentee ballot. The *Bullington* court, although rejecting the argument that the statutory requirements for absentee voting were merely directory and therefore could be disregarded, did not consider whether the more flexible standard of substantial compliance might be more in keeping with the predominant goal of absent voter legislation. That goal, as recognized in *Bullington*, was to permit "a fuller expression of public opinion at the ballot box." 88 Colo. at 564, 298 P. at 1060 (quoting *Jenkins v. State Board*, 180 N.C. 169, 178, 104 S.E. 346, 351 (1920)). To hold that the failure of an absent voter to execute an affidavit invalidates his or her ballot does not necessarily mean that any deviation whatever from absentee voting legislation should likewise be fatal to an absentee ballot. There are degrees of noncompliance and this case squarely presents the court with the choice of alternative rules in assessing the extent to which noncompliance should invalidate an absent voter's ballot. A strict compliance standard, in our view, would unduly infringe upon the suffrage rights of qualified absentee voters. We therefore conclude that substantial compliance, rather than strict compliance, is the appropriate standard for evaluating the validity of absent voter ballots.

A.

Absentee voting legislation enables electors, including the physically incapacitated and those who anticipate that they will be away from the district on election day, to cast a ballot in a different manner than voters who present themselves at polling places on the day of election. Two reasons have generally been offered to support the strict construction of absentee voting legislation. The first justification stems from the notion that absentee voting is not a right but rather is a mere privilege. *See Bell v. Gannaway*, 303 Minn. 346, 227 N.W.2d 797 (1975). This notion is based on the premise that the constitutional right of suffrage means the right of a qualified elector to cast a ballot in person at a designated polling place on the day of election. Since, under this view, absentee voting legislation grants voters something to which they are not constitutionally entitled, strict compliance is nothing more than a reasonable *quid pro quo* for this legislatively granted privilege. The second justification for the rule of strict construction is rooted in the legislature's duty to safeguard the purity of elections. *See Bullington v. Grabow, supra.* The prevention of election fraud, it is argued, requires rigid adherence to the statutory conditions for absentee voting especially since, in contrast to in-person voters, absent voters are unable to respond to inquiries from election judges about their status as qualified voters.

[3–5] We believe the time has come to interpret absentee voting legislation in light of the realities of modern life and the fundamental character of the right of suffrage. We live in a society which, to a great extent, depends upon mobility as an indispensable condition of progress. Many persons for legitimate reasons cannot be physically present at a polling place to cast their ballots on the day of election. These electors, no less than in-person voters, should be able to present their views on issues of public importance without being encumbered by an unyielding standard of statutory exactitude. Moreover, the right to vote is a fundamental right of the first order. *Jarmel v. Putnam*, 179 Colo. 215, 499 P.2d 603 (1972). Absentee voting legislation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote. *See In re Interrogatories of the United States District Court*, 642 P.2d 496 (Colo. 1982). Nor should the exercise of the voting right be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters. A rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, re-

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sults in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit. We agree with the observations of the Florida Supreme Court in this respect:

> "The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right." *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla.1975), *appeal dismissed*, 425 U.S. 967, 96 S.Ct. 2162, 48 L.Ed.2d 791 (1976).

See also Serna v. Enriquez, 545 S.W.2d 281 (Tex.Civ.App.1976); *Lanser v. Koconis*, 62 Wis.2d 86, 214 N.W.2d 425 (1974). We reject the rule of strict compliance and adopt a standard of substantial compliance which, in our view, is adequate to the task of both preventing fraud in elections and preserving the absent voter's right of suffrage against unnecessary and technical restrictions. *See* section 32–1–834, C.R.S.1973 (1982 Supp.) (liberal construction required to permit all legally qualified voters to vote and to prevent fraud and corruption in special district elections).

B.

[6] Specific provisions of the Special District Act reinforce our selection of the substantial compliance standard as appropriate to this case. Section 32–1–830(1), C.R.S.1973 (1982 Supp.), expressly states that courts reviewing controversies arising out of special district elections shall decide the issues "with a view to obtaining substantial compliance" with the election provisions of the act. Also, section 32–1–824, C.R.S.1973 (1982 Supp.), requires special district boards, when canvassing the returns of an election, to count votes which do not strictly conform to the statute as long as "such returns are sufficiently explicit to enable such persons authorized to canvass votes and returns to determine therefrom how many votes were cast for the several candidates or on the questions submitted." Finally, the legislature included many measures, in addition to the absent voter affidavit, to curb fraud in special district elections.[10]

[7, 8] Considering the nature and purpose of absentee voting legislation as well as the specific legislative provisions relating to absentee voting in special district elections, we are satisfied that where, as here, there is neither claim nor showing of fraud, undue influence, or intentional wrongdoing, a district court resolving a special district election controversy must apply a standard of substantial compliance rather than strict compliance in determining the validity of absent voters' ballots.[11] Substantial compliance, in the context of this case, means that the absent voter has affixed his or her signature to the affidavit and has provided sufficient information in the affidavit to

10. Some of the measures designed to safeguard against fraud include the following: the requirement that an election judge in each precinct keep a poll book containing the names of electors voting (section 32–1–812(3)); the right of each candidate to appoint an election watcher in each election precinct (section 32–1–813(2)); specific provisions for challenges to voter qualification (section 32–1–822(2)); detailed procedures for the canvass of votes (section 32–1–823) and the recount of votes (section 32–1–826); and the right to petition the court for an expeditious review of an election challenge (section 32–1–830).

11. *Stegon v. Pueblo West Metropolitan District*, 198 Colo. 128, 130, 596 P.2d 1206, 1208 (1979), in which we stated that "the better rule is to require strict compliance when evaluating the notice of a special election within a district," is not contrary to our adoption of the substantial compliance rule in this case. In *Stegon*, we relied upon strict compliance in order to ensure that adequate notice of an election would be provided to special district electors. The instant case concerns the validity of individual ballots cast by absent voters in a contested election. The central focus in both *Stegon* and this case is the right to vote itself, and the rule applied in each situation is tailored to safeguard that right against unnecessary abridgement.

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establish the elector's qualifications to vote in a special district election.

III.

We turn now to the absentee ballots rejected by the district judge. The seven voters whose ballots were disqualified fit into four groups which we will consider separately.

A.

[9] The affidavits of David and Diane E. Doyle were incomplete in the following respects: first, although they did write the word "Eagle" in the taxable property category of voter qualification, they failed to mark one of the voter qualification boxes; next, they failed to write their address on the affidavit form; and, last, they failed to fill in the election date on the affidavit. These affidavits, in our view, meet the standard of substantial compliance.

The failure to place a cross mark in the box immediately preceding the appropriate voter qualification category was remedied by the Doyles' writing of the word "Eagle" in the voter qualification category peculiar to them and in no other category.[12] The Doyles' claim of qualification to vote on the basis of taxable property within the district was thus obvious from the affidavit itself.

The Doyles' failure to write their residence on the line immediately above their signature did not invalidate their ballots. The listing of an address is admittedly of critical significance when residency within an electoral district is an indispensable prerequisite to voting. In this case, however, residency was only one of three alternative categories of voter qualification, and nonresidency, by itself, was not a basis for disqualification.[13] Given the stipulated fact that the Doyles were qualified to vote in the election, plus their writing of the county in which their taxable property was located within the district, and their sworn statement that they were qualified to vote at a general election in the state, we do not consider fatal to their ballot their failure to include their present place of residence on the affidavit.

Nor should the Doyles' ballots have been invalidated because of their failure to write in the date of the election on the affidavit. The text of the clause, "I have not previously voted at the election of the Directors held on _____, 19____," was phrased in the past tense but required the inclusion of a future date. This inconsistency might have engendered some confusion as to what date was to be written in the affidavit. Also, since the Doyles had applied for absentee ballots for this particular election, their acknowledged statement that "I have not previously voted at the election of the Directors" was an affirmation that they had not cast any other ballot in that particular election.

B.

[10] The next group of disqualified voters consists of April R. Nottingham, Brian L. Nottingham, and Duane Piper. Each of these voters placed an "X" mark in the box preceding the appropriate voter qualification category and completed the blank lines in that category,[14] but failed to fill in the blank lines for residence and election date immediately above their signature. These omissions are identical to two of the omissions which we considered in the case of the Doyle affidavits. Because these three voters were qualified to vote in the election, signed the affidavit and placed an appropriate mark in the voter qualification category applicable to them, and further attested

12. The voter qualification category selected by the Doyles read: "I (or my spouse) own taxable real or personal property within the _____ District, Eagle County, Colorado, or the area to be included in the district."

13. Although not critical to our decision, we note the trial court's observation that the residency blank was somewhat ambiguous. It could have been interpreted as referring to the voter's residence in the district or, instead, the voter's permanent place of residence. *See* note 7, *supra*.

14. April R. Nottingham and Duane Piper designated taxable property as the basis of voter qualification, and Brian L. Nottingham the category of residency.

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that they had not previously voted at the election, we conclude that these affidavits reach the standard of substantial compliance.

C.

[11] We next consider the affidavit of James J. Collins, who checked the residency box and filled in the blanks in the sentence which followed it, thereby affirming that he had been a resident of the "Avon Metro District, Eagle County, Colorado or the area to be included in the district for not less than thirty-two (32) days." Although Collins claimed residency as the basis of his right to vote, he wrote immediately above his signature that he resided at 777 Potato Patch Drive, an address which all agree was outside the district. Under these circumstances Collins' affidavit was patently contradictory as to his residency and therefore failed to meet the substantial compliance standard for absentee voting. Hence, the district court properly concluded that Collins' vote should not be counted in the tally.

D.

[12] The final nonconformity relates to the affidavit of Barbara Koch who, after writing her name on the first line of the affidavit and placing an appropriate mark in the taxable property category as the basis of her qualification to vote, failed to sign her affidavit. Section 32-1-821(4), C.R.S.1973 (1982 Supp.), requires that the affidavit of the absent voter be signed, and a signature, in our opinion, is the starting point for an inquiry under the substantial compliance standard of review. The signature line on the affidavit form was clearly designated with the words "Elector's Signature" at the very end of the voter's statement of qualification. Thus, there could be no confusion over the fact that the affidavit was to be signed by the voter in the place designated.[15] The name "Barbara Koch" in the first line of the affidavit merely established the identity of the affiant and nothing more. A "signature," in contrast, is not only a mark of identity but also a sworn affirmation or adoption of the contents of the affidavit itself. Without the signature, there is in reality no affidavit.

IV.

[13] In summary, we conclude that the district court properly rejected two of the

15. The location of the signature line in the affidavit distinguishes this case from the situation described in *Lanser v. Koconis*, 62 Wis.2d 86, 214 N.W.2d 425 (1974), where the court was faced with a rather chaotic affidavit form described as follows:

"Each challenged absentee ballot envelope has on the back a form which in part reads, 'I, _____ (certify) (do solemnly swear) ....' with another space for the absentee voter's signature at the bottom and on the right-hand side of this certification paragraph and immediately above the statement to be executed by a notary public or officer authorized to administer oaths. The voters who completed these challenged certifications did not sign their names at the bottom of this paragraph where the space is provided for their signature but, instead, put their names in the space at the beginning of the paragraph. Below, and to the right of the voter's certification paragraph, is the affidavit form which can be completed by a notary public or officer authorized to administer oaths, in lieu of having two witnesses certify the absentee voter's signature. The officer's affidavit form was not used by these voters." 62 Wis.2d at 95, 214 N.W.2d at 429.

In holding that the signing of the affidavit at the beginning rather than at the end constituted substantial compliance, the court stated:

"[W]e are of the opinion that one reason for the confusion on the part of these voters regarding the proper placement of their signature, stems from the fact that the voter certification paragraph and the officer's affidavit form are so located on the envelope that one could reasonably have concluded that the signature space between the two was part of the officer's affidavit and not for the certification of the voter's signature before two witnesses. Our conclusion is buttressed by the fact that those envelopes, which were subscribed to before an officer who completed the affidavit, had voter certifications signed in the proper place. To further add to the confusion, the instructions on the end of the envelope state, 'Only one certificate need be signed—NOT BOTH.'

"In each instance the voter signed his name, although not in the specific place designated, and the signature was witnessed by two witnesses." 62 Wis.2d at 95-96, 214 N.W.2d at 429-30.

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seven challenged absentee ballots but erred in rejecting five other ballots. We are unable to determine on the basis of the record before us what effect, if any, the five incorrectly invalidated ballots had on the outcome of the election, and, therefore, we leave that matter for resolution by the district court in the course of further proceedings. We accordingly remand the case to the district court with directions to resolve the election controversy pursuant to its statutory authority under section 32-1-830, C.R.S.1973 (1982 Supp.), and in a manner consistent with the views expressed herein.

Merrell N. COOK, Petitioner,

v.

The DISTRICT COURT In and For the COUNTY OF WELD and the Honorable Robert A. Behrman, One of the Judges Thereof, Respondents.

No. 83SA166.

Supreme Court of Colorado,
En Banc.

Oct. 11, 1983.

Petitioner brought original proceeding to compel the District Court to grant his petition for leave to proceed in forma pauperis. The District Court denied the petition because the relief requested in the tendered complaint was within the jurisdiction of the county court. The Supreme Court issued a rule to show cause why the petitioner should not be permitted to proceed in forma pauperis in the District Court. The Supreme Court, Lohr, J., then held that in absence of factors such as bad faith or plainly frivolous claim, judge's discretion in granting petition to commence and prosecute or defend action without payment of costs is limited to determining whether petitioning party has financial resources to pay costs and expenses incident to litigation.

Rule made absolute in part, and case remanded.

1. Costs ⇐128

In absence of factors such as bad faith or plainly frivolous claim, judge's discretion in granting petition to commence and prosecute or defend action without payment of costs is limited to determining whether petitioning party has financial resources to pay costs and expenses incident to litigation. Rules App.Proc., Rule 12(b); C.R.S. 13-16-103.

2. Courts ⇐192

Right of plaintiff to select forum for claim less than $5,000 is not conditioned by Constitution or by statute; rather, legislature has seen fit to permit plaintiff to file such actions in district court unconstrained by considerations of whether county court is adequate forum for just resolution of complaint and of any increased costs to public incident to district court adjudicative process. C.R.S. 13-6-104.

3. Courts ⇐192

Statute governing jurisdiction of county courts does not differentiate between rights of indigent and nonindigent litigants to bring actions for less than $5,000 in district court even though county court may provide adequate forum for impecunious party's grievances, and demand on judicial resources may vary dependent upon forum selected. C.R.S. 13-6-104.

4. Courts ⇐473

Forum selection decisions involve weighing of countervailing considerations, a process which litigants, knowing factual bases of their claims and acting with assistance of counsel, are best suited to conduct. C.R.S. 13-6-104.

5. Courts ⇐473

Nonindigent plaintiffs are unfettered in their choice of court in which to bring action for less than $5,000; nothing in stat-

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(attachment 2)

No. 47,357

MARTIN BAUGHER and H. R. KROKSTROM, partners, d/b/a Chanute Livestock Auction, *Appellees*, v. HARTFORD FIRE INSURANCE COMPANY, a corporation, *Appellant*.

(522 P. 2d 401)

SYLLABUS BY THE COURT

1. TRIAL—*Pre-trial Conference—Part of the Procedural Process—What Conference Designed to Accomplish.* The pre-trial conference contemplated in K. S. A. 60-216 has become an important part of our procedural process designed, among other things, to acquaint each party in advance of trial with respect to the factual contentions of the parties upon matters in dispute, thus reducing the opportunity for maneuver and surprise at the trial, and enabling all parties to prepare in advance for trial. Orders entered at the pre-trial conference have the full force of other orders of the court and they control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.
2. APPEAL AND ERROR—*Instructions—Necessity to Object.* Under K. S. A. 60-251 (*b*) no party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection, unless the instruction is clearly erroneous.
3. INSURANCE—*Exceptions, Limitations and Exclusions—Duty to Define Limitation on Coverage.* Exceptions, limitations and exclusions to insuring agreements require a narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms.
4. SAME—*Avoiding Liability on Specific Exception—Burden of Proof.* When an insurer seeks to avoid liability on the ground that the accident or injury for which compensation is demanded is covered by some specific exception to the general terms of the policy, the burden of proof rests upon the insurer to prove the facts which bring the case within such specified exception.
5. SAME—*Coverage Provisions—Exclusionary Clause—Burden of Proof.* The distinction between "coverage" provisions and exculpating or "exclusionary" clauses in an insurance contract is the decisive factor in determining which party has the burden of proof on an issue, where coverage under the insurance contract is disputed. The assured has the burden of proving the loss was of a type included in the general coverage provisions of the insurance contract.
6. APPEAL AND ERROR—*Raising New Issue—Not Presented Below.* A party cannot on appeal be permitted to change its theory of the case or raise new issues not previously presented to the trial court, or inconsistent with the position taken before the trial court.
7. INSURANCE—*Proof of Theft—Circumstantial Evidence.* Affirmative proof of theft, or the elements necessary to prove the claim, may be made by circumstantial evidence.

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01-24-91

has the burden of proving that the loss was of a type included in the general coverage provisions of the insurance contract. (*Ruffalo's Truck Serv. v. National Ben-Franklin Ins. Co.*, 243 F. 2d 949 [1957].)

Apparently the trial court in construing the provisions of the policy here in question, with the acquiescence of the appellant in the trial court, determined the coverage provisions of the policy included theft of cattle from the premises. This the trial court defined to be an act of stealing as set forth in its instructions. The subsequent clause, after the semicolon in the policy provision heretofore quoted, that theft "shall not include mysterious disappearance, shortage, nor other occurrence where there has been a voluntary surrender of the livestock" was construed by the trial court as an exculpating or exclusionary clause in the policy. This is the theory upon which the case was tried and submitted to the jury by the court's instructions in the trial court. The appellant acquiesced in the presentation of the case on this theory throughout the trial proceedings. Points attacking the pre-trial orders and instructions given by the trial court are challenged for the first time on appeal, under a new theory which is asserted for the first time on appeal.

A party cannot on appeal be permitted to change its theory or raise new issues not previously presented to the trial court, or inconsistent with the position taken before the trial court. (*Mater v. Boese*, 213 Kan. 711, 518 P. 2d 482; and cases cited therein.)

With the case in this posture we are not called upon to construe the provisions of the policy to determine whether the trial court erred in its construction of the policy. The appellant is bound by the theory upon which the case was submitted in the trial court. Under the theory upon which the case was tried, the instructions given by the trial court were not clearly erroneous.

The last point asserted by the appellant is that the trial court erred in overruling its motion for a directed verdict at the close of the evidence because there was not sufficient evidence to submit the case to the jury.

Here the appellant argues there is actually no dispute as to the facts. It is stated that every witness for the insured simply stated that there was never any indication as to what happened to the cattle except that they were missing.

The mysterious disappearance of hogs for which recovery was sought under a contract of insurance was before the Nebraska Supreme Court in *Raff v. Farm Bureau Ins. Co.*, 181 Neb. 444, 149

ATTACHMENT #2-2

No. 44,537

In re The Trusteeship of the Will of Thomas H. Bowlus, Deceased. SCHOOL DISTRICT NO. 10, ALLEN COUNTY, KANSAS, *Appellant*, v. ALLEN COUNTY STATE BANK, Trustee Under the Will of Thomas H. Bowlus, Deceased, *Appellee*.

(416 P. 2d 711)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Necessity to Raise Question Below—No Change of Theory on Appeal.* On appeal, a litigant may not change the theory of his case from that on which it was presented to the trial court, nor may he present matters or issues which he did not bring to the attention of the trial court (following *Green v. Kensinger*, 193 Kan. 33, 392 P. 2d 122).
2. SAME—*Ex Parte Order—When Appeal Lies.* The general rule is that an appeal will not lie from an *ex parte* order until after an application to vacate or modify the same has been presented to and overruled by the trial court.
3. SAME—*Appeal from Order Taxing Costs—Order Vacated—Appeal Moot.* Where an appeal has been taken from an order taxing costs, and the order is later vacated and set aside by the trial court, such appeal becomes moot.
4. TRUSTS—*Fine Arts and Cultural Center—Appeal Dismissed.* The record is examined in an appeal from orders entered by the district court relating to a testamentary trust and, for reasons appearing in the opinion, it is *held* the appeal must be dismissed.

Appeal from Allen district court; SPENCER A. GARD, judge. Opinion filed July 14, 1966. Appeal dismissed.

Stanley E. Toland, of Iola, argued the cause, and *Frank W. Thompson*, of Iola, was with him on the briefs for the appellant.

Howard M. Immel, of Iola, argued the cause and was on the brief for the appellee.

Clyde Hill, of Yates Center, was on the brief *pro se*, as *amicus curiae*.

Mitchell H. Bushey and *J. D. Conderman*, both of Iola, and *Robert F. Stadler*, of Humboldt, were on the brief for the intervenors, Charles H. Apt, *et al.*

The opinion of the court was delivered by

FONTRON, J.: The appellant, School District No. 10, Allen County, Kansas, has appealed from three orders entered by the District Court of Allen County. The first order of which complaint is made directed the District School Board or Board of Education to report annually concerning its administration of property left in trust under the will of Thomas H. Bowlus; the second order contained various directives to the School Board, and the third retaxed specific costs to the School District. In this opinion, we will refer to School Dis-

ATTACHMENT #2-3

ministration of this Fine Arts and Cultural Center facility and its uses. If the testator's gift is an absolute gift to the appellant school district with limitation on use to the purposes stated in the Will, then the District Court has no supervisory jurisdiction whatsoever. . . ."

A great deal of emphasis has been placed on this "basic issue" both in the brief filed by the Board and in its oral argument. However, the difficulty with the Board's position is this: That particular "basic issue" was not raised prior to this appeal. The Board made no claim in the trial court that the District was simply the recipient of an outright gift from the testator. The Board's failure to advance this contention before the trial court is made clear by the remarks of its counsel made at the conclusion of the hearing which resulted in the June 30 order. At that time, counsel spoke only of the discretionary powers possessed by the Board, and referred not at all to the contention now being advanced that the trial court lacked supervisory authority over the Board.

It is the long and well-established rule of this jurisdiction that this court will not consider on appeal issues or questions which were not presented to the trial court. In *Green v. Kensinger*, 193 Kan. 33, 392 P. 2d 122, we held:

"On appeal, a litigant may not change the theory of his case from that on which it was presented to the trial court, nor present matters not brought to the trial court's attention." (Syl. ¶ 4.)

See, also, cases collected in 1 Hatcher's Digest, Revised Edition, Appeal and Error, § 304, and 2 West's Kansas Digest, Appeal and Error, §§ 169, 171.

The rule that a question may not be submitted for the first time on appeal is a salutary one which finds its justification in certain basic considerations. A party may not be permitted to sit idly by and then complain of an adverse judgment which he might have prevented by the timely presentation of issues not considered by the court. The obvious purpose of requiring the submission of issues first to the trial court is to apprise that court accurately of the position taken by a litigant to the end that the court, being fully advised, may arrive at a just decision or, when shown to be in error, to correct its rulings. A further purpose to be served is to permit the opposing side to nullify or overcome a defect, if possible. It is only through the consistent application of the foregoing rule that our appellate function may be exercised expeditiously and with fairness to litigants.

The same considerations which underlie the rule of appellate

ATTACHMENT #2-4

No. 34,425

DON C. CAMPBELL, *Appellant*, v. FLOYD E. RAMSEY, *Appellee*.

(92 P. 2d 819)

SYLLABUS BY THE COURT

1. ELECTIONS—*Contests—Appeals—Nature and Scope.* In an election contest case the record was made before the contest court, and on appeal the district court examined the record and exhibits that were before the contest court and heard no other evidence. *Held*, that on appeal this court will examine the same record and reach its own conclusion as to the facts.

2. SAME—*Contest Court—Powers and Duties.* In an action such as that described in the above paragraph of the syllabus, the contest court should make a recount of those precincts only where irregularities and fraud are charged in the pleadings of contester and contestee.

3. SAME—*Contest—Evidence.* In an action such as that described in syllabus, paragraph 1, the record is examined, and it is held that there was sufficient evidence of fraud and irregularity to warrant the contest court in ordering a recount.

4. SAME—*Contest—Evidence—Weight and Sufficiency.* In an action such as that described in syllabus, paragraph 1, in order for the ballots to be the best evidence it must appear that they have been kept safely and not tampered with from the time when they were delivered to the county clerk to the time when they were tendered to the contest court.

5. SAME—*Contest—Evidence.* In an action such as that described in syllabus, paragraph 1, the record is examined, and it is found that the ballots had not been securely kept, had been tampered with and the result of the recount should not be considered.

6. SAME—*Contests—Canvassing Board—Procedure.* In an action such as that described in syllabus, paragraph 1, where the county canvassing board found four more tallies on the tally book than were credited to the candidate in the totals, and two more for another candidate, it was the duty of the canvassing board to consider the total number of tallies and to give the candidate credit therefor.

7. SAME—*Contests—Counting.* In an action such as that described in syllabus, paragraph 1, the record is examined, and it is held that there actually were four more tallies marked on the poll book for contester and two more for contestee than they were given credit for in the totals.

8. SAME—*Voters—Residence.* An elector who enters the service of the government and moves to some place other than his place of residence to perform his duties does not thereby lose his residence in the place where he resided when he entered the service.

9. SAME—*Voters—Residence of Married Women.* The residence, for the purpose of voting, of a married woman who is not permanently separated from her husband is that of her husband.

ATTACHMENT #2-5

There was evidence at West Freedom precinct one of the judges of the election arrived at the polling place before the rest of the board and when they arrived he had the envelopes containing the ballot opened. The election laws provide in detail just how an election shall be conducted from the time notice of the election is first published, just how the ballots shall be printed and distributed, how the board is appointed, the polls opened, the actual voting done and the votes counted. The statute is minute in its direction as to the counting and the record of the counting and the care of ballots. The provisions of these statutes were violated or ignored in many instances in this election. Where election boards were so careless as to the well-known rules of carrying on an election and ignored them so flagrantly, while the evidence does not show any willful fraud, it is not a violent assumption that the boards were careless enough in their work of counting that a recount would probably change the result of the election, since the winning candidate only had a majority of one.

There is another question, however, that must be settled before we can decide whether the court was correct in its refusal to consider the result of the recount.

The question to be decided in an election contest is which candidate received the most legal votes. In determining that question the ballots are the best evidence; that is, they are the best evidence if when the contest is being heard the contest court can be sure that the ballots it is asked to count are the same ballots that were counted at the polling places—otherwise not. For that reason the statutes throw the many safeguards around the ballots after they are counted, requiring them to be strung on a wire, uniting the ends of the wire and sealing them with sealing wax, enclosing the ballots in an envelope, sealing it and returning them to the officer from whom the election officials received them. (See G. S. 1935, 25-419.) The same section also provides as follows:

"Such officer shall carefully preserve all such ballots for six months, and at the expiration of that time shall destroy them by burning, without previously opening any of the said envelopes."

The officer referred to in this case is the county clerk.

Taken in its most favorable light for the contester, this record discloses that the county clerk did not comply with the above statute. The ballots in this case were put in a room where, to say the least, there was ample opportunity for a number of people other

ATTACHMENT #2-6

No. 47,834

DAY & ZIMMERMAN, INC., and LIBERTY MUTUAL INSURANCE COMPANY, *Appellants*, v. NORMAN DEAN GEORGE and THE SECOND INJURY FUND OF STATE OF KANSAS, *Appellees*.

(542 P. 2d 313)

SYLLABUS BY THE COURT

1. WORKMEN'S COMPENSATION—*Liability of Second Injury Fund—Handicapped Employee—Burden of Proof upon Employer—"But for" Preexisting Impairment.* In order to assess liability against the Second Injury Fund for disability of a handicapped employee arising from a second injury to such employee, the burden is upon the employer, under the provisions of K. S. A. 44-567 [now 1974 Supp.], to prove a causal relation between the handicap and the subsequent injury; that the subsequent accident was the proximate cause of the injury; and that the accident would not have occurred "but for" the preexisting impairment.
2. SAME—*Findings Supported by Evidence—Upheld on Appellate Review.* Findings in a workmen's compensation case which are supported by substantial competent evidence will be upheld by this court on appellate review even though there is evidence of record which, if given credence by the trial court, would have supported contrary findings.
3. APPEAL AND ERROR—*Determining Whether Findings Supported by Evidence—Review.* In examining the record on appellate review to determine whether there is substantial competent evidence to support the findings made, the record must be viewed in the light most favorable to the party prevailing below.
4. SAME—*Credibility of Witnesses—Weight of Evidence—Review.* On appellate review this court does not judge the credibility of witnesses or determine the weight to be accorded their testimony.
5. WORKMEN'S COMPENSATION—*Handicapped Person—Second Injury Fund—Modifying Award Arising from First Accident Error—Competent Evidence for Award from Second Injury.* In a workmen's compensation proceeding involving a subsequent injury to a handicapped workman, wherein the Second Injury Fund was impleaded, the record is examined and it is *held:* (1) There is no substantial competent evidence to support the district court's judgment modifying the award to claimant for disability arising from his first accident; and (2) there is substantial competent evidence sufficient to support the district court's judgment awarding compensation for temporary total disability arising from injury suffered by claimant resulting from a second accident.

Appeal from Labette district court, division No. 3; HAL HYLER, judge. Opinion filed November 8, 1975. Affirmed in part, reversed in part and remanded with directions.

Garry W. Lassman, of Keller, Wilbert, Palmer and Lassman, of Pittsburg, argued the cause and was on the brief for the appellants.

ATTACHMENT #2-7

can all be tied in with the accident which he described to his back on October 14, 1970."

Dr. Battenfield, on the other hand, testified that because of the first surgery, claimant's back was weak and susceptible to a second ruptured disc through the original surgical site and that in his opinion the subsequent rupture of the disc was due to the lifting. It is evident from their interpretations of Dr. Battenfield's testimony that both the examiner and the director found that claimant's subsequent ruptured disc resulted from the effect of lifting upon his back which had become weakened and susceptible to injury as a result of the first injury and subsequent surgery.

While testimony such as that disclosed in this record can reasonably be the subject of opposite interpretations and even support opposing conclusions, the test is whether the record contains any substantial competent evidence which on any theory of credence justifies the trial court's findings. It is not the function of this court to judge the credibility of witnesses or to determine what weight should be given their testimony. (*Stanley v. A & A Iron Works*, supra.)

Viewing the record in the light which we are required to do, we are compelled to say that there is substantial competent evidence to the effect that claimant's second ruptured disc was caused by "lifting" on his job and that it amounted to personal injury by accident which "but for" the preexisting condition of claimant's back would not have occurred.

In view of what has been said the posture of the case is that the first award for the sum of $13.49 per week based upon 20% permanent partial disability should not have been modified and the award of the director and examiner in this respect should be reinstated insofar as it affects the liability of appellants. In this connection appellants state in their brief:

"If, however, the original award is not to be affected, then that simply means that the appellant should pay the $13.49 awarded against it under the original award but should not in any way be affected by the second award against the second injury fund. . . ."

In other words, the liability of appellants in this regard is $13.49 per week based upon 20% permanent partial general bodily disability for the compensable period under the award of January 24, 1972, and appellants are entitled to reimbursement from the Second Injury Fund for any excess paid by appellants in this regard.

ATTACHMENT #2-8

No. 52,962

FIRST NATIONAL BANK & TRUST COMPANY, *Appellee*, v. LOWELL L. LYGRISSE and JUDITH LYGRISSE, *et al, Appellants.*

(647 P.2d 1268)

SYLLABUS BY THE COURT

1. MORTGAGES—*Dragnet Mortgage—Subsequent Debts Secured under Dragnet Clause.* Subsequent debts may be secured under the dragnet clause of a real estate mortgage in either of two ways: (1) by specifically stating on the face of the new note that it is secured by the prior mortgage; or (2) by showing that the subsequent debt is of the same kind or character as, or part of the same transaction or series of transactions with, that originally secured by the mortgage.
2. SAME—*Antecedent Debts—When Secured under Mortgage.* Antecedent debts may be secured by a mortgage containing a dragnet or other advances clause only if the antecedent debts are clearly identified in the mortgage. This rule, however, has no application where subsequent notes specifically indicate that certain antecedent debts were intended to be secured.
3. SAME—*Contract Rules Apply to Construction.* Promissory notes and mortgages are contracts between the parties, and the rules of construction applicable to contracts apply to them.
4. CONTRACTS—*Intention of Parties.* The intention of the parties and the meaning of a contract are to be deduced from the instrument where its terms are plain and unambiguous.
5. SAME—*Intention of Parties—Written Terms Most Persuasive Evidence of Intent.* The best and most persuasive evidence of the intention of parties who enter into a written agreement is that which is expressed by the terms of that agreement.
6. JUDGMENTS—*Presumption of Validity—Appellate Review.* A presumption of validity attaches to a judgment of the district court until the contrary is shown, and before this court will set aside a judgment it must be affirmatively made to appear that such judgment is erroneous.
7. APPELLATE PROCEDURE—*Record.* The burden is upon an appellant to designate a record sufficient to present its points to this court, and to establish the claimed error.
8. SAME—*Error Never Presumed—Burden of Proof on Appellant.* On appeal, error below is never presumed and the burden is on the appellant to make it affirmatively appear.
9. APPEAL AND ERROR—*Sufficiency of Evidence—Burden on Appellant to Provide Transcript, Abstract of Testimony or Reconstruction of Testimony.* Where an appellant has failed to procure an official transcript or abstract the testimony of record or reconstruct it in some accepted manner, this court will not review any action of the trial court requiring an examination of the evidence.

Review of the judgment of the Court of Appeals in 7 Kan. App. 2d 291 (1982). Appeal from Butler District Court; J. PATRICK BRAZIL, judge. Judgment of the

ATTACHMENT #2-9

Does the note of April 12, 1976, represent a "future advance" or is it an "antecedent debt"? In view of the fact that this note makes specific reference to the mortgage as providing security therefor, this point, though the only one raised by appellant, is perhaps academic. The rule against extending a mortgage containing a dragnet clause to secure antecedent debts, absent reference thereto in the mortgage, has no application where subsequent notes specifically indicate that certain antecedent debts were intended to be secured. See *Kamaole Resort Twenty-one v. Ficke Hawaiian Inv., Inc.*, 60 Hawaii 413, 426-27, 591 P.2d 104 (1979).

Here the Bank on April 12, 1976, loaned the Lygrisses money to pay existing notes and interest to other banks; it loaned them "new money" in the amount of $18,000; and it consolidated the $47,000 note of January 30, 1976, and one or more other notes of the Lygrisses that it held. All of the notes thus consolidated were paid, and a single new obligation, specifically secured by the real estate mortgage, was created. This was not an antecedent debt, but a future advance.

We turn next to the conclusions of the Court of Appeals that certain findings of the trial court were not supported by the evidence. Certain long-standing rules of appellate review are applicable:

1. The rule of this jurisdiction is that a presumption of validity attaches to a judgment of the district court until the contrary is shown and that before this court will set aside a judgment it must be affirmatively made to appear that such judgment is erroneous. *Klepper v. Stover*, 193 Kan. 219, 220-21, 392 P.2d 957 (1964); *McClelland v. Barrett*, 193 Kan. 203, Syl. ¶ 3, 392 P.2d 951 (1964).

2. The burden is upon an appellant to designate a record sufficient to present its points to this court, and to establish the claimed error. *Farmers Ins. Exchange v. Schropp*, 222 Kan. 612, Syl. ¶ 8, 567 P.2d 1359 (1977).

3. On appeal, error below is never presumed and the burden is on the appellant to make it affirmatively appear. *Kohn v. Babb*, 204 Kan. 245, 248, 461 P.2d 775 (1969); *Gladney v. Sheriff of Leavenworth County*, 3 Kan. App. 2d 568, 598 P.2d 559 (1979).

4. It is incumbent upon the appellant to include in the record on appeal any matter upon which he wishes to base a claim of error. *Frevele v. McAloon*, 222 Kan. 295, 299, 564 P.2d 508

ATTACHMENT #2 - 10

serts a cause of action barred by the statute of limitations does not relate back to the first petition so as to deprive defendant of the defense of the statute." (*Powers v. Lumber Co.*, 75 Kan. 687, syl. ¶ 1, 90 Pac. 254.)

The bar relates to the commencement of the cause of action with each separately, and as this action was not commenced until long after the bar of the statute had run, the ruling of the trial court was correct in not permitting it to be related back to the time of the commencement of the former action.

The judgment is affirmed.

No. 31,311.

JOHN N. FREE, *Appellant*, v. JOHN W. WOOD, *Appellee*.

(22 P. 2d 978.)

SYLLABUS BY THE COURT.

ELECTIONS—*Contest—Right to Recount of Ballots.* In a proceeding to contest an election it is held that the provision of R. S. 25-419, that "In all cases of contested elections, either of the parties contesting shall have the right to have such ballots opened and to have all errors of the judges in counting the ballots corrected by the court or body trying such contest," does not give one desiring to contest the election an absolute right to have the votes recounted; but he must first make such showing of irregularity and fraud as to make it probable that a recount would change the result of the election.

Appeal from Sedgwick district court *en banc*; GROVER PIERPONT, ISAAC N. WILLIAMS, ROSS MCCORMICK and R. L. NESMITH, judges. Opinion filed June 10, 1933. Affirmed.

Harold A. Zelinkoff, Dale M. Bryant and *Howard T. Fleeson*, all of Wichita, for the appellant.

George Siefkin, Enos E. Hook, E. L. Foulke, F. W. Prosser and *H. C. Castor*, all of Wichita, for the appellee.

The opinion of the court was delivered by

SMITH, J.: This was an election contest. The contest court decided against the contester. This decision was upheld by the four district judges of Sedgwick county, sitting *en banc*. The contester appeals.

John Free and John Wood ran against each other for county attorney. There were about 57,000 votes cast. Wood was declared to have received 17 votes majority.

ATTACHMENT #2 - 11

provisions of the contest statute. This statute sets up the machinery for a contest, provides how it shall be commenced, the causes therefor, the creation of a special court, the hearing of the case, the determination of the issues, etc. (R. S. 1923, 25-1411 *et seq.*)

"If it had been intended to wipe out the causes for contest, the hearing thereon and a decision following such hearing it would have been easy enough for the legislature to have said so. It not having said so, the conclusion seems inevitable that the two statutes must be read together, and the causes must be proven before a recourse is had to the ballots; that the right exists only when preceded by proper proof. This conclusion is borne out by the decision of our supreme court in *Moorhead v. Arnold,* 73 Kan. 132, which was decided after the statute was enacted. It was there held that there was not an absolute right to introduce the ballots, but that such right arose only after a proper preliminary foundation—in that case, proof that the ballots had not been tampered with."

The rule is laid down in 20 C. J. 255, as follows:

"Since the ballots themselves, when their integrity has been established, are the best evidence of the result of an election, it is held by some authorities that in a statutory contest where error, mistake, fraud, misconduct or corruption in counting the ballots or declaring the result of an election is alleged, a recount of the ballots upon request of the complaining parties should be ordered as a matter of course. But a party has no right to demand a recount as a mere fishing excursion, and the better rule seems to be that a resort to the ballots cannot be had until the contestant produces evidence which indicates at least a probability that a recount would decide the election in his favor, that there were frauds, irregularities, or mistakes committed in the acceptance of the ballots and return of their count, or that there is error in the record declaring the result of the election; although the actual lawful result as disclosed by a recount will not be defeated by the fact that the recount is ordered before such proof is submitted."

The majority of the court have reached the conclusion that the above rule from Corpus Juris is the better rule, and that this case is one where from the record it appears that the counting of the ballots would be a fishing expedition.

In *Gray v. Huntley,* 77 Colo. 478, the court held:

"A party to an election contest is not entitled, as a matter of right, to have ballot boxes opened and a recount made. Before such an order can be properly made there must be some preliminary evidence supporting the alleged charges, and then the matter is within the sound legal discretion of the trial court, the exercise of which is ordinarily held to be final on review." (Syl. ¶ 7.)

In *Conaty v. Gardner,* 75 Conn. 48, the court, in dealing with an election contest, said:

"The statute does not provide what facts must be proved, or what evidence

ATTACHMENT #2 -12

No. 56,099

HESSTON CORPORATION, *Appellant*, v. STATE OF KANSAS EMPLOYMENT SECURITY BOARD OF REVIEW and WELDON BACHMAN, *et al.*, PAUL H. WENGER, *et al.*, and JOYCE LEE, *Appellees*.

(684 P.2d 388)

SYLLABUS BY THE COURT

1. APPELLATE PROCEDURE—*Record—Duty of Appellant.* It is the duty of an appellant to bring up a complete record of all matters upon which review is sought.

2. SAME—*Record—Appellant Must Furnish Record That Shows Prejudicial Error in Trial Court.* The appellant has the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. In the absence of such a record, we presume that the action of the trial court was proper.

3. EMPLOYMENT SECURITY LAW—*Unemployment Compensation during Two-week Economic Shutdown of Plant.* In an appeal by an employer from an unemployment compensation case, it is *held:* (1) employees laid off during a two-week economic shutdown were temporarily unemployed; (2) each employee's claim constituted that employee's registration for work; (3) under the circumstances of this case, those persons who were temporarily unemployed during the two-week economic layoff were not required to search for another job; and (4) under the terms of the collective bargaining agreement, employees who were entitled to take vacation time at any time during the year were not required to take it during the economic shutdown, and thus they were not "voluntarily unemployed" during the shutdown.

Appeal from Harvey District Court; SAM H. STURM, judge. Opinion filed June 8, 1984. Affirmed.

Robert D. Overman, of Martin, Churchill & Overman, of Wichita, argued the cause and was on the briefs for appellant.

Marlin A. White, of Topeka, argued the cause and was on the brief for appellee State of Kansas Employment Security Board of Review.

William H. Seiler, Jr., of Bremyer & Wise, P.A., of McPherson, argued the cause and was on the brief for appellees Bachman, *et al.*, Wenger, *et al.*, and Lee.

The opinion of the court was delivered by

MILLER, J.: This is an appeal by an employer, Hesston Corporation, from a judgment of the Harvey County District Court, finding the individual defendants, Hesston employees, eligible for unemployment benefits under the Kansas Employment Security Law, K.S.A. 44-701 *et seq.* The separate claims of some sixty-four Hesston employees are before us in this consolidated appeal. The issues raised by Hesston are four:

(1) Whether employees who took vacation with pay during a two-week plant shutdown are eligible to receive unemployment benefits for the shutdown time;

ATTACHMENT #2-13

of one year; or the Board may have considered the week as the waiting period and allowed compensation at the end thereof; or it may have disallowed compensation but counted that week as a waiting period, making the employees eligible without waiting during the ensuing fifty-one week period in the event of further layoffs. The record does not disclose precisely what action the Board took, or what its reasoning was. It is the duty of an appellant to bring up a complete record of all matters upon which review is sought. *Armstrong v. City of Salina*, 211 Kan. 333, Syl. ¶ 2, 507 P.2d 323 (1973); *Eckdall v. Negley*, 5 Kan. App. 2d 724, Syl. ¶ 1, 624 P.2d 473 (1981). Stated another way, the appellant has the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. In the absence of such a record, we presume that the action of the trial court was proper. *Jackson v. City of Kansas City*, 235 Kan. 278, 307, 680 P.2d 877 (1984); *State v. Bright*, 299 Kan. 185, 623 P.2d 917 (1981). We conclude that we are unable to determine the waiting period issue on the basis of this record.

We turn now to the final issue: Whether employees who were entitled to vacation time but who did not use it during the two-week shutdown, and who elected to take it at other times during the year, were eligible for unemployment benefits during the shutdown time. This would apply to employees who fall within the fourth and fifth classifications or groups listed earlier in this opinion. Hesston claims that these employees who were entitled to some vacation time and did not take it during the shutdown were not involuntarily unemployed. In discussing this claim, the parties cite *Goodyear Tire & Rubber Co. v. Employment Security Board of Review*, 205 Kan. 279, 469 P.2d 263 (1970). The holding in that case is summarized by paragraph No. 2 of its syllabus:

> "Under a collective bargaining agreement which authorized the employer to shut down all or part of its plant for two weeks for vacation purposes, and those employees eligible to a vacation were required to take their vacations during the shutdown period, unless they elected to defer all or part of their vacation to the following year, or had scheduled their vacation for some other time during the vacation year, in which case they were considered on a 'leave of absence,' it is *held*, that employees who elected to take their vacations at some other time than during the shutdown period were *voluntarily unemployed* and, thus, were not eligible for unemployment compensation benefits under the law." (Emphasis in original.)

ATTACHMENT #2-14

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 64,669

COLORADO INTERSTATE GAS COMPANY and
NORTHERN NATURAL GAS COMPANY,
a division of Enron Corp.,

Petitioners-Appellants,

v.

THE BOARD OF COUNTY COMMISSIONERS
OF MORTON COUNTY, KANSAS, and THE
BOARD OF COUNTY COMMISSIONERS OF
PRATT COUNTY, KANSAS,

Appellees.

- - - - - -

No. 64,701

IN THE MATTER OF THE APPEAL OF
THE BOARD OF COUNTY COMMISSIONERS
OF MEADE COUNTY, KANSAS, FROM
A CERTIFICATION OF ASSESSED VALUATION
BY THE DIRECTOR OF PROPERTY VALUATION.

SYLLABUS BY THE COURT

1.

A constitutional provision is not to be narrowly or technically construed, but its language should be interpreted to mean what the words imply to persons of common understanding.

2.

The scope of a tax exemption created by a self-executing

ATTACHMENT #2-15

nendment to the Kansas Constitution is to be determined by the language utilized in the amendment.

3.

The 1986 amendment to Article 11, § 1 of the Kansas Constitution is discussed, and it is held that natural gas owned by public utilities and stored for resale comes within the exemption from ad valorem taxation afforded to merchants' and manufacturers' inventories.

Appeals from the State Board of Tax Appeals. Opinion filed December 7, 1990. The order of the State Board of Tax Appeals reversing the Director of Property Valuation is reversed.

Richard D. Greene, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and *Mark A. Ohlsen*, of the same firm, *Karen Pauley*, of Colorado Interstate Gas Company, of Colorado Springs, Colorado, and *E. Chris Kaitson*, of Enron Interstate Pipelines, of Houston, Texas, were with him on the briefs for petitioners/appellants.

Bruce F. Landeck and *Janice S. Martin*, of Bennett, Lytle, Wetzler, Winn & Martin, of Prairie Village, argued the cause and were on the briefs for intervenor/appellant Panhandle Eastern Pipe Line Company.

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Benjamin James Neill, of Perry and Hamill, of Overland Park, argued the cause, and *Linda Ann Terrill* and *Catherine Moir Walberg*, of the same firm, and *Darrel E. Johnson*, Morton County Counselor, were with him on the brief for appellees Boards of County Commissioners of Meade, Morton, and Pratt Counties.

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ne opinion of the court was delivered by

McFARLAND, J.: In this consolidated appeal, appellants Colorado Interstate Gas Company, Northern Natural Gas Company, and Panhandle Eastern Pipe Line Company appeal from the decision of the State Board of Tax Appeals (BOTA) reversing the determination of the Director of Property Valuation (PVD) that stored natural gas belonging to appellants constituted merchants' and manufacturers' inventory and was thus exempt from ad valorem taxation pursuant to Article 11, § 1 of the Kansas Constitution. The appellees are the Boards of County Commissioners of Meade, Morton, and Pratt Counties who had appealed the PVD's decision to BOTA.

Before turning to the issues, a brief background statement is appropriate. The appellants are public utilities operating interstate natural gas pipelines and are regulated by the Federal Energy Regulatory Commission. They buy gas at the wellhead, in the field, or at plant outlets for transportation and sale to local distribution companies. The level of production of natural gas remains relatively constant throughout the year, but the demand for the product is much higher in the cold weather months. As a result, appellants buy more gas during the warm weather months than their markets can immediately absorb. The surplus gas is regularly and routinely placed in underground storage facilities to await its sale

ATTACHMENT #2-18

during the periods of greater demand. Such storage facilities are authorized by the Underground Storage of Natural Gas Act, K.S.A. 55-1201 *et seq.* Such facilities, as pertinent herein, exist as follows:

1. Colorado Interstate in Morton County;

2. Northern Natural Gas in Pratt County; and

3. Panhandle Eastern in Meade County.

The PVD annually determines the fair market value of public utility property, both real and personal, tangible and intangible, and apportions the assessed valuation among the involved taxing units (K.S.A. 79-5a01 *et seq.*). The PVD determined public utilities' stored natural gas was merchants' or manufacturers' inventory under Article 11, § 1 of the Kansas Constitution and its implementing statute and, accordingly, was exempt from ad valorem taxes. The fair market value of such property was not included in the PVD's assessment of the property owned by said public utilities and this resulted in lower valuations being certified by the PVD to the respective counties herein. The counties appealed to BOTA, which reversed the PVD as to the exempt status of the stored natural gas and directed that the PVD recompute the assessed valuations of property owned by each of the public utilities and certify the

ATTACHMENT #2-19

..ew figures to the taxing districts involved herein. The public utilities appeal from said order of BOTA.

The primary issue is the proper interpretation of the constitutional amendment involved. More specifically, does the natural gas herein purchased for resale by the appellant public utilities in the ordinary course of their business come within the merchants' and manufacturers' inventory exemption from ad valorem taxation?

By virtue of the rationale expressed by BOTA in denying the exemption, it is particularly important to state the history of the amendment and the events leading to this litigation.

In November 1986, Kansas voters approved an amendment to Article 11, § 1 of the Kansas Constitution. The amendment permitted, *inter alia*, a new exemption from property taxation for "merchant's and manufacturer's inventories." The amendment provides, in pertinent part:

> "(2) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchant's and manufacturer's inventories and livestock and all household goods and personal effects not used

ATTACHMENT #2-20

for the production of income, shall be exempted from property taxation." L. 1985, ch. 364, § 1.

In 1988, the Kansas Legislature enacted legislation, codified at K.S.A. 1988 Supp. 79-201m, concerning the exemption, as follows:

"To the extent herein specified, merchants' and manufacturers' inventory shall be and is hereby exempt from all property or ad valorem taxes levied under the laws of the state of Kansas.

"As used in this section:

(a) 'Merchant' means and includes every person, company or corporation who shall own or hold, subject to their control, any tangible personal property within this state which shall have been purchased for resale without modification or change in form or substance, and without any intervening use;

(b) 'manufacturer' means and includes every person, company or corporation who is engaged in the business of transforming, refining or combining materials and labor to convert tangible personal

ATTACHMENT #2-21

property from one form to another including packaging; and

(c) 'inventory' means and includes those items of tangible personal property that: (1) Are held for sale in the ordinary course of business (finished goods); (2) are in process of production for such sale (work in process); or (3) are to be consumed either directly or indirectly in the production of finished goods (raw materials and supplies). Assets subject to depreciation or cost recovery accounting for federal income tax purposes shall not be classified as inventory. A depreciable asset that is retired from regular use and held for sale or as standby or as surplus equipment shall not be classified as inventory.

"The provisions of this section shall apply to all taxable years commencing after December 31, 1988."

These definitions were expressly intended to conform with general accounting standards, income tax definitions, Internal Revenue Service holdings and regulations, and other statutes.

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In December 1988, Terry Hamblin, then Director of Property Valuation for the State of Kansas, attended a meeting of utility tax personnel in Kansas City. While there, a number of attendees argued that they were entitled to the inventory tax exemption. Hamblin took the issue under advisement and subsequently decided that stored natural gas qualified for the exemption. He based his decision on the "plain and unambiguous" statutory language that "operated to grant the exemption."

On March 28, 1989, Panhandle Eastern sent a letter to the PVD requesting that the underground gas stored in Meade County be declared exempt as merchants' and manufacturers' inventory for the tax year 1989.

On April 20, 1989, the PVD issued a memorandum to all public utility companies. The memorandum discussed the exempt status of inventories. It advised companies to submit requests defining "exempt" accounts and "detailing why it should be considered as 'inventory'."

On July 10, 1989, in response to a request from Mr. Hamblin, the Kansas Attorney General issued Op. No. 89-85 which addressed the classification amendment, the Kansas Constitution, and certain exemptions found in the Constitution. The opinion

ATTACHMENT #2-23

found statutory and constitutional support for the exemption of stored gas. The opinion concluded:

> "Further, subsequent enactment of K.S.A. 1988 Supp. 79-201m is indicative of legislative intent to include the type of property in question as merchants' or manufacturers' inventory. We have found nothing in recorded legislative history to evidence a contrary intent. Thus, your interpretation appears to coincide with commonly held notions of what constitutes merchants' or manufacturers' inventory for purposes of exemption pursuant to the Kansas Constitution. We find nothing in article 11, section 1 which would preclude personal property of a public utility from being considered merchants' or manufacturers' inventory entitled to exemption from taxation."

In reversing the allowance of the exempton by the PVD, BOTA held that public utilities were not merchants or manufacturers, and, hence, not entitled to the exemption granted to merchants' and manufacturers' inventories. BOTA accepted the PVD's determination that the appellants' stored natural gas constitutes inventories. The stored natural gas clearly comes within the commonly understood meaning of "inventory" and the statutory definition thereof set forth in K.S.A. 1988 Supp.

ATTACHMENT #2-24

79-201m(c). As an alternative position, appellees contend a portion of the stored natural gas cannot be properly classified as inventory. This claim will be discussed later in the opinion. The primary issue in the appeal is whether or not public utilities are included within the term "merchants' and manufacturers'."

Before proceeding further, it is appropriate to emphasize the scope of the litigation before us. The constitutional amendment granting the exemption at issue expressly provides that it "shall govern assessment and taxation of property on or after January 1, 1989." The determination by the PVD and the order of BOTA concern the appropriate 1989 valuations of the public utilities' property based upon the constitutional amendment and the definitions contained in K.S.A. 1988 Supp. 79-201m. The BOTA decisions herein were filed on December 6 and 7, 1989. On December 8, 1989, the Kansas Legislature passed House Bill No. 2004, which amended K.S.A. 79-201m by adding:

> "(b) The provisions of this section shall not apply to any tangible personal property of a public utility as defined by K.S.A. 79-5a01, and amendments thereto."

The bill was signed by the governor on December 12, 1989. For some inscrutable reason, the parties herein make no

ATTACHMENT #2-25

reference to this amendment to K.S.A. 79-201m. There is nothing available in the legislative history of House Bill No. 2004 to indicate what relationship, if any, its introduction has to the BOTA litigation herein. Under the circumstances, the validity of the December 12, 1989, amendment to K.S.A. 79-201m is not before us.

The portion of the 1986 constitutional amendment to Article 11, § 1 of the Kansas Constitution before us is clearly self-executing. The exemptions are granted by the amendment itself as opposed to empowering the legislature to enact legislation in the subject area. Examples of constitutional amendments which are not self-executing are Article 15 § 3a (bingo); 15 § 3b (parimutuel wagering); 15 § 3c (state-owned lottery); and 15 § 10 (intoxicating liquors). A good discussion of self-executing vs. not self-executing constitutional provisions is contained in 16 Am. Jur. 2d, Constitutional Law § 139 *et seq.* commencing on page 510.

> "The rule is that a self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of constitutional right to make it more available. Thus, even in the case of a constitutional provision which is self-executing, the legislature

ATTACHMENT #2-26

may enact legislation to facilitate the exercise of the powers directly granted by the constitution; legislation may be enacted to facilitate the operation of such a provision, prescribe a practice to be used for its enforcement, provide a convenient remedy for the protection of the rights secured or the determination thereof, or place reasonable safeguards around the exercise of the right. And, even though a provision states that it is self-executing, some legislative action may be necessary to effectuate its purposes. But legislative authority to provide the method of exercising a constitutional power exists only where the constitutional provisions themselves do not provide the manner and means and methods for executing the powers therein conferred. Procedure prescribed in a self-executing provision must be followed to the exclusion of that prescribed by statute, and failure to comply with the provisions of a statute which differ from those in the constitutional provision is not a defect.

"It is clear that legislation which would defeat or even restrict a self-executing mandate of the constitution is beyond the power of the legislature. Also, the legislature is neither

ATTACHMENT # 2-27

required nor permitted to enact laws purporting to confer rights in excess of and different from those contemplated by the constitution. A liability imposed by a self-executing provision is absolute and not subject to legislative enlargement or lessening or restriction as to manner of enforcement."

See also Annot., 4 A.L.R.2d 744 concerning the authority of the legislature relative to self-executing tax exemption.

Some rules of constitutional construction need to be stated at this point. In *Board of Wyandotte County Comm'rs v. Kansas Ave. Properties*, 246 Kan. 161, 786 P.2d 1141 (1990), we held:

"In ascertaining the meaning of a constitutional provision, the primary duty of the courts is to look to the intention of the makers and adopters of that provision." Syl. ¶ 2.

"In interpreting and construing the constitutional amendment, the court must examine the language used and consider it in connection with the general surrounding facts and

ATTACHMENT #2-28

circumstances that cause the amendment to be submitted." Syl. ¶ 3.

A constitutional provision is not to be narrowly or technically construed, but its language should be interpreted to mean what the words imply to men of common understanding. *State, ex rel., v. Highwood Service, Inc.*, 205 Kan. 821, Syl. ¶ 4, 473 P.2d 97 (1970). A constitution should not be interpreted in any refined or subtle sense, but should be held to mean what the words imply to the common understanding of men. *State v. Sessions*, 84 Kan. 856, Syl. ¶ 1, 115 Pac. 641 (1911). When interpreting the constitution, each word must be given due force and appropriate meaning. *State, ex rel., v. Hines*, 163 Kan. 300, 304, 182 P.2d 865 (1947).

Realistically speaking, it is highly unlikely that many 1986 Kansas voters spent much time meditating on whether public utilities could come within the term "merchants or manufacturers." The test is, however, what meaning people of common understanding would give to the words in question.

In *Campbell v. City of Anthony*, 40 Kan. 652, 20 Pac. 492 (1887), this court was concerned with whether a lumber dealer was a merchant or retailer and thus required by a city ordinance to buy a license. We stated:

ATTACHMENT #2-29

"A merchant is defined to be 'one who traffics or carries on trade; one who buys goods to sell again; one who is engaged in the purchase and sale of goods.' A retailer is defined to be 'one who sells goods by small quantities, or parcels.' 'Goods,' as used in this definition, includes wares, commodities and chattels. We have no doubt but that a lumber dealer is included in the ordinary signification of both a merchant and retailer. In the case of *City of Newton v. Atchison*, 31 Kan. 151, which was sharply contested, elaborately argued by counsel, and thoroughly considered by the court, a hardware dealer was confessedly included within the general term of merchant." 40 Kan. at 654.

Webster's New Collegiate Dictionary 719 (1977), defines "merchant" as "a buyer and seller of commodities for profit." This appears to be consistent with other dictionary definitions and general understanding of the term. K.S.A. 1988 Supp. 79-201m(a), in defining the constitutional use of 'merchant' in the exemption, contains a more elaborate definition but is in keeping with the dictionary definition, as follows:

"(a) 'Merchant' means and includes every person, company or corporation who shall own or

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hold, subject to their control, any tangible personal property within this state which shall have been purchased for resale without modification or change in form or substance, and without any intervening use."

The appellant companies are clearly and undisputably in the business of buying and selling natural gas. Severed natural gas is, obviously, tangible personal property. So it would appear quite clear that the public utilities herein are merchants within the constitutional amendment.

BOTA's position to the contrary may be summarized as being that no public utility can be a merchant or manufacturer. To reach this conclusion, BOTA climbs onto some very thin branches. It stresses the legislative development of the amendment. Particular emphasis is placed upon the minutes of the Senate Committee on Assessment and Taxation relative to 1985 Senate Concurrent Resolution No. 1616, wherein it was stated that under the proposed constitutional amendment "public utilities would continue to be taxed as they were at the present." Reference is made to the fact that the PVD testified that such would be the case. The problem with this argument is that Senate Concurrent Resolution 1616 contained no exemption for merchants' and manufacturers' inventories. This exemption came in through 1985 House Concurrent Resolution 5018.

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BOTA also relied on the fact that, prior to the amendment, inventories of public utilities were assessed under K.S.A. 79-5a01 *et seq.* rather than as merchants' inventories under K.S.A. 79-1001 *et seq.* (Ensley 1984) and concluded, therefore, public utilities could not be merchants under the constitutional amendment. However, the statutes relative to merchants (K.S.A. 79-1001 *et seq.* [Ensley 1984]) were repealed contemporaneously with the implementation of the classification/exemption amendment. Further, the public utilities had never conceded that they were not merchants under the prior law.

Various legislators filed affidavits in the BOTA proceedings herein to the effect that the proposed amendment was not intended to alter the assessment and taxation of inventories owned by public utilities. The 1989 amendment to K.S.A. 79-201m clearly supports this position. The problem here is that in enacting the proposed constitutional amendment the legislature determined the size of the mesh in the net and the requisite number of voters approved the mesh size. The mesh size is thus fixed in the constitution. The fact that unintended varieties of fish may pass through the mesh has little bearing on anything.

Under the circumstances, this court can only apply the clear language of the amendment. As we said in *Harris v.*

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Shanahan, 192 Kan. 183, 196, 387 P.2d 771 (1963), in discussing statutory construction:

> "'. . . Errors plainly clerical in character, mere inadvertences of terminology, and other similar inaccuracies or deficiencies will be disregarded or corrected where the intention of the legislature is plain and unmistakable. But the court cannot delete vital provisions or supply vital omissions in a statute. No matter what the legislature may have really intended to do, *if it did not in fact do it, under any reasonable interpretation of the language used*, the defect is one which the legislature alone can correct.'" (Emphasis in original.) (Quoting *Russell v. Cogswell*, 151 Kan. 793, 795, 101 P.2d 361 [1940].)

In the case before us, we are primarily concerned with the 1988 amendment itself and what persons of common understanding would imply from the words used therein.

Further, the inclusion of public utilities in the merchants' and manufacturers' inventory exemption is not so unreasonable as to demand a contrary interpretation. There was testimony before BOTA to the effect no other state taxed natural gas stored by public utilities for resale. Public policy

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favoring the storage of natural gas is stated in K.S.A. 55-1202 as follows:

> "The underground storage of natural gas which promotes conservation thereof, which permits the building of reserves for orderly withdrawal in periods of peak demand, which makes more readily available our natural gas resources to the domestic, commercial and industrial consumers of this state, and which provides a better year-round market to the various gas fields, promotes the public interest and welfare of this state."

We conclude that: (1) the PVD correctly interpreted the constitutional exemption for merchants' and manufacturers' inventories in determining that public utilities herein were entitled to come within such exemption; and (2) BOTA erred in reversing the PVD on this issue.

By virtue of this conclusion, we need not consider the appellants' claim that BOTA's interpretation of the amendment and its definitional statutes constituted a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

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As an alternative position, the appellees argue that the PVD incorrectly determined the extent of the exemption by: (1) including stored gas classified as "non-current" gas as inventory; and (2) in the method used to compute the exemption. Highly technical arguments are raised in these fallback positions and little would be gained by their lengthy discussion herein.

We have long held that matters of valuation and taxation are administrative in character, and a determination of the administrative agency acting within its legislative power, when fairly and honestly made, is final, and courts will not interfere to usurp the agency's function or substitute their judgment for that of the agency. *Mobil Pipeline Co. v. Rohmiller*, 214 Kan. 905, 917, 522 P.2d 923 (1974). Courts will not substitute their judgment for that of the assessing authority in the absence of fraud or conduct so oppressive, arbitrary, or capricious as to amount to constructive fraud. *Cities Service Oil Co. v. Murphy*, 202 Kan. 282, 289, 447 P.2d 791 (1968).

It is sufficient to say we have carefully considered the respective arguments of the parties and find no arbitrary, unreasonable, or capricious conduct by the PVD in regard to these fallback contentions.

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The order of the State Board of Tax Appeals reversing the Director of Property Valuation is reversed.

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No. 36,377

HAROLD N. JOHNSON, *Appellee*, v. STEVE RUSSELL, *Appellant*.

(159 P. 2d 480)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Appealable Orders—Motion for Judgment as Demurrer.* Where a motion for judgment on the pleadings is properly construed as a demurrer an order overruling the motion is appealable under G. S. 1935, 60-3302.
2. ELECTIONS—*Regulations as to Soldier's Absentee Ballot Law.* Section 25-1225, G. S. 1943 Supp., does not empower the secretary of state to make regulations fixing the qualification of voters or modifying the general law relating to the rejection of ballots or of votes for any candidate.
3. SAME—*Contest Action—Pleading—Distinguishing Marks.* In a statement of intention to contest the election of a county commissioner the contestor alleged that certain ballots voted by absentee voters had printed thereon the names of candidates for county commissioner in two commissioner districts; that certain absentee voters made a cross mark not only in the square after the name of a candidate in the district in which they were qualified electors but also in the square after the name of a candidate in the other district; that in a certain ward the votes for commissioner on the ballots so marked were unlawfully rejected; that "the number of said votes so. . . rejected was sufficient mathematically to have changed the result of said election" for county commissioner. *Held*: (*a*) The statement of intention, reasonably construed, alleged that the contestor would have been elected if the votes so rejected had been counted. (*b*) In the absence of fraud or evidence that the cross mark after the name of a candidate in the district in which the voter was not a qualified elector was intended as an identifying mark such mark did not make the ballot void under the provisions of G. S. 1935, 25-419. (*c*) Such cross mark, referred to in paragraph (*b*), *supra*, did not make invalid a vote otherwise properly marked for a candidate for commissioner in the district in which the voter was a qualified elector.

Appeal from Miami district court; GARFIELD A. ROBERDS, judge. Opinion filed June 9, 1945. Affirmed.

Douglas Hudson, of Fort Scott, and *Bernard L. Sheridan*, of Paola, argued the cause, and *L. Perry Bishop* and *J. Milton Sullivant*, both of Paola, were on the briefs for the appellant.

W. C. Jones, of Olathe, argued the cause for the appellee.

The opinion of the court was delivered by

HOCH, J.: This is an election contest case involving the office of county commissioner in Miami county. A motion by the contestee for judgment on the pleadings was overruled and he appeals.

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invalidating the ballot under the provision above quoted, and that in the absence of any showing of fraud or fraudulent intent such ballots were properly counted. In the opinion it was said: "In the literal sense it could hardly be said that the electors using this ballot placed cross marks in any of the voting squares for any other than the purpose of voting, although that purpose was not accomplished by using the square in question." (p. 152.) There is certainly more reason, under the present situation, for holding that the ballots should be counted. If a voter who makes a mark in a printed square after the words *"no nomination"* does so for *"the purpose of voting,"* certainly one who makes a mark in a printed square *after the name of a candidate* does so for the "purpose of voting" in the absence of some indication to the contrary.

The decision in *Short v. Davis,* supra, has stood unquestioned for more than twenty-five years. Since that decision some changes have been made in the statute but the provision upon which it was based has not been changed. Such changes as have been made have had the effect of making the requirements less rigid (for history of changes made prior to 1925 see *Wall v. Pierpont,* 119 Kan. 420, 240 Pac. 251). One change, made in 1913, was to remove the restriction that only a pencil with black lead could be used. Another and important change, also made in 1913, was to add the following provision:

> "No ballot shall be invalidated and thus thrown out because a cross within the square is not made with mathematical precision. The intent of the voter must be first considered, and if in the opinion of the judges the cross is not an identifying mark the ballot shall be counted." (G. S. 1935, 25-420.)

The general trend of these changes and of our decisions since *Short v. Davis,* supra, has been to emphasize the voter's intention and to count the ballot unless in the opinion of the judges the mark in question was intended as an identification mark. (*Mathewson v. Campbell,* 91 Kan. 625, 138 Pac. 637; *Wall v. Pierpont,* supra; *Boddington v. Schaible,* 134 Kan. 696, 8 P. 2d 314; *Hansen v. Lindley,* 152 Kan. 63, 77-80, 102 P. 2d 1058.) In the present case the fact that the squares in which the voters improperly made a cross mark were printed on the ballots, and the further fact that there were forty-five voters who made the same mistake strongly fortifies the view that the marks were not made for purposes of identification.

It is thus clear that it would have been improper to reject the whole ballot. The next question is whether all votes for commissioner upon ballots so marked should have been rejected. We find

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No. 45,471

MATH KOHN, *Appellant* and *Cross-Appellee*, v. HELEN BABB, *Appellee* and *Cross-Appellant*.

(461 P. 2d 775)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Review of Evidence—Omitted From Record.* Questions relating to a review of evidence cannot be answered on appeal when it is apparent pertinent evidence before the trial court is omitted from the record on appeal.
2. CONTRACTS—*Character and Kind of Breach Warranting Rescission.* To warrant rescission of a contract because of a breach of its terms, the breach must be material and the failure to perform so substantial as to defeat the object of the parties in making the agreement; a breach which goes to only a part of the consideration, which is incidental and subordinate to the main purpose of the contract, does not warrant a rescission. (Following *In re Estate of Johnson*, 202 Kan. 684, 452 P. 2d 286.)
3. SAME—*Breach Not Defeating Purpose—Rescission Denied.* The failure of a landlord to include certain farm payments as income in an accounting is not so material as to defeat the object of the parties in making the agreement. Such a breach goes only to a part of the consideration which is incidental and subordinate to the main purpose of the contract, and does not warrant rescission.
4. LANDLORD AND TENANT—*Farming Operation—Tenant Abandoning Lease—No Recovery for Crop Not Planted.* When a tenant under a lease is paid for his services from a share of the crops raised on the land, and after cultivating certain land in preparation to seeding he abandons the lease, he cannot recover for expenses and labor in preparing the ground for a crop he did not plant or harvest.
5. ACCORD AND SATISFACTION—*Requisites Stated.* In order for a payment to finalize an accord and satisfaction it must be offered as full satisfaction of a claim, and be accompanied by such declarations, or under such circumstances, as would amount to a condition that, if accepted, it would be in full satisfaction of the claim.
6. LANDLORD AND TENANT—*Appeal From Judgment No Error.* In an appeal from a judgment in favor of a farm tenant on an accounting and from a judgment in favor of a landlord on the tenant's claim for restitution the record is examined and no error is found.

Appeal from Mitchell district court; DONALD J. MAGAW, judge. Opinion filed December 6, 1969. Affirmed.

Don W. Noah, of Beloit, argued the cause and was on the brief for appellant.

Tweed W. Ross, of Beloit, argued the cause and *Harry W. Gantenbein*, of Beloit, was with him on the brief for appellee.

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We have examined the tenant's motion for new trial and his motion for amendment and additional findings and find no contention that grain stored in bins was omitted in the accounting. Under the state of the record presented to this court we are unable to determine whether this grain was overlooked or included by the trial court. It may have been included in Exhibit E which is not made a part of the record. On appellate review error in the court below is never presumed. The burden is cast upon the appellant to affirmatively establish that error has been committed. (See Hatcher's Kansas Digest, Revised Edition, Appeal and Error, § 408.) Questions relating to a review of evidence cannot be answered on appeal when it is apparent pertinent evidence before the trial court is omitted from the record on appeal. (*Jocich v. Greyhound Cab Co.*, 188 Kan. 268, 362 P. 2d 27.)

On the next point the tenant claims expenses incurred in overhauling and rebuilding machinery were wrongfully included in farm operating expenses. He contends such expenses were the responsibilty of the defendant-landlord. Included in these were truck tires placed on one of the three trucks which were used in the farming operation. Some of the larger items complained of were parts and labor totalling $68.80 paid to Moritz Implement Company and a repair or overhaul job for $150.97 paid to Meis Hardware and Implement Company.

The lease provides:

"VI. Lessor agrees to furnish and pay for all of the operating expense of said farming operation, including both the real estate and machinery used thereon, which shall include, but not be limited to, all fertilizer, machinery, repairs, seed, gas, oil, grease and all other goods and supplies required in the farming operation of such real estate.

"VII. And, lessee agrees the lessor shall keep and maintain all records regarding said farming activities; that he will furnish and deliver to her, at least once each month, all bills, receipts, statements, and other evidence required to reflect in detail all income and expense of such farming operation.

. . . . . .

"XIII. And, lessee agrees that if any major repairs are required on any machinery, either his or that belonging to the lessor, he will first confer with lessor in regard to such and will proceed only with her agreement before the same may be considered as part of the expense of the farming operation."

The tenant arranged for the repairs to machinery and there is nothing in the evidence or in the lease which supports the tenant's contention that expenses of overhauling and rebuilding of machinery were to be separately paid for by the landlord. Paragraph XIII of

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Ed. M. Moss v. H. E. Patterson.

1. Elections — *Contest — Rejection of Votes.* In a contested election case, where a large number of witnesses are produced who testified to their age, residence, and length of residence in a particular voting precinct; that they voted for a certain candidate for county clerk at the election about which the contest arose; all questions and answers being without objection, it is error for the contest court to reject these votes, and not count them for the candidate for whom they were cast. A vote must be presumed to be legal until the contrary is shown.
2. Review — *Objections Waived.* This court will not consider a motion to dismiss the petition in error because the transcript of the proceedings of a contest court is not properly authenticated, when such a motion was filed in the district court and then withdrawn, and there was no ruling thereon.

Error from Harper District Court.

Contest for the office of county clerk of Harper county. Judgment for *Patterson*, at the June term, 1888. *Moss* brings the case here. The material facts appear in the opinion.

Geo. E. McMahon, H. C. Finch, W. S. Cade, and *Hatton & Ruggles*, for plaintiff in error.

Shepard, Grove & Shepard, Finch & Finch, and *Sam. S. Sisson*, for defendant in error.

Opinion by Simpson, C.: At the general election held in Harper county on the 8th day of November, 1887, Ed. M. Moss and H. E. Patterson were rival candidates for the office of county clerk. Neither was the nominee of a political party, Moss being the candidate on what was termed the "South ticket," and Patterson being the candidate on the "North ticket"; the line of division being a contest over the removal of the county seat from Anthony, south of the center, to Harper, north of the center of the county. At this particular election the relocation of the county seat was not voted upon, but the *virus* of the agitation destroyed party lines,

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and subjected every other material interest of the county to its specific ulcers. The canvass of the returns of the election by the board of county commissioners resulted in the declaration that Patterson had received 1,735 votes, and Moss 1,364 votes, and the certificate of election was given to Patterson. These were the only candidates for that office, no one else having received a vote. Moss instituted a contest before the probate judge and two associates, who tried the case, made special findings, and rendered a judgment in his favor. From this judgment Patterson took the case by petition in error and bill of exceptions to the district court of that county, and there the judgment of the contest court was reversed, and Patterson was found and adjudged to have been elected; and to reverse this finding and judgment of the district court, Moss brings the case here. It was argued and submitted in connection with the case of *Peter v. Blue*, just decided, and differs from that case in this single particular, to wit: After evidence had been introduced by and on behalf of Moss, tending to establish a fraudulent conspiracy on the part of the judges and clerks of election at the Harper precinct, and others, to allow to be polled and manufactured a large and illegal vote, and thus destroying the *prima facie* character of the election returns from that precinct, Patterson then produced on the witness stand 355 persons, who testified to their names, ages, places of residence, and length of residence in Harper City; that they voted at the election held in that precinct on the 8th day of November, 1887, for H. E. Patterson for the office of county clerk. These persons testified, so far as we know, or so far as the record discloses, without specific objection by the plaintiff in error. It is not insisted now, so far as we understand counsel, but that Patterson had the undoubted legal right to offer such testimony after the state of the evidence was such as to render it probable that the returns from Harper City were so tainted with fraud that the truth could not be deduced from their face; but the objection insisted upon is, that a fundamental rule governing the admis-

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sibility of evidence has been violated by counting these votes for Patterson, as must have been done in the district court in order to adjudge that he was elected. Conceding for the purposes of this opinion, that the returns as canvassed by the county board were absolutely correct so far as Moss is concerned, these gave Moss but 1,364 votes. Deducting from Patterson's vote of 1,735, as shown by the canvass, the total vote cast for him in the city and township of Harper, which was 606, and 45 in the east precinct of Lake township, it leaves him 1,084. If the 355 votes that are now in dispute be added to the result, it gives Patterson 1,439—a majority of 75 over Moss. This ignores the evidence of the persons who testified to their own votes, concerning 57 other persons who were not produced before the contest court, whom they claimed to have seen vote for Patterson at that precinct, and the vote of the east precinct of Lake township. The contest court rejected all the votes of the 355 persons who testified, except the votes of twenty of such persons, for the reason, in many instances, that it was not shown that they were citizens of the United States; or that "it was not shown that they were male persons of 21 years of age and upwards"; or that it was not shown that they had cast legal ballots for Patterson; and for other reasons—the theory of the contest court being, that before they were authorized by law to count the votes of such persons for Patterson they must establish, affirmatively, by satisfactory evidence, that they possessed all the statutory qualifications of electors of the state; and also, that they had cast a legal ballot; it being insisted that the naked declaration of the witness that he voted is not sufficient, but he is required to show that he voted a written or printed ballot, with the name of H. E. Patterson thereon, as a candidate for the office of county clerk. The judgment rendered in the action of the district court of Harper county contains neither special findings of fact nor separate conclusions of law, but is a general finding and judgment in favor of Patterson, and to reverse it here on the record presented, it must either appear that the judgment was wrong as a matter of law, or that there

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No. 46,248

CHARLES A. OGDEN, *Appellee and Cross-Appellant*, v. CONTINENTAL CASUALTY COMPANY, a Corporation, *Appellant and Cross-Appellee*.

(494 P. 2d 1169)

SYLLABUS BY THE COURT

1. INSURANCE—*Group Disability Insurance Policy—Premiums Paid Equally by Employer and Employee—Notice of Cancellation or Modification Necessary.* Where a group policy of disability insurance provides that part of the premiums shall be paid by the insured employee, the employee is entitled to notice of cancellation or modification of policy benefits, and, in the absence of such notice, may recover under the original master policy and certificate of insurance issued thereunder.
2. SAME—*Action to Recover Benefits Under Group Policy—Notice of Modification Not Given—Attorney's Fees Properly Denied.* The record is examined in an action to recover benefits under a group policy of disability insurance and for reasons stated in the opinion it is *held:* (*a*) The trial court's finding that the appellee did not receive notice of modification of policy benefits was supported by substantial, competent evidence; and (*b*) the trial court did not err in denying to appellee an allowance of attorney's fees.

Appeal from Cowley district court, division No. 1. DOYLE E. WHITE, judge. Opinion filed March 4, 1972. Affirmed.

Stephen J. Jones, of Hershberger, Patterson, Jones & Thompson, of Wichita, argued the cause and *William R. Smith*, of Hershberger, Patterson, Jones & Thompson, of Wichita, was on the brief for the appellant and cross-appellee.

Robert L. Bishop, of Janicke, Herlocker & Bishop, of Winfield, argued the cause, and was on the brief for the appellee and cross-appellant.

The opinion of the court was delivered by

PRAGER, J.: This is an action to recover benefits under a group insurance policy brought by an employee insured thereunder. The insurance policy was issued by the appellant Continental Casualty Company to provide disability insurance coverage to the employees of Tracor, Inc., of Austin, Texas. Benefits payable under the policy were set forth in a schedule attached to the certificate of insurance issued to each individual employee. The master policy was in the possession of the employer Tracor. Premiums on the policy were paid one-half by the employer and one-half by the employee. Participation in the group insurance plan was voluntary.

As an employee of Tracor, Inc., the appellee Charles A. Ogden was issued a certificate of insurance dated September 1, 1966, to

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ATTACHMENT #2 -

In its second point the appellant Continental contends that the trial court erred in its failure to find that Ogden was given proper notice of the modification made to his group insurance policy. At the trial of this case a disputed issue of fact was presented to the trial court. The trial court found under the evidence that actual notice of the modification of the group insurance policy was never given to Ogden prior to the time his disability occurred. In his testimony the appellee Odgen categorically denied any notice of the amendment to his group insurance policy reducing disability benefits. Lou Anne Ogden likewise denied receipt of such notice. Continental's only witness, Oscar Dean Cruse, testified that he had no personal knowledge that an amended certificate of insurance pertaining to Ogden was ever even delivered to Tracor by Continental; nor could he testify to his knowledge that Ogden had received any actual notice of the modification of the policy. We have no hesitancy in holding that there was substantial, competent evidence to support the finding of the trial court that appellee Ogden did not receive notice of modification of the group insurance policy prior to the date his disability occurred.

As its third point on this appeal the appellant Continental urges that since, Tracor, Inc., the employer of Ogden, had actual knowledge of the modification of the insurance policy, such knowledge must be imputed to Ogden as a matter of law. It is clear from the record in this case that the question of any agency relationship was never presented to the trial court. As pointed out heretofore the only evidence offered by appellant was the testimony of Oscar Dean Cruse, Tracor's manager of personnel administration. His testimony in no way sought to establish an agency relationship between the employer Tracor and the appellee Ogden. Nowhere in his testimony was anything said concerning the relative responsibilities of the employer and its employees in the administration of the group insurance program. The issue of agency is clearly a new theory which was first presented on appeal to this court. The rule is well established in this jurisdiction that a litigant is bound by the theory on which his case was submitted to the trial court. This court on appeal will not consider a case on a theory other than that adopted by the parties in the court below. (*Potwin State Bank v. Ward,* 183 Kan. 475, 327 P. 2d 1091.) The desirability of such a rule is apparent in the case at bar. Whether an employer is the agent of the insurance company or the agent of its employees

No. 44,854

DWIGHT SHERBERT, *Appellee*, v. HENRY MALL, *Appellant*.

(434 P. 2d 549)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Findings and Judgments Where Supported by Evidence.* The court will not weigh conflicting evidence on appeal but will examine the record only for the purpose of determining whether there is substantial and competent evidence to support the findings and judgment.
2. SAME—*Appellants' Burden to Show Error.* The burden remains always on an appellant to show error in the ruling complained of, and when an appellant has not sustained that burden this court cannot assume error in the ruling.
3. CONTRACTS—*Oral Contract—Evidence to Support Verdict.* In an action on an oral contract the record is examined and it is *held*, there was evidence to support the verdict and the trial court did not err in entering judgment thereon.

Appeal from Clay district court, division No. 1; LEWIS L. MCLAUGHLIN, judge. Opinion filed December 9, 1967. Affirmed.

John Berglund, of Clay Center, argued the cause, and was on the brief for appellant.

Bruce H. Wingerd, of Clay Center, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

FROMME, J.: This is an appeal in an action on an oral contract. The jury rendered a verdict for $1,500 in favor of plaintiff and judgment was entered thereon. The defendant Henry Mall appeals from the verdict and judgment.

Defendant-appellant assigns two errors in his statement of points. In his brief he states:

"The point which the appellant relies upon is that the verdict and decision of the lower court is not supported by the evidence as the evidence supported an agreement for $1,000.00, and the jury rendered a verdict in amount of $1,500.00 against the appellant.

"Point No. 2 is abandoned."

We thus have but one point left to decide.

A pre-trial stipulation was signed by the parties in which they agreed as follows:

"Parties agree that this is a contract matter, that the action is timely brought and involves the law of oral contracts and the only issues to be determined are questions of fact."

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The plaintiff sued for $2,500. This amount represented the value of a one-half interest in a certain tractor which gave rise to plaintiff's claim. The defendant testified plaintiff had only a $1,000 interest in the tractor.

The township assessor testified that the defendant had advised him that plaintiff owned a one-fourth interest in the tractor at the beginning of 1964. He further testified the tractor was then valued at $6,000 and that a one-fourth interest would be worth $1,500.

The jury fixed the amount of plaintiff's recovery at $1,500.

The parties stipulated at pre-trial the only issues to be determined were questions of fact for the jury. The amount of plaintiff's recovery was an issue of fact determined by the jury on testimony of the township assessor.

This court will not weigh conflicting evidence on appeal but will examine the record only for the purpose of determining whether there is substantial and competent evidence to support the findings and judgment. (*Newcomb v. Brettle*, 196 Kan. 560, 413 P. 2d 116; see also Hatcher's Kansas Digest, Appeal and Error §§ 507, 508.)

The burden remains always on an appellant to show error in the ruling complained of, and when an appellant has not sustained that burden this court cannot assume error in the ruling. (*Reynard v. Bradshaw*, 196 Kan. 97, 409 P. 2d 1011; see also Hatcher's Kansas Digest, Appeal and Error § 583.)

The judgment is affirmed.

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No. 46,415

WILLIAM L. SHORT, *Appellant*, v. SUNFLOWER PLASTIC PIPE, INC., a corporation; KENNETH FREDERICK; ARDITH FREDERICK; J. D. FREDERICK; RUSSELL FREDERICK; WESLEY FREDERICK and LEONARD FREDERICK, *Appellees*.

(500 P. 2d 39)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Findings—Credibility of Witnesses—Extent of Review.* Under K. S. A. 60-252 (*a*) where trial is to the court, the trial judge shall find the controlling facts, and on appellate review the findings of fact made by the trial judge shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.
2. SAME—*Findings Attached for Insufficiency of Evidence—Scope of Review.* When findings of fact of a trial judge are attacked for insufficiency of evidence, or as being contrary to the evidence, the duty of the appellate court extends only to a search of the record for the purpose of determining whether there is competent substantial evidence to support the findings. The appellate court will not weigh the evidence or pass upon the credibility of the witnesses. Under these circumstances the appellate court must review the evidence in the light most favorable to the prevailing party below.
3. TRIAL—*Negative Finding.* A negative finding is descriptive of a trial court's failure to find the existence of a fact, or of a trial court's finding of the nonexistence of a fact or set of facts.
4. SAME—*Effect of Negative Finding—Extent of Review.* The effect of a negative finding is that the party upon whom the burden of proof is cast did not sustain the requisite burden. Absent arbitrary and capricious disregard of undisputed evidence or some extrinsic consideration such as bias, passion or prejudice on the part of the trial judge, the finding cannot be disturbed. An appellate court cannot nullify a trial judge's disbelief of evidence nor can it determine the persuasiveness of evidence which the trial judge may have believed.
5. SAME—*Affirmative Finding—What Negative Finding Requires.* While affirmative findings of a trial judge are not to be set aside unless clearly erroneous under K. S. A. 60-252 (*a*), the setting aside of a negative finding usually requires the nullification of a trial court's disbelief of evidence, or rejection of evidence.
6. CONTRACTS—*Employment Contract—Execution Necessary.* Where the parties to a proposed multi-year employment contract contemplate and intend a formal written instrument to be signed by the parties before it takes effect, absent such executed written document there is no enforceable contract between the parties.
7. SAME—*Oral Agreement Prior to Execution—Question of Fact.* Whether the parties negotiating a contract are bound by their oral agreement, prior to

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agreement or contract until all the terms of the oral agreement are met and satisfied. An oral agreement, one of the terms and conditions of which is that the agreement shall commence on the date the written agreement is signed by the parties, does not commence and is not effective or enforceable until it is signed by the parties.

"3. Plaintiff is not entitled to performance of the oral agreement for the reason that a part of the oral agreement was that the oral agreement was to commence when reduced to writing *and signed by the parties*. The oral agreement was reduced to writing but never signed by either party.

"4. Defendant Sunflower, and all other defendants, filed only a general denial to plaintiff's claim. Having failed to raise the affirmative defenses enumerated in K. S. A. 60-208 (*c*) [statute of frauds], none of such defenses are available to them.

"5. The only issue raised by the answer and supported by evidence of the defendants with respect to plaintiff's first cause of action therefore, is, *whether an oral contract was made*. This issue is resolved in favor of the *defendants* and against the plaintiff.

"6. Plaintiff is denied recovery on his second claim for relief. Judgment is awarded defendants and against the plaintiff on plaintiff's claim on the theory of quantum meruit." (Emphasis added.)

K. S. A. 60-252 (*a*) provides that where trial is to the court, the trial judge shall find the controlling facts, and it further provides:

". . . *Findings of fact shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ." (Emphasis added.)

The appellant has the burden on appeal of showing that the findings made by the trial court are clearly erroneous. (*Mountain Iron & Supply Co. v. Jones*, 201 Kan. 401, 441 P. 2d 795; and *Aspelin v. Mounkes*, 206 Kan. 132, 135, 476 P. 2d 620.)

Decisions of our court after the adoption of the new code of civil procedure do not suggest that any change was made by 60-252 (*a*), *supra*, regarding a review of the evidence to sustain the findings of the trial court. (For federal decisions under Federal Rule No. 52 [*a*], providing that findings of fact made by the trial judge shall not be set aside unless clearly erroneous, see Gard, Kansas Code of Civil Procedure Annotated, § 60-252.) When findings of fact are attacked for insufficiency of evidence, or as being contrary to the evidence, the duty of this court extends only to a search of the record for the purpose of determining whether there is any competent substantial evidence to support the findings. This court will not weigh the evidence or pass upon the credibility of the witnesses. Under these circumstances this court must review the evidence in the light most favorable to the party prevailing below. (*Brohan v.*

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No. 48,041

LARRY STEELE and MAX STEELE, d/b/a STEELE FARMS, *Appellants*, v. PAUL E. HARRISON, D. D. S., *Appellee*.

(552 P. 2d 957)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Scope of Review.* On appeal it is not the function of the appellate court to weigh conflicting evidence, pass on the credibility of witnesses or redetermine questions of fact. The reviewing court is concerned only with evidence which supports the trial court's findings, and not with evidence which might have supported contrary findings.
2. CONTRACTS—*Meeting of the Minds.* In order for parties to form a binding contract there must be a meeting of the minds on all the essential terms thereof.
3. SAME—*What Constitutes a Meeting of the Minds Stated.* To constitute a meeting of the minds there must be a fair understanding between the parties which normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract.
4. SAME—*Acceptance of Offer Necessary—Counter-offer Not an Acceptance.* It is fundamental that a communicated offer creates a power to accept the offer that is made, and only that offer. Any expression of assent that changes the terms of the offer in any material respect may be operative as a counter-offer, but it is not an acceptance and constitutes no contract. Unless the original offeror subsequently expresses unconditional assent to the counter-offer there will never be a contract.
5. APPEAL AND ERROR—*When Points Abandoned.* Points neither briefed nor argued on appeal will be deemed abandoned.
6. PLEADINGS—*Amendment—Necessity to Show Prejudice—Judicial Discretion.* No error will lie from a trial court's order allowing an amendment to a pleading unless the adverse party can demonstrate prejudice resulting of such a nature as will justify the appellate court in finding the trial court abused its discretion.
7. SPECIFIC PERFORMANCE—*To Convey Land—No Contract Entered into by Parties—Specific Performance Denied.* In an action for specific performance of an alleged agreement to convey land the record on appeal is examined and it is *held:* (1) The evidence supports the judgment of the trial court that no binding contract was entered into by the parties, and (2) specific performance was properly denied.

Appeal from Greeley district court; BERT J. VANCE, judge. Opinion filed July 23, 1976. Affirmed.

J. D. Muench, of Scott City, argued the cause and was on the brief for the appellants.

Keen K. Brantley, of Wallace, Brantley & Shirley, of Scott City, argued the cause, and *James W. Wallace* and *John Shirley*, of the same firm, were with him on the brief for the appellee.

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The opinion of the court was delivered by

FROMME, J.: This action is for specific performance of an agreement to convey farm land in Greeley County, Kansas. After a trial to the court it was held no binding agreement had been consummated and specific performance was denied. Plaintiffs have appealed.

The primary question on appeal is whether there is evidence in the record to support the findings and conclusions of the trial court.

On appeal it is not the function of the appellate court to weigh conflicting evidence, pass on the credibility of witnesses or redetermine questions of fact. The reviewing court is concerned only with evidence which supports the trial court's findings, and not with evidence which might have supported contrary findings. (*Parsons Mobile Products, Inc. v. Remmert*, 216 Kan. 256, Syl. 1, 531 P. 2d 428; *Landrum v. Taylor*, 217 Kan. 113, 535 P. 2d 406.) With these principles in mind we turn to the facts which gave rise to the controversy.

Larry and Max Steele own a farm in Greeley County, Kansas, and operate in partnership. Dr. Paul Harrison of Stafford, Kansas, owns other farm land in that same county. Harrison, a non-resident landowner, had been leasing his land to a farm tenant on a crop-share basis. In January, 1973, Larry Steele wrote to Harrison and expressed an interest in Harrison's land. He advised that the Steeles were interested in trading certain Stanton County land owned by them for the Greeley County land owned by Harrison.

In February, 1973, Harrison replied to Steele's letter and expressed an interest in trading his land in Greeley County, but he wanted land in either Greeley, Hamilton, Wichita, Kearny, Gray or Ford County, not in Stanton County. Harrison received an immediate reply from Steele advising that the Steele brothers would begin looking for land to purchase which might be suitable for trade.

Early in April, 1973, the parties met in a coffee shop at Tribune, Kansas, to discuss the proposed land transaction. Harrison testified at the trial that he and Larry Steele met at Tribune and discussed trading land. At that time he explained to Steele that he was only interested in a trade because his land in Greeley County had a low tax base and in event of a sale he would incur a heavy tax liability. Harrison suggested that the Steeles work with the Stanley Realty

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No. 61,170

J. W. THOMPSON COMPANY, *Appellee*, v. WELLES PRODUCTS CORPORATION, *Defendant*, and PENTA CONSTRUCTION COMPANY, INC., and FEDERAL INSURANCE COMPANY, *Appellants*.

(758 P.2d 738)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Findings of Fact and Conclusions of Law—Appellate Review.* Where the trial court has made findings of fact and conclusions of law, the function of this court on appeal is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law.

2. BONDS—*Contractors' Bonds—Public Works Projects.* In Kansas, contractors' bonds on public works projects filed pursuant to K.S.A. 60-1111, are substitutes for mechanics' liens. Contractors' bonds are for the use of all persons in whose favor liens might accrue.

3. LIENS—*Contractors' Bonds—Rules Applicable to Mechanics' Liens are Analogous to Contractors' Bonds.* In general, it is appropriate to analogize rules applicable to mechanics' liens to contractors' public works bonds.

4. SAME—*Suppliers of Equipment and Material to Contractors and Subcontractors—Such Suppliers Protected by Mechanic's Liens and Contractors' Bonds.* Suppliers of equipment and material to contractors and subcontractors come within the purview of the protection afforded by mechanics' liens and contractors' public works bonds. Suppliers to suppliers (remote suppliers) are not within the purview of such statutes.

5. SAME—*Contractors' Bonds—Subcontractors and Suppliers Distinguished in Regard to Bonds.* Subcontractors and suppliers are discussed and distinguished.

6. EQUITY—*Unjust Enrichment—Application of Doctrine of Facts of Case.* The doctrine of unjust enrichment is discussed and held inapplicable to the facts herein.

Appeal from Sedgwick district court, KENNETH C. KIMMEL, judge. Opinion filed July 8, 1988. Reversed and remanded with directions.

Wyatt A. Hoch, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Robert L. Howard*, of the same firm, was with him on the briefs for appellants.

William P. Tretbar, of Fleeson, Gooing, Coulson & Kitch, of Wichita, argued the cause and was on the brief for appellee.

William A. Larson, of Gehrt & Roberts, Chartered, of Topeka, was on the brief *amicus curiae* for The Associated General Contractors of Kansas, Inc.

The opinion of the court was delivered by

McFARLAND, J.: In this action plaintiff, J. W. Thompson Company (Thompson), seeks to recover the selling price of certain

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Penta and its surety appeal from the judgment.

The first issue before us is whether the district court erred in concluding that Welles was a subcontractor to Penta rather than a supplier. This legal conclusion was crucial to the subsequent conclusion that Penta and its surety were liable on the bond herein.

The standard of appellate review is clear. Where the trial court has made findings of fact and conclusions of law, the function of this court on appeal is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. *Moore v. R. Z. Sims Chevrolet-Subaru, Inc.*, 241 Kan. 542, Syl. ¶ 3, 738 P.2d 852 (1987); *Rosenbaum v. Texas Energies, Inc.*, 241 Kan. 295, Syl. ¶ 5, 736 P.2d 888 (1987); *Southwest Nat'l Bank of Wichita v. ATG Constr. Mgt., Inc.*, 241 Kan. 257, Syl. ¶ 1, 736 P.2d 894 (1987).

Were the trial court's findings of fact sufficient to support its legal conclusion that Welles was a subcontractor of Penta rather than a supplier or materialman? We believe not.

As the *amicus* brief filed by the Associated General Contractors of Kansas, Inc., (AGC) ably points out, the terms of the purchase order between Penta and Welles are wholly consistent with it being a contract for the purchase of equipment and are significantly lacking in the basic requirements of a subcontract. The instrument speaks of the sale price, contract of sale, return of goods, security interest in goods delivered, delivery dates, etc. There is no reference to work to be performed, performance bonds, maintenance of general liability insurance, workers' compensation requirements, that proof be supplied of payment of labor and materials used, hold harmless agreements for negligence, etc. Penta and Welles are referred to as buyer and seller, respectively. There is no evidence that either Penta or Welles considered their relationship to be that of contractor-subcontractor rather than what the purchase order clearly showed to be a buyer-seller relationship.

K.S.A. 60-1111 provides, in pertinent part:

"(a) *Bond by contractor.* Except as provided in subsection (c), whenever any public official, under the laws of the state, enters into contract in any sum exceeding $10,000 with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on

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the instant case. There were no prejudicial remarks by the prosecuting attorney nor improper instructions by the trial court. The affidavit was permitted to be read and was treated as the deposition of the absent witnesses by both parties and the court. It was the province of the jury, however, to weigh the evidence.

In our opinion the evidence was sufficient to justify the verdict of conviction and there was no abuse of discretion in refusing to grant the continuance. We find no error which would warrant a reversal.

The judgment is affirmed.

No. 26,220.

JESSE D. WALL, *Plaintiff*, v. GROVER PIERPONT, *Defendant*.

SYLLABUS BY THE COURT.

1. ELECTIONS—*Ballots—Identifying Marks.* By virtue of section 7, chapter 189, Laws of 1913 (R. S. 25-420), which effected a distinct change in the law relating to invalidity of ballots exhibiting irregular marking within the square opposite the names of candidates, departures from the true cross consisting of one line, one other line, and one crossing of those lines at any angle, do not as a matter of law invalidate. The intent of the voter must first be considered, and if in the opinion of the judges the cross is not an identifying mark the ballot shall be counted.

2. SAME—*Identifying Marks—Application of Statute.* The section referred to applies to the cross mark within the square at the right of names of candidates, used for voting purposes, and is not applicable to marks or writings which under other sections of the statute it is not lawful to make, or which render the ballot void.

Original proceeding in quo warranto. Opinion filed October 10, 1925. Judgment for defendant.

John S. Dean, Harry W. Colmery, both of Topeka, *A. V. Roberts, Richard E. Bird, I. H. Stearns, John W. Blood, Ray Campbell* and *John B. Bryant*, all of Wichita, for the plaintiff.

D. H. Branaman, of Topeka, *A. L. Noble, George McGill, S. A. Buckland, Robert C. Foulston* and *George Siefkin*, all of Wichita, for the defendant.

The opinion of the court was delivered by

BURCH, J.: The action is one of quo warranto to determine the correct result of the election in Sedgwick county in November, 1924,

1. Elections, 20 C. J. § 194. 2. Id., 20 C. J. § 194.

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two feet of the floor of the polling place. No one would contend that if the curtain of one of a number of booths at a precinct should, through inadvertence, be six inches short, the election in that precinct would be void. To insure secrecy the statute provides that any ballot which shall have been marked or written upon with other than a pencil shall be wholly void, and no vote thereon shall be counted. That provision is mandatory. When the legislative intention is not so plain, whether nonobservance of a regulation avoids a ballot depends on the intimacy of the relation between the regulation and the general purpose to be accomplished, and the nature and extent of the departure. Generally, a voter may be held to strict compliance with rules laid down for his own guidance. Generally, he is not disfranchised for nonconformity by others with rules laid down for their guidance. Generally, innocent voters are not disfranchised on account of the conduct of other individual voters. Contestants for office may have illegal ballots thrown out, but the legal votes of a precinct may not also be thrown out unless conduct has been so flagrant as to corrupt the entire vote. . . .

"No penalty is imposed on the voter unless he acts with apparent improper intent. There is no prohibition against counting a ballot allowed to be seen through accident, or inadvertence, or blameless lack of understanding of the significance of secrecy, and there is no implication of prohibition, in the absence of apparent improper intention. The conclusion must be, the legislature did not regard nonconcealment as working disfranchisement in every case. Although the provisions of section 4217 are highly important, and ought to be observed in all cases, they are not mandatory in the strict legal sense of the term, and the question whether an exposed ballot should be counted depends on the circumstances attending the exposure." (pp. 407, 408.)

The result was that, under circumstances stated in the opinion, voters were not held to strict compliance with rules laid down for their own guidance. No other decision of importance interpreting the ballot law, rendered since 1913, is referred to by the litigants.

Plaintiff has selected from the ballots which he contends were erroneously counted by the commissioner, approximately eighty which exhibit representative defects, and has caused photostatic copies of the markings to be made. Some of these copies are appended to this opinion. It will appear later that the whole ballot should be considered whenever particular marks are to be interpreted.

The argument that any mark of the character indicated *ispo facto* invalidates the ballot rests in final analysis upon *ita lex scripta est.* The statute speaks of a cross and nothing else. When the term "voting mark" is used it refers to a cross. The form of cross is shown in the statute, and consists of two straight lines intersecting each other, and nothing else. One line crossing another at any angle within the voting square will suffice. But the cross still consists of one line intersecting another. No digression is permissible except in

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