

Approved: March 14, 1995
Date

MINUTES OF THE SELECT HOUSE COMMITTEE ON ELECTION CONTESTS.

The meeting was called to order by Chairperson David Heinemann at 3:30 p.m. on February 1, 1995 in Room 313-S-of the Capitol.

All members were present.

Committee staff present:

Dennis Hodgins, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:

Victor Miller, Attorney for Joe Shriver
Eric Rucker, Attorney for Danny Jones

Others attending: See attached list

The staff provided the committee with a report which told of 26 ballots that were looked at by the court and gave an explanation of each ballot. (Attachment 1)

Chairman Heinemann asked if there were any other ballots which the attorney's wished to raise for questions. Both attorney's replied that there were other ballots, besides the 26 the court looked at, which they would request the committee review. Victor Miller claimed that there were two illegal votes that he knew about and there might be others. Eric Rucker replied that there was one vote that was found to be illegal but was counted because the court couldn't tell for whom the vote was cast. He wants to preserve that ballot as an issue.

Staff also provided the committee with precinct/township vote totals, which the attorneys both have stipulated to as being the correct count. (Attachment 2) Also provided was a showing of each of the five counts that were done broken down by precincts. (Attachment 3)

Representative O'Neal requested that in order to speed the process up the attorney's should provide the committee with their suggested findings of facts and conclusions of law.

The Chairman asked the attorneys to prepare the requested items in writing and provide these to the committee on February 3, 1995. Each attorney will present their case to the committee on February 6, 1995.

Committee members requested that staff provide each of them with a copy of the court files. (Attachment 4)

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MEMORANDUM

To: Select Committee on Contested Elections
From: Mary Torrence, Assistant Revisor of Statutes
Date: January 31, 1995
Subject: Court Opinion in Jones v. Shriver

In its opinion in Jones v. Shriver, the District Court narrowed the issues to 26 ballots:

Nine inspection ballots

Three were not counted--cast by voters in another district
Six were not counted--no candidate's name was marked but blank write-in line was marked; court held voter's intent could not be ascertained [see K.S.A. 25-3002(b)(1) & (b)(2)(B)]

Four resolution ballots

Two were counted--dark mark next to one candidate's name and light or small mark next to other candidate's name; court held that voter's intent was clear [see K.S.A. 25-3002(b)(1)]

One was counted--dark mark by one candidate's name; another name written on all write-in lines on ballot, but without marks by name; court held voter's intent was clear [see K.S.A. 25-3002(b)(1)]

One was not counted--dark mark by one candidate's name; partially filled oval with "X" through it next to blank write-in line; court held invalid under K.S.A. 25-3002(b)(2)(B)

Three challenged votes

One was counted--voter changed name due to divorce and was registered under married name; voter filled out proper affidavit, which inadvertently was not forwarded to canvassers; court held that voter voted legally [see K.S.A. 25-2316c(a)]

One was counted--voter moved to new precinct before election (rented apartment 10/1, closed sale of house 10/11, gave up possession of house 10/14; election held 11/8); voter voted in new precinct when should have voted in former precinct; voter filled out change of address affidavit for move within precinct rather than move to new precinct; court held that voter voted legally because moved within 30 days before election and that voter should not be disenfranchised by the error of election officials which caused her to vote in wrong precinct (see K.S.A. 25-3701 et seq.)

One was not counted--voter moved to new precinct more than 30 days before election; no reregistration found; court held voter was not eligible to vote under K.S.A. 25-2316c(b)

Ten illegal votes

Nine not counted--voter moved to new precinct more than 30 days before election and did not reregister; court held votes illegal [see K.S.A. 25-2316c(b)]

One not counted--voter's name purged from registration books for failure to vote in 1988 and 1990 elections; voter allowed to vote illegally in 1992; court held vote illegal [see K.S.A. 25-2302 & 25-2316d]

sions. Such apportionment shall be made in accordance with the provisions of this act and any rules and regulations of the state election board applicable thereto.

History: L. 1968, ch. 53, § 2; March 19.

CASE ANNOTATIONS

1. Failure to exhaust remedy under 25-2204 precluded challenging assessment under act. State, ex rel., v. Unified School District, 218 K. 47, 48, 52, 542 P.2d 664.

25-2203. State election board; membership; meetings; rules and regulations. There is hereby established the state election board, the members of which shall be the lieutenant governor, the secretary of state and the attorney general. The state election board shall meet on the call of the secretary of state. The state election board shall adopt rules and regulations for determination of apportionment of election expenses among the subdivisions of government. Such rules and regulations shall identify and define the election expenses which are direct and those which are indirect, or shall define sufficient means of making determination thereof. The state election board shall make such additional rules and regulations as it deems advisable relating to payment of election expenses.

History: L. 1968, ch. 53, § 3; L. 1974, ch. 364, § 3; Jan. 13, 1975.

Attorney General's Opinions:

Governor's authority to appoint lieutenant governor chairman of the state parole board. 91-80.

CASE ANNOTATIONS

1. Failure to exhaust remedy under 25-2204 precluded challenging assessment under act. State, ex rel., v. Unified School District, 218 K. 47, 48, 542 P.2d 664.

25-2204. Appeal to state election board; effect of determination of appeal; enforcement. In the event that any subdivision of government receives a statement of apportionment of election expense from a county election officer and is aggrieved thereby, the governing body of such subdivision of government may within thirty (30) days after the receipt of such statement appeal to the state election board specifying such changes as it believes should be made in such statement. In accordance with its rules and regulations, the state election board shall receive and determine such appeal, with or without hearing, and issue an order confirming the statement as made or providing that certain changes be made in the statement. The determination of the state election board of any appeal under the provisions of this section shall be conclusive, and shall be the exclusive remedy in such cases. Mandamus

action may be maintained to enforce any order of the state election board.

History: L. 1968, ch. 53, § 4; March 19.

CASE ANNOTATIONS

1. Failure to exhaust administrative remedy precluded challenging assessment under act. State, ex rel., v. Unified School District, 218 K. 47, 48, 53, 542 P.2d 664.

25-2205. Definitions; adoption by reference. Words and terms used in this act have the same meaning as is ascribed thereto in other acts of the legislature at which this act is passed.

History: L. 1968, ch. 53, § 5; March 19.

Cross References to Related Sections:

Definitions enacted in same legislative session include those found in 25-2002 to 25-2008, 25-2101 to 25-2106, 25-2501 to 25-2507.

Article 23.—REGISTRATION OF VOTERS

25-2301. Proof of right of suffrage. Citizens who are entitled to the right of suffrage shall be ascertained as provided in this act, except as is otherwise provided in K.S.A. 25-1215 *et seq.* and 25-1801 *et seq.* The provisions of this act are of statewide importance and concern.

History: L. 1968, ch. 55, § 1; April 30.

Research and Practice Aids:

Elections § 95 *et seq.*
C.J.S. Elections §§ 36, 37.

25-2302. Duty of qualified voters to register; evidence of right to vote. It is the duty of all legally qualified voters to register to vote. Such registration, when made as provided in this act, shall entitle such voters to vote, if otherwise legally qualified. Such registration, if the same meets the requirements of this act, shall be prima facie evidence of the right of such voters to vote at any election held in the voting district where such voter resides.

History: L. 1968, ch. 55, § 2; L. 1971, ch. 132, § 1; July 1.

25-2302a to 25-2302c.

History: L. 1971, ch. 132, §§ 2 to 4; Repealed, L. 1973, ch. 167, § 2; July 1.

25-2302d. Late registration by recently discharged federal service people; certificate; filing with election board. An elector who was a person in federal service within the meaning of K.S.A. 25-1214, and amendments thereto, and whose status in such federal service has been terminated by discharge from the armed forces, by separation from the merchant marine, or by termination of service or employ-

obtain a ballot is falsely swearing to an affidavit given to satisfy the requirements of subsection (a) or subsection (b) of K.S.A. 25-2316c.

False swearing to an affidavit to obtain a ballot is a class B misdemeanor.

History: L. 1973, ch. 166, § 2; L. 1977, ch. 138, § 1; July 1.

25-2316b.

History: L. 1976, ch. 187, § 1; Repealed, L. 1977, ch. 138, § 3; July 1.

→ **25-2316c.** Registration of voters; change of name of registered voter; change of resident by registered voters; failure to vote at general election; removal of names of voters from registration lists; notification of voter; basis for removal of names. (a) When a registered voter changes name by marriage, divorce or legal proceeding, if such voter is otherwise qualified to vote at such voting place such voter shall be allowed to vote at any election on the condition that such voter first gives an affidavit to the election judges stating the facts relevant to such change of name and authorizes the county election officer to change the voter's registration records to reflect such change. The county election officer shall send, by nonforwardable first-class mail, a new certificate of registration to any voter giving such affidavit.

(b) When a registered voter changes residence, such voter must reregister in order to be eligible to vote, except that when a registered voter changes residence from one place in a precinct to another place within the same precinct, if such voter is otherwise qualified to vote in the voting place within the precinct in which the current residence is located, such voter shall be allowed to vote at any election in such precinct on the condition that such voter registers at such time by completing a registration card, making an oath in the form prescribed by the secretary of state and providing proof of residence in accordance with rules and regulations adopted by the secretary of state therefor. Such registration card shall authorize the county election officer to change the voter's registration records to reflect such change. The county election officer shall send, by nonforwardable first-class mail, a new certificate of registration to any such voter. Any person registering to vote at the polls as herein authorized shall be permitted to vote at such election. Whenever the county election officer receives from any election officer a notice of registration of a voter in a different place than

that shown in the records of the county election officer, such officer shall remove the name of such voter from the registration book and party affiliation list.

(c) When a voter fails to vote at a general election at which members of the United States presidential electoral college are elected, such voter's name shall be subject to removal from the voter registration book and the party affiliation list in the manner provided in subsection (d). When a voter fails to vote at any other general election held on the Tuesday following the first Monday in November in an even-numbered year, such voter's name may be subject to removal from the voter registration book and the party affiliation list in the manner provided in subsection (d) if the county election officer determines that the removal of the names of voters who failed to vote in such election is necessary to the maintenance of accurate voter registration records.

(d) When a voter's name is subject to removal from the registration book and the party affiliation list as provided in subsection (c), the county election officer shall attempt to notify such voter by first-class mail at the mailing address specified in the registration book. Such notification shall advise that the registration books show that the person did not vote in the applicable November general election and that it is necessary to reregister if the residence of such person has changed. Such notification shall be mailed in an envelope or on a postcard which clearly indicates that it is not to be forwarded to another address. If such notification is not returned undelivered to the county election officer and no address correction which indicates that the voter has moved is received by the county election officer, the voter's name shall not be removed from the registration book or party affiliation list. If such notification is returned undelivered to the county election officer or if an address correction which indicates that the voter has moved is received by the county election officer, the county election officer shall check to verify that the mailing address on the notification is the same as that on the voter registration list. If it is determined that an error was made in addressing the notification, another notice shall be sent to the correct mailing address. If it is determined that no error was made in addressing the original notification or if the second notification is returned undelivered or an address correction is received therefor, the name of such person

shall be stricken from the registration books and the party affiliation lists.

(e) Except as otherwise provided by law, when a voter dies or is disqualified for voting, the registration of the voter shall be void, and the county election officer shall remove such voter's name from the registration books and the party affiliation lists. Whenever (1) an obituary notice appears in a newspaper having general circulation in the county reports the death of a registered voter, or (2) a registered voter requests in writing that such voter's name be removed from registration, or (3) a court of competent jurisdiction orders removal of the name of a registered voter from registration lists, or (4) the name of a registered voter appears on a list of deceased residents compiled by the secretary of health and environment as provided in K.S.A. 65-2422, and amendments thereto, or appears on a copy of a death certificate provided by the secretary of health and environment, or (5) pursuant to K.S.A. 25-2316d, and amendments thereto, a registered voter fails to vote in two consecutive state general elections the county election officer shall remove from the registration books and the party affiliation lists in such officer's office the name of any person shown by such list or death certificate to be deceased. The county election officer shall not use or permit the use of such lists of deceased residents or copies for any other purpose than provided in this section.

(f) Election board judges are hereby authorized to administer oaths for the purpose of taking affidavits under this section. All such affidavits shall be made upon forms approved by the secretary of state. Every affidavit given under this section shall be returned to the county election officer with the registration books.

(g) Except as otherwise provided in this section, no person whose name has been removed from the registration books shall be entitled to vote until such person has registered again.

History: L. 1977, ch. 138, § 2; L. 1980, ch. 112, § 2; L. 1980, ch. 110, § 4; L. 1982, ch. 154, § 4; L. 1988, ch. 120, § 2; L. 1989, ch. 109, § 2; L. 1992, ch. 281, § 1; May 28.

Cross References to Related Sections:

Change of residence to another precinct within state, see 25-3701 et seq.

Attorney General's Opinions:

Removal of voters' names from registration lists; basis for removal: conviction of felony; constitutionality. 93-68.

25-2316d. Failure to vote in two consecutive state general elections, registration

void; removal of name from lists. When a registered voter fails to vote in two consecutive state general elections beginning with the state general election in 1980, the voter registration of such person is hereby declared to be void. Thereupon, the county election officer shall remove from the registration books and the party affiliation lists in such officer's office the name of any such person. When a person's voter registration is declared void pursuant to this section, the county election officer shall send by nonforwardable first class mail a notice to that person indicating that the voter registration of that person has been declared void for failing to vote in two consecutive state general elections. This notice shall include a registration application and a party affiliation form.

History: L. 1980, ch. 112, § 3; July 1.

25-2316e. Severability. If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

History: L. 1980, ch. 112, § 8; July 1.

25-2317.

History: L. 1968, ch. 55, § 17; Repealed, L. 1973, ch. 166, § 3; July 1.

25-2318. Registration books for voting places. (a) The county election officer shall prepare a registration book for each voting place. Such registration books shall have entered therein, in alphabetical order, the registered voters authorized to vote at such voting place if otherwise a qualified voter.

(b) The registration book or a copy thereof for each voting place shall be certified as to its authenticity by the county election officer, and shall be delivered by the supervising judge to the voting place in time for the opening of the polls.

(c) Registration books to comply with the provisions of this section shall be in any form which has received the prior written approval of the secretary of state.

History: L. 1968, ch. 55, § 18; April 30.

Cross References to Related Sections:

Effect when name not in registration book, see 25-2908.

25-2319. Record of vote in registration books. At every election, one of the judges of the election board shall, as each person votes, enter on the registration book the word

Article 30.—ORIGINAL CANVASS OF
ELECTIONS

25-3001. Reading, counting and recording votes; entries and totals on tally sheets. Election boards shall make the original canvass according to the following procedure:

(a) A ballot box shall be opened and a judge designated by the supervising judge shall take the ballots out of the box either one at a time or in limited quantities as authorized by the supervising judge.

(b) A judge shall read and announce the vote on the ballot for each candidate. In reading and announcing the vote on ballots, the judge shall so place the ballot that another member of the election board may view the ballot as the vote is announced. The clerks shall make a tally mark opposite the name of each candidate receiving a vote as announced by the judge. Such tally marks shall be made upon tally sheets provided by the county election officer. The supervising judge may direct a judge to perform the functions of a clerk for limited periods during the canvass and thereby temporarily relieve one or both clerks.

(c) After one judge announces the votes upon a ballot, he shall hand the same to a second judge, who shall examine it and dispose of it as provided in this act.

(d) Void and blank ballots shall be announced by the judge, and the clerks shall make one tally mark for each such ballot opposite the proper designation on the tally sheet.

(e) From time to time during the canvass the clerks shall compare tally sheets and reconcile any differences to the satisfaction of a majority of the election board. When the canvass is completed, the number of votes received by each candidate shall be written in the indicated place on the tally sheet.

History: L. 1968, ch. 406, § 30; April 30.

Research and Practice Aids:
Elections § 241 et seq.
C.J.S. Elections § 224.

Attorney General's Opinions:
Mail ballot election act, 86-49.

→ **25-3002.** Rules for canvassers; validity of ballots or parts thereof. (a) The rules prescribed in this section shall apply to:

- (1) The original canvass by election boards.
- (2) Intermediate and final canvasses by county boards of canvassers.
- (3) Final canvass by the state board of canvassers.

(4) All election contests.

(5) All other officers canvassing or having a part in the canvass of any election.

(b) Rules for canvassers:

(1) No ballot, or any portion thereof, shall be invalidated by any technical error unless it is impossible to determine the voter's intention. Determination of the voter's intention shall rest in the discretion of the board canvassing in the case of a canvass and in the election court in the case of an election contest.

(2) The occurrences listed in this subpart (2) shall not invalidate the whole ballot but shall invalidate that portion, and that portion only, in which the occurrence appears. The votes on such portion of the ballot shall not be counted for any candidate listed or written in such portion, but the remainder of the votes in other portions of the ballot shall be counted. The occurrences to which this subpart (2) shall apply are:

(A) Whenever a voting mark shall be made in the square at the left of the name of more than one candidate for the same office, except when the ballot instructs that more than one candidate is to be voted.

(B) Whenever a voting mark is placed in the square at the left of a space where no candidate is listed.

(c) A write-in vote for those candidates for the offices of governor and lieutenant governor shall not be counted unless the pair of candidates have filed an affidavit of candidacy pursuant to K.S.A. 25-305 and amendments thereto, and:

(1) Both candidates' names are written on the ballot; or

(2) only the name of the candidate for governor is written on the ballot.

(d) A write-in vote for those candidates for the offices of president and vice-president shall not be counted unless the pair of candidates have filed an affidavit of candidacy pursuant to K.S.A. 25-305 and amendments thereto, and:

(1) Both candidates' names are written on the ballot; or

(2) only the name of the candidate for president is written on the ballot.

(e) A write-in vote for candidates for state offices elected on a statewide basis other than offices subject to subsection (c) shall not be counted unless the candidate has filed an affidavit of candidacy pursuant to K.S.A. 25-305, and amendments thereto.

(f) Any absentee or mail ballot whose envelope containing the voter's written declara-

tion is unsigned, shall be wholly void and no vote thereon shall be counted.

History: L. 1968, ch. 406, § 31; L. 1975, ch. 204, § 9; L. 1976, ch. 189, § 2; L. 1991, ch. 100, § 4; L. 1992, ch. 291, § 9; L. 1993, ch. 287, § 11; July 1.

25-3003. Stringing or other preservation of ballots. (a) After the vote upon a ballot has been announced, the ballot shall be preserved according to one of the following methods:

(1) String the ballots closely upon a flexible wire or cord and unite or tie securely the ends of such wire or cord.

(2) Fasten the ballots that are counted in metal clamps or fasteners of a type which has had the prior approval of the secretary of state.

(3) The secretary of state may prescribe any other system of preserving ballots so long as such system will maintain the ballots in good condition and secure.

(b) Ballots marked "blank," "void" or "objected to" shall not be strung or fastened with other ballots.

History: L. 1968, ch. 406, § 32; April 30.

25-3004. Exhibition of ballots to authorized poll agent during original canvass. During the original canvass by election boards, the judge announcing the vote on any ballot shall, upon request of any authorized poll agent, exhibit such ballot fully opened in a condition that such agent may fully and carefully read and examine the same. The judge shall not allow any such ballot to be taken from his hands.

History: L. 1968, ch. 406, § 33; L. 1969, ch. 185, § 3; April 19.

25-3005. Observation of original, intermediate and final canvasses of elections and casting of ballots by authorized poll agents; rules and regulations of secretary of state. At all elections authorized poll agents shall be allowed to be present and observe the proceedings at all original, intermediate and final canvasses of elections and at the time and place of casting ballots, subject to such limitations as are prescribed by law or rules and regulations of the secretary of state. The supervising judge of each voting place shall be in charge thereof and may direct authorized poll agents as to their conduct within the voting place, but such directions shall not favor agents of one kind or party over agents of another kind or party, and such directions shall not be contrary to law, rules and regulations of the secretary

of state, or instructions of the county election officer.

History: L. 1908, ch. 54, § 13; R.S. 1923, 25-217; L. 1968, ch. 406, § 80; L. 1969, ch. 185, § 4; April 19.

Revision note, 1923:

Edited by striking out provision as to nonpartisan nominee since no provision for a blank ticket.

Research and Practice Aids:

Elections ⇐ 126(7).

C.J.S. Elections § 119.

CASE ANNOTATIONS

1. General election laws are applicable to canvass. *Griffin v. Gesner*, 78 K. 669, 674, 97 P. 794.

2. Subdivision 6, here omitted, was rendered inoperative by amended 25-214. *Brown v. Potteck*, 107 K. 737, 739, 193 P. 359.

3. Returns shall contain entire number of votes cast for each candidate. *Koehler v. Beggs*, 121 K. 897, 901, 250 P. 268.

25-3005a. Authorized poll agent; definition; appointment; identification; application of section. (a) As used in this act "authorized poll agent" means any one of the following persons:

- (1) Chairperson of county party committee;
- (2) chairpersons of committees concerned with question submitted elections;
- (3) chairperson of state party committee;
- (4) any candidate;
- (5) any precinct committeeman or precinct committeewoman;

(6) any write-in candidate who has filed an affidavit of write-in pursuant to K.S.A. 25-305, and amendments thereto;

(7) any person appointed as provided in this section by any of the persons specified in this subsection.

(b) Every person appointed to be an authorized poll agent under authority of this act shall be so appointed in writing by the person making such appointment. Such written appointment shall be carried by the authorized poll agent at all times such person is acting as such agent and shall be displayed upon demand of any member of any election board or any other election officer. Every appointment of an authorized poll agent shall be made in such form as is approved by the secretary of state. The number of authorized poll agents in each voting place at any one time appointed by any of the following shall be limited to the number indicated:

- (1) State and county chairpersons, one;
- (2) candidates, not to exceed one each;
- (3) precinct committeemen and committeewomen, one each;

that the petitioners are "legally qualified electors" or words of like effect in conformity with the applicable statute shall be accepted, by the officer determining the sufficiency of petition signatures, as proper signatures, so long as persons of the same names or ones of such similarity as to reasonably appear to be the same persons are contained in the registration books, and so long as the address of the petitioner is furnished, unless such official has reasonable evidence that the asserted signature in question is not in fact the signature of the person it purports to be, or that the signature though genuine is not the signature of a duly qualified elector. The secretary of state shall adopt rules and regulations for the guidance of county election officers and other officers as specified by law in making determination under this section of sufficient similarity of names on petitions and names in registration books.

History: L. 1970, ch. 147, § 4; March 11.

25-3605, 25-3606.

History: L. 1970, ch. 147, §§ 5, 6; Repealed, L. 1973, ch. 167, § 2; July 1.

25-3607. Where registration is required, registration books conclusive of number of qualified electors. In counties, cities, school districts and other municipalities, or part thereof, where registration of voters is required, the registration books shall be conclusive in determining the number of "legally qualified electors," or words of like effect in conformity with the applicable statute.

History: L. 1970, ch. 147, § 7; March 11.

Article 37.—VOTING IN PRECINCT OF FORMER RESIDENCE

25-3701. In-state residence change; vote in former residence, when. For the purposes of this act, a "former precinct resident" shall mean a person who is otherwise a qualified elector of the state of Kansas, who has removed from the precinct of his former residence in this state and established residence in another precinct in this state during the thirty (30) days next preceding any election held in the precinct of his former residence. Such person may vote in such election in such precinct of his former residence to the same extent and in the same manner as if he had retained his residence in such precinct, except as otherwise provided in this act.

History: L. 1972, ch. 143, § 1; July 1.

Research and Practice Aids:
Elections — 73.
C.J.S. Elections § 21.

25-3702. Affidavit to obtain ballot to vote at precinct of former residence; notice to reregister, voter registration materials. Any such former precinct resident offering to vote in the precinct of such person's former residence, before receiving a ballot shall make an affidavit in writing on a form to be prescribed by the secretary of state, sworn or affirmed before one of the election judges, stating the address or location of former residence, the date of removal therefrom, the address or location of such person's new residence, and that such person has not voted at such election. Such affidavit shall be delivered to the election judges and transmitted to the county election officer with the election returns and supplies. Upon receipt of an affidavit of a former precinct resident, the county election officer shall send to the current address specified on the affidavit, by forwardable first-class mail, a notice that it is necessary to reregister to vote. The notice also shall include voter registration materials if the voter is still a resident of the county of the original registration. The notice authorized by this section shall be on a form prescribed by the secretary of state.

History: L. 1972, ch. 143, § 2; L. 1988, ch. 120, § 3; April 14.

25-3703. Challenges hereunder. The votes of such former residents shall be subject to challenge for cause to the same extent, and any such challenges shall be determined in the same manner, as provided by law with respect to votes of resident electors.

History: L. 1972, ch. 143, § 3; July 1.

25-3704.

History: L. 1972, ch. 143, § 4; Repealed, L. 1973, ch. 167, § 2; July 1.

25-3705. Poll book entries; returns to county election officers. Election boards receiving ballots of such former precinct resident voters shall record the names of such voters in the poll books, with the notation "former resident." They shall forward to the county election officer, with the election returns and supplies, any affidavits and statements in lieu of registration submitted by such voters.

History: L. 1972, ch. 143, § 5; July 1.

25-3706. Copies of papers to county election officer of county of present residence. The county election officer shall send promptly

PRECINCT/
TOWNSHIP

	Jones	Shriver	Contested
	-----	-----	-----
3 South	35 *	23 *	
6 A	11 *	1 *	
1 A	77	80	
1 B	131	130	
1 C	160	155	
1 D	114 *	103 *	
2 A	148 *	160 *	
2 B	103	105	
2 C	8 *	33 *	
2 D	35 *	27 *	
3 A	50	61	
3 B	53	61	
3 C	52	73	
4 A	140	116	
4 B	105	199	
4 C	108	153	
4 D	185	244	
4 E	166	153	
East Creswell	274	202	
Liberty	28 *	7 *	
Pleasant Valley	152	137	
Beaver	66 *	29 *	
East Bolton	117	144	
Cedar	2	1	
Grant	17 *	6 *	
Silverdale	57	55	
Spring Creek	14 *	6 *	

PRECINCT/ TOWNSHIP -----	Jones -----	Shriver -----	Contested -----
West Creswell	147	104	
West Bolton	135	128	
Absentee	130	146	
Write-In	121	120	9
Hand Count	17	9	
Challenged	43	42	
Resolution	31	22	4
 TOTAL	 <u>3032</u>	 <u>3035</u>	 <u>13</u>

* By Stipulation

PRECINCT	CANVASSED		RECOUNT #1		MACHINE RECOUNT #2		HAND RECOUNT #3		MACHINE TOTAL #2		PRECINCT
	J	S	J	S	J	S	J	S	J	S	
3 South	35	23	35	23	35	23	35	23	35	23	3 South
6 A	11	1	11	1	11	1	11	1	11	1	6 A
1 A	78	88	77	80	77	79	77	80	78	87	1 A
1 B	136	142	129	140	131	130	131	130	136	141	1 B
1 C	178	162	160	155	160	155	160	155	177	162	1 C
1 D	117	105	114	103	114	103	114	103	117	105	1 D
2 A	156	166	148	160	148	160	148	160	156	166	2 A
2 B	106	119	103	105	102	105	103	105	106	119	2 B
2 C	9	39	8	33	8	33	8	33	9	39	2 C
2 D	36	27	35	27	35	27	35	27	36	27	2 D
3 A	54	66	50	61	50	61	50 (52)	61 (63)	54	66	3 A
3 B	58	69	53	61	53	61	53	61	57	70	3 B
3 C	57	76	53	72	52	70	52	73	57	76	3 C
4 A	145	126	140	116	140	116	140	116	146	126	4 A
4 B	111	208	105	199	105	201	105	199	111	208	4 B
4 C	113	159	108	153	107	153	108	153	113	160	4 C
4 D	202	252	185	244	185	244	185	244	200	252	4 D
4 E	175	158	166	153	166	152	166	153	175	158	4 E
East Creswell	296	210	273	202	274	202	274	202	295	211	East Creswell
Liberty	47	16	28	7	28	7	28	7	47	16	Liberty
Pleasant Valley	158	147	152	137	152	137	152	137	159	147	Pleasant Valley
Beaver	71	31	66	29	66	29	66	29	71	31	Beaver
East Bolton	124	151	117	144	116	144	117	144	125	151	East Bolton
Cedar	3	1	2	1	2	1	2	1	8	3	Cedar
Grant	17	7	17	6	17	6	17	6	17	7	Grant
Silverdale	62	56	57	55	57	55	57	55	60	56	Silverdale
Spring Creek	22	8	14	6	14	6	14	6	22	8	Spring Creek
West Creswell	163	110	147	104	147	104	147	104	162	110	West Creswell
West Bolton	144	150	134	129	135	128	135	128	144	149	West Bolton
Absentee	138	149	130	146	129	144	130	146	129	144	Absentee
Write-In			110	121			121	120			Write-In
Hand Count	18	9			17	9	17	9	17	9	Hand Count
Challenged			44	41			43	42			Challenged
Resolution			34	23			34	23			Resolution
TOTAL	3040	3031	3005	3037	2833	2846	3035 (3037)	3036 (3038)	3030	3028	TOTAL

Select Election Contests
 2-01-95
 Attachment 3

CIVIL APPEARANCE DOCKET
 DISTRICT COURT of COWLEY COUNTY - WINFIELD
 311 E. 9th St.
 Winfield, KS 67156

Printed: Wednesday January 11, 1995

Page: 1

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STATE OF KANSAS Case No: 94C 00201W
 Judicial District 19 County :COWLEY Date Filed 12/07/94 Judge :S
 Case Description : DANNY P. JONES vs JOE D. SHRIVER
 Source :ORIGINAL Nature of Action :OTHER

Case Title	Attorneys
Plaintiff :	
DANNY P. JONES	DOUGLAS P. WITTEMAN

vs

DEFENDANT :	VICTOR W. MILLER
JOE D. SHRIVER	
820 NORTH 9TH	
ARKANSAS CITY, KS 67005	

DATE	Action Filed	
REC. #87956 - \$66.00 12-8-94		LC 12-19-94 DC/PC(Bond
12-7-94	NOTICE OF CONTEST	
"	SUMMONS ISSUED (TO JOE D. SHRIVER)	
"	2 COPIES OF NOTICE OF CONTEST MAILED TO WILLIAM GRAVES, SEC. OF ST.	
"	COPY OF NOTICE OF CONTEST MAILED, CERT. RESTRICTED MAIL, TO	
	CHIEF JUSTICE, RICHARD W. HOLMES.	
12-8-94	SUMMONS RETD. "SERVED JOE D. SHRIVER VIA MINDI SHRIVER ON 12-7-94"	
	COPY ATTY.	
12-9-94	AFFIDAVIT OF BILL GRAVES.	
12-13-94	RET. RECPT. CARD RETD., SERVED CHIEF JUSTICE, RICHARD W. HOLMES VIA	
	? ON 12-9-94" COPY ATTY.	
12-15-94	ANSWER OF CONTESTEE TO NOTICE OF CONTEST. BY VICTOR W. MILLER.	
12-19-94	MOTION FOR INSPECTION OF BALLOTS. BY DOUGLAS P. WITTEMAN.	
12-21-94	20 BLANK SUBPOENAS GIVEN TO ERIC RUCKER, ATTY. FOR DANNY JONES.	
"	ORDER (APPOINTING INSPECTORS AND SETTING HEARING) BY JUDGE HILL.	
12-22-94	AMENDED NOTICE OF CONTEST. BY DOUGLAS P. WITTEMAN	
"	10 BLANK SUBPOENAS GIVEN TO VICTOR W. MILLER	
"	10 BLANK SUBPOENAS GIVEN TO DOUGLAS P. WITTEMAN	
12-27-94	CONTESTE'S ANSWER TO CONTESTANT'S AMENDED NOTICE OF CONTEST. BY	
	VICTOR W. MILLER	
"	SUBPOENA RETD. "P.S. ON CURTIS RICHARDS ON 12-26-94" COPY RUCKER	
"	SUBPOENA RETD. "P.S. ON DONITA RICHARDS ON 12-26-94" COPY RUCKER	
"	SUBPOENA RETD. "P.S. ON WALTER EUGENE SIMMONS ON 12-26-94" COPY	
	RUCKER.	
"	SUBPOENA RETD. "P.S. ON RUSSELL WAYNE KEEFE ON 12-26-94" C. RUCKER	
"	SUBPOENA RETD. "P.S. ON FILOMENA GARCIA ON 12-23-94" COPY RUCKER	
12-27-94	SUBPOENA RETD. "P.S. ON RUBY L. SCHALK ON 12-23-94" COPY RUCKER	
"	SUBPOENA RETD. "P.S. ON DOROTHY BOHRER ON 12-23-94" COPY RUCKER	
"	MEMORANDUM CONTEST HEARING BRIEF. BY DOUGLAS WITTEMAN	
"	2 BLANK SUBPOENA'S GIVEN TO ERIC RUCKER	

STATE OF KANSAS Case No: 94C 00201W
 Judicial District 19 County :COWLEY Date Filed 12/07/94 Judge :S
 Case Description : DANNY P. JONES vs JOE D. SHRIVER
 Source :ORIGINAL Nature of Action :OTHER

DATE	Action Filed
"	SUBPOENA RETD. "N.S. ON RUSSELL WAYNE KEEFE" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON RAY VICK ON 12-27-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON EDITH DICKERSON ON 12-22-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON BERNICE RUSH ON 12-25-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON DONNA SCHALK ON 12-24-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON AMBER L. TURNER AND WILLIAM J. TURNER ON 12-26-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON GLADYS WEIGAND ON 12-26-94" COPY MILLER
"	SUBPOENA RETD. "P.S. ON NORMAN D. WEIGAND ON 12-26-94" C. MILLER
12-27-94	SUBPOENA RETD. "P.S. ON MODDIE G. GRAHAM ON 12-26-94" C. RUCKER
"	SUBPOENA RETD. "N.S. ON SARAH WARD" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON HAL BUMGARNER ON 12-27-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON KATHEY KORNR ON 12-27-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON JACQUELINE MULHEIM ON 12-27-94" C. RUCKER
"	SUBPOENA RETD. "P.S. ON CARRIE BOWMAN ON 12-27-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON DORRIS MADDEN ON 12-27-94" COPY RUCKER
"	WITNESS REGISTER (COPY TO MILLER & WITTEMAN)
12-28-94	SUBPOENA RETD. "P.S. ON MAXINE PRATHER ON 12-27-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON JANICE STACEY ON 12-27-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON ERWIN E. KRAMER ON 12-27-94" COPY RUCKER
"	10 BLANK SUBPOENA'S GIVEN TO ERIC RUCKER
12-29-94	SUBPOENA RETD. "P.S. ON DONNA SWARTZ ON 12-28-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON DONNA ATHEARN ON 12-28-94" COPY RUCKER
12-29-94	SUBPOENA RETD. "P.S. ON VIRGINIA BOYD ON 12-28-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON BERNICE RUSH ON 12-28-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON BETTY PALMER ON 12-28-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON LUCILLE KOCH ON 12-28-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON DORIS MADDEN ON 12-28-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON JESSIE L. LAMB ON 12-28-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON PHYLLIS UTT ON 12-28-94" COPY RUCKER
"	AFFIDAVIT (OF HEIDI DEVORE) SHOWING SERVICE OF SUBPOENA TO JULIE COLDWELL VIA MARK COLDWELL ON 12-29-94" COPY ATTY.
"	SUBPOENA RETD. "N.S. ON BARBARA CRAIN" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON DONNA SWARTZ ON 12-22-94" COPY RUCKER
"	SUBPOENA RETD. "P.S. ON LUCY OTTE ON 12-22-94" COPY RUCKER
"	WITNESS REGISTER. (COPY TO MILLER & WITTEMAN)
12-30-94	SUBPOENA RETD. "N.S. ON TERRI L. STAMPER" COPY RUCKER
"	SUBPOENA RETD. "N.S. ON LULA MCMINN" COPY RUCKER
"	SUBPOENA RETD. "N.S. ON BETTY PALMER" COPY RUCKER
1-3-95	MOTION FOR RECONSIDERATION. BY VICTOR W. MILLER
1-5-95	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION. BY VICTOR W. MILLER
1-6-95	ORDER. (RE; HEARING OF 12-27-94 AND 12-29-94) BY JUDGE HILL
"	ORDER DENYING MOTION FOR RECONSIDERATION. BY JUDGE HILL
1-9-95	LETTER RESPONSE TO CONTESTEE'S MOTION FOR RECONSIDERATION (COPY) B DOUG WITTEMAN

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STATE OF KANSAS Case No: 94C 00201W
 Judicial District 19 County :COWLEY Date Filed 12/07/94 Judge :S
 Case Description : DANNY P. JONES vs JOE D. SHRIVER
 Source :ORIGINAL Nature of Action :OTHER

=====

DATE	Action Filed
1-11-95	COURT FILE FORWARDED TO SPEAKER OF HOUSE
"	(COPY OF JUDGE HILL'S ORDER OF 1-6-95 SENT TO SECRETARY OF STATE)

PATTERSON, NELSON, NOLLA & WITTEMAN, L.C.

TALLGRASS EXECUTIVE PARK ♦ BUILDING #800, SUITE 102 ♦ 8100 EAST 22ND STREET NORTH ♦ WICHITA, KS 67226 ♦ 316/687-2400 ♦ 687-2572 FAX

ATTORNEYS AT LAW

January 5, 1995

The Honorable Stephen D. Hill
Judge of the District Court
P. O. Box 187
Paola, KS 66071

FILED DISTRICT COURT
JAN 3 11 07 AM '95
DOCKET BY [Signature]
M.F. DATE

VIA FACSIMILE: 913-294-2535

RE: Jones v Shriver
Cowley County District Court Case No. 94-C201-W

Dear Judge Hill:

In response to the Contestee's Motion for Reconsideration which concerns the ballot of Edith J. Dickerson, the Contestant is providing the Court with relevant authority and evidence in opposition to said Motion. Because of the short time frame available, the Contestant has not filed a Memorandum Brief in Opposition.

Initially, the Contestant would invite the Court to carefully read and consider the case of Hooper v. McNaughton, 113 Kan. 405 (1923), which the Contestee cites as authority in regard to the distinction between mandatory and directory provisions of election statutes. The relevant portions of this case are on pages 406 through 408. The statute at issue in Hooper is quoted on page 406, and as a noted therein the statute contained several "shall" provisions. The essential issue determined by the Court in construing this statute was whether the noncompliance by voters, judges, and clerks with the aforementioned statute with regard to maintaining the secrecy of the ballot would invalidate those ballots.

On page 2 of Contestee's Motion for Reconsideration it is indicated the Hooper court found that a statute requiring a pencil as the writing instrument voided the ballot because of the use of the use of word "shall" in the statute. A careful reading of Hooper indicates that this is in fact not the case and furthermore was not even at issue in the Hooper case. On page 407 of Hooper, the court indicated that such a statute would void a ballot, however, the Court was simply contrasting that statute (which apparently had a specific penalty provision in it) with the statute that was at issue and that did not contain a penalty provision. The holding in Hooper was that the statute at issue was not mandatory in nature and instead was directory because it contained no express penalty provision. Therefore, noncompliance was nothing more than an election irregularity which did not void ballots.

On pages 2 and 3 of Contestee's Motion for Reconsideration, two (2) Illinois cases are cited for the proposition that where the terms of a statute are absolute, explicit and peremptory, the courts are given no discretion in construing those statutes. Accompanying this correspondence are copies of both of the Illinois

The Honorable Stephen D. Hill
January 5, 1995
Page 2

cases cited in Contestee's Motion. A reading of these cases indicates that Contestee has given the Court an incomplete statement of the law for which these cases stand. A full statement of the pertinent legal principles is as follows.

Statutes giving directions as to the mode of conducting elections will generally be construed as directory unless a failure to comply therewith is expressly declared to be fatal. If such statute merely provides that certain things shall be done in a given manner and time, and there is no declaration that conformity to these provisions is essential to the validity of the election, the statute will be construed to be directory and not mandatory. No discretion is given where the terms of the statute are preemptory and explicit, and, where penalties are imposed against a violation of the terms of the act, the penalties have the same effect as expressed negative provisions in the statute.

Waters v. Heaton, 4 N. E. 2d 41, 45, 46, 364 Ill. 150 (1936) (emphasis added) (attached hereto as Exhibit A); Siedschlag v. May, 2 N.E. 2d 836, 838, 363 Ill. 538 (1936) (attached hereto as Exhibit B). The essential principle to be gleaned from both Illinois cases as well as the Kansas cited by the Contestee is that for a statute to be construed as mandatory the statute must contain a specific penalty provision therein. This principle is firmly rooted in Kansas election law jurisprudence. See Gilleland v. Schyler, 9 Kan. 569, 589-91 (1872). Neither K. S. A. 25-3701 or K.S.A. 25-3702 contain such a provision, and therefore must be construed as directory.

The Kansas Supreme Court in Kimsey v. Board of Education, 211 Kan. 618, 507 P.2d 180 (1973), has recognized that if a county election officer designates a system wherein a voter may cast their ballot at a polling place other than the polling place that serves the geographic area in which the voter lives, such a procedure does not affect the validity of the election. The Court noted that such an election irregularity was nothing more than a departure from a directive provision of the statute. Kimsey at 628. In this election County Election Officer, Joe Gaston, did in fact create a system wherein voters were encouraged to vote at polling places other than those geographic polling places designated by statute. Attached hereto as Exhibit "C", is the transcript of the testimony of Dorothy L. Bohrer, who was the election judge of precinct 4D, where Edith J. Dickerson cast her ballot in this election. As is indicated therein voters were encouraged to vote at whichever precinct they presented themselves.

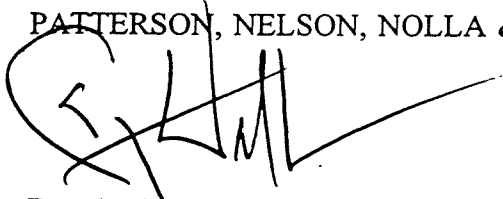
On page 3 of Contestee's Motion for Reconsideration, it is also erroneously indicated that "no one instructed the voter to vote in her new precinct." The fact is that Ms. Dickerson was specifically instructed by the poll worker to cast her ballot in precinct 4D, and to not go to the polling place of her previous residence to cast her ballot. These instructions are clearly indicated in the transcript of the testimony of Edith Dickerson, which is attached hereto as Exhibit "D".

The Honorable Stephen D. Hill
January 5, 1995
Page 3

Both the facts and the law are clearly supportive of the Court's previous ruling regarding the ballot of Edith Dickerson. The Contestant respectfully requests the Court maintain its proper ruling in this regard and overrule Contestee's Motion for Reconsideration. We understand that a conference call will be initiated this afternoon, Thursday, January 5, 1995, at 2:00 p.m., in order that the Contestee's Motion for Reconsideration can be considered by the Court. Both Mr. Rucker and I will participate in this call.

Sincerely,

PATTERSON, NELSON, NOLLA & WITTEMAN, L.C.

A handwritten signature in black ink, appearing to read 'DPW', with a long horizontal flourish extending to the right.

Douglas P. Witteman

DPW:bh

Attachments

cc: Victor W. Miller

Fax No 913-233-2613

Rose Stalleto, a witness for the defendant, testified that she operated the tavern at which the defendant and his party had dinner the night of the accident, that they ordered four chicken dinners and had twelve beers, and that they did not order any whisky and that the defendant was not drunk.

Augusta Kearin testified that she was with the defendant at the tavern and rode in the front seat with him; that she had two beers and that the defendant had two whiskies and three beers, and that he was not intoxicated. She further testified that she did not see the car strike any one but heard a bump and asked the defendant to stop, which he did as soon as possible, and that she and Mrs. Clark got out of the car when it stopped and walked 3 miles to a car line. She testified on cross-examination that the weather was sort of hazy and there was a lot of ice on the street, that she thought the defendant was driving about in the middle of the street, but it was hard to tell, as the ice was piled up so they could not see the sides of the street, and that the car was driven about 25 miles an hour.

Four witnesses testified that the reputation of the defendant in the neighborhood where he resided and among the people with whom he worked was good.

Lucy Clark, the wife of Ford Clark, testified that they went to Rossi's Tavern for dinner; that the defendant had two drinks of whisky, but at no time was under the influence of liquor; that the streets were icy and they were not driving fast; that she heard a noise and some one scream but did not see the car strike any one; and that after the car stopped she got out of the car and went home.

The defendant testified that Mr. and Mrs. Clark and Mrs. Kearin and himself left Mrs. Kearin's home about 6 o'clock in the evening and went to Rossi's Tavern, in Franklin Park, arriving there about 7 o'clock, and ordered chicken dinners; that he had two drinks of whisky and several beers while in the tavern; that while he was there he met the chief of police; that around 9:30 they left the tavern, and as he was driving east on Franklin avenue, at about 20 miles an hour, he saw a car which he thought was coming towards him, as the lights were very bright, and as he passed abreast of the car he felt a jar, and some one in the back seat said,

"You hit something;" that he did not see anything that happened, but stepped on the brakes, and the car started to skid, so he released the brakes and stepped on the accelerator to straighten the car out, and that he brought the car to a stop as soon as he could; that as near as he could judge he was in the middle of the street and that there were ruts in the ice caused by the traffic; that after he stopped the car they all got out and several people came up to him. He testified as to his arrest and the tests made at the police station by the doctor.

The foregoing brief review of the evidence for the people and for the defense indicates that the record, as a whole, warranted conviction of the defendant. His argument as to the insufficiency of the evidence is largely based upon the oral testimony of the witnesses as to various estimates of speed, but this ignores the surrounding circumstances, which are of serious import. It is probable that the jury took into consideration the fact that the deceased was a large man, weighing 240 pounds; that his body was thrown high enough into the air to turn a complete somersault and was hurled a distance of 50 feet from where the collision occurred; that he struck a post with such force as to fracture his skull and several other bones; that the left headlight and left part of the radiator shell of the car was bent and dented, and that the hood was dented on the left top part; that the defendant's car traveled approximately two blocks after the accident before being stopped and that by the time those near by arrived at the point of stopping the two female occupants of the automobile had seen fit to hastily depart, with considerable inconvenience to themselves. The jurors were not required to ignore the import of these established facts merely because some witnesses gave their opinion that the car was traveling at a low rate of speed.

[1] The above facts also obviate the defendant's second principal contention, which is that the court erred in admitting the partially full bottle of whisky in evidence. The facts above set forth would be sufficient to justify the verdict of the jury, whether the defendant was drunk or sober. It was not necessary to their verdict that they should find him to have been intoxicated, and evidence of intoxication was cumulative, at most, as bearing upon the gist of the offense. We cannot assume

that the sight of a bottle partly full of whisky would so arouse the passion and influence the minds of the jurors as to seriously prejudice the defendant's rights, and we therefore pass the question of the court's ruling on this exhibit as not prejudicial error, even if erroneous. This was not a case in which the jury fixed the penalty.

[2] The defendant further complains that it was error for the trial court to call Ford S. Clark as a court's witness. Clark was the companion of the defendant at the time and place of the accident, had been with him all evening, and had testified at the coroner's inquest. The prosecuting attorney, out of the presence of the jury, stated these facts, stating further that Clark's testimony at the coroner's inquest had been in many ways contradictory and inconsistent and that the people did not care to vouch for his credibility. Clark was an eyewitness to the accident, and his being called by the court was within the rules laid down in *Carle v. People*, 200 Ill. 494, 66 N.E. 32, 93 Am.St.Rep. 208, *People v. Cleminson*, 250 Ill. 135, 95 N.E. 157, *People v. Daniels*, 354 Ill. 600, 188 N.E. 886, and *People v. Touhy*, 361 Ill. 332, 197 N.E. 849. There was no error committed in this respect.

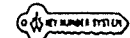
[3-5] We have held that, where a person drives an automobile in a willful and wanton manner, disregarding the safety of others and in such a manner as to indicate a disregard for the safety of others, and thereby causes a person's death, he is guilty of manslaughter. *People v. Smaszcz*, 344 Ill. 494, 176 N.E. 768; *People v. Flanagan*, 338 Ill. 353, 170 N.E. 265; *People v. Herkless*, 361 Ill. 32, 196 N.E. 829. The same cases hold that it is the province of the jury to determine, from a consideration of all the evidence, whether the car was driven in such a manner as to show an utter disregard of the rights of other persons using the street. As we have seen, the testimony and surrounding circumstances in this case were such as to permit the jury to arrive at a conclusion of guilt without acting unreasonably, and we must decline to disturb their verdict.

[6] A further point is raised by the defendant in connection with the argument of the assistant state's attorney who tried the case for the people. Two objectionable remarks were made, but neither of them of any seriously prejudicial character.

In one instance, however, the objection was sustained, and the prosecutor immediately withdrew the remark and apologized for it. As to the other improper statement, an objection was promptly sustained, and the jury instructed to disregard the remark. We can find nothing of importance presented under this branch of the case, and upon the whole record we are of the opinion defendant had a fair trial.

The judgment of the criminal court of Cook county will therefore be affirmed.

Judgment affirmed.



WATERS v. HEATON.

No. 23284.

Supreme Court of Illinois.

June 10, 1936.

As Modified on Denial of Rehearing Oct.

7, 1936.

1. Pleading ⇐408(3)

Filing of answer after denial of motion to dismiss petition in election contest held not a waiver of objections to sufficiency of petition (110 S.H.A. § 125 et seq.).

2. Elections ⇐285(5)

Verification of petition in election contest that allegations of certain paragraphs were true in substance and in fact, and that as to paragraphs relating to grounds of contest affiant was informed and believed that such facts were true, and stated that they were true upon his information and belief, held sufficient against contention that verification was bad because such allegations were not sworn to as being true in substance and in fact.

3. Elections ⇐285(1)

Petition in election contest for county treasurer which alleged that petitioner was a resident and legally qualified elector in designated county and precinct, that election was held on specified date, and that petitioner was one of candidates for office, that election was in all respects regular and ballots and returns were properly preserved, that, because of specified irregularities, opponent was declared elected, but that, if votes were correctly

Exhibit A

counted, they would show majority for petitioner, held sufficient.

4. Elections ¶177

In absence of fraud or other improper conduct which would affect result of election, statute providing for initialing of ballots by judges should be held to be directory and not mandatory (40 S.H.A. § 311).

5. Elections ¶198

Statutes relating to mode of conducting elections will generally be construed as directory unless failure to comply therewith is expressly declared to be fatal (40 S.H.A. § 311).

6. Elections ¶198

Where statute relating to mode of conducting elections merely provides that certain things shall be done in given manner and time, and there is no declaration that conformity to such provisions is essential to validity of election, statute will be construed to be directory and not mandatory (40 S.H.A. § 311).

7. Elections ¶198

Where terms of election statute are peremptory and explicit, and where penalties are imposed for violation of its terms, no discretion is permitted as to how statute will be construed; penalties having same effect, as express negative provisions in statute.

8. Elections ¶186(3)

Ballots initialed by one election judge with initials of another such judge with his consent should have been counted for candidates for whom such ballots were cast, in absence of proof of fraud or other improper conduct which would affect result of election; statute requiring election judge to indorse "his" initials on ballots being directory and not mandatory (40 S.H.A. § 311).

STONE and WILSON, JJ., dissenting.

Appeal from Circuit Court, Douglas County; Joseph S. McLaughlin, Judge.

Election contest by Harry L. Waters against Charles E. Heaton. From a judgment, entered after a recount of the ballots, finding that plaintiff had been elected, defendant appeals.

Reversed.

Pate & Collord and W. W. Reeves, all of Tuscola, for appellant.

D. H. Wamsley and Cotton & Nichols, all of Tuscola, for appellee.

FARTHING, Justice.

At the election on November 6, 1934, appellant, Charles E. Heaton, and appellee, Harry L. Waters, were, respectively, the Democratic and Republican candidates for the office of county treasurer of Douglas county. Heaton was declared elected by a majority of 25 votes. He received his certificate of election and qualified. On November 28, 1934, Waters filed a petition to contest the election. Heaton moved to dismiss the petition and challenged the sufficiency of it and of the verification. The circuit court of Douglas county overruled the motion. Heaton filed his answer, and, after a recount of the ballots, the court found that Waters had been elected by 4,004.86 votes to 3,978.14, or a majority of 26.72 votes. This appeal followed.

Appellant takes the position that an election contest petition must be drawn, as well as verified, in the same manner and with the same requirements as a bill in chancery, and that the verification is bad because too few allegations are sworn to as being true in substance and in fact. He points out that the petition contains allegations as to facts of record (particularly in the tenth paragraph, where the result of the canvass is referred to), which were known or readily accessible to appellee, and that, because all the grounds of contest appear subsequent to the first five paragraphs, which alone are sworn to as being true in substance and in fact, the case presented is similar to one where the whole petition is verified on information and belief.

The material part of the affidavit reads as follows: "Harry L. Waters * * * upon oath * * * says that he is petitioner * * * and that the allegations of said petition contained in paragraphs 1, 2, 3, 4 and 5 * * * are true in substance and in fact and that as to the remainder of the matters and facts alleged in said petition this affiant is informed and believes that the same are true and states that the same are true upon his information and belief."

In the first paragraph Waters alleged that he was a citizen of the county and precinct (naming them) and had been for more than two years prior to 1934, and that on the date named he was a resident and legally qualified elector in said county and precinct. The second paragraph says that the election was held on November 6, 1934, and that Waters and Heaton were candidates for the office of county treasurer,

etc., and that their names appeared on the official ballot, etc.; that the election was in all respects regular and the ballots and returns were properly preserved. The third paragraph says that the polls closed as prescribed by statute and that the judges and clerks of election proceeded to tabulate the votes. Paragraph 4 contains the statement that after tabulating the votes the judges and clerks made return to the county clerk, etc. The fifth paragraph states the number and names of the precincts in Douglas county. Paragraph 6 to 14, inclusive, contain allegations as to irregularities in voting, counting ballots for the wrong candidate, failing to count ballots for the petitioner, voting by disqualified persons, mistakes in counting and tabulating votes, etc. These paragraphs are sworn to only on information and belief. After alleging irregularities in the attempt of voters to cast their ballots under the absent voters statute, the allegation is made that, as a result of the illegal and incorrect canvass, etc., Heaton was declared elected, but that, if the votes were correctly counted, they would show that Waters received 4,533 votes to Heaton's 3,438. Then follows the prayer for relief and process.

[1] Appellee contends that, by filing his answer after the trial court denied Heaton's motion to dismiss, the latter waived his objections to the sufficiency of the petition. Appellee cites *Haley v. Reid-berger*, 340 Ill. 154, 172 N.E. 19, *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N.E. 232, 8 Am.St.Rep. 349, and *Jackson v. Winans*, 287 Ill. 382, 122 N.E. 611. But since the adoption of the Civil Practice Act (110 S.H.A. § 125 et seq.) and rule 21 of this court (110 S.H.A. § 259.21) such a waiver does not occur when the defendant answers after his motion questioning the sufficiency of the petition has been overruled.

In *MacGuidwin v. South Park Com'rs*, 333 Ill. 58, 75, 164 N.E. 208, 215, we held that a petition to contest an election must set forth the points on which the election is to be contested, must be verified by the proper affidavit, must be filed within the time prescribed by statute, must allege that the contestant is an elector of the political subdivision in which the election was held, and must comply with all other statutory provisions necessary to give the court jurisdiction. We said: "This court has held that in an election contest, where a contestant states by proper allegations generally that he received a certain number of

votes cast in the entire voting municipality or district more than his opponent received, who by the election returns was declared to be elected, such contestant has the right to have the entire ballots counted to determine the true result of the election." And we quoted from *Leonard v. Woolford*, 91 Md. 626, 46 A. 1025, 1027, to the effect that, if we were to require the precision and certainty in an election petition as in the pleadings between parties to a suit at law, which pleadings have for their object the production of a single issue, the difficulty of stating precisely the manner in which a fraud had been committed or an undue or incorrect return had been made would to a great degree nullify the law itself, which designs that such charges should be investigated. The Maryland court said: "The rule must not be held so strict as to afford protection to fraud, by which the will of the people is set at naught, nor so loose as to permit the acts of sworn officers, chosen by the people, to be inquired into without an adequate and well-defined cause."

In *Smith v. Township High School District*, 335 Ill. 346, 351, 167 N.E. 76, 78, we recognized the rule that in an election contest the statute must be strictly followed, but we said: "To hold that a petition to contest an election should only contain such allegations of fact as are within the contestant's personal knowledge would be impracticable, for the very nature of the proceeding compels him largely to rely upon information obtained from other persons, and it is obvious that as to such information the contestant can only make oath that he believes the allegations to be true. *Jackson v. Winans*, 287 Ill. 382, 122 N.E. 611; *Farrell v. Heiberg*, 262 Ill. 407, 104 N.E. 835." We held the petition sufficient and that the general charge that illegal votes were cast at the election and counted in favor of the proposition submitted, and that without such vote that proposition would have been defeated, to be a sufficient ground of contest.

In *Farrell v. Heiberg*, 262 Ill. 407, 104 N.E. 835, 836, objection was made to the verification, which said that the matters stated to be true were true in substance and in fact, and that as to statements made on information and belief the affiant believed them to be true. We held the verification to be good and said: "The general rule applicable to the verification of bills in equity is that the affidavit should be in such

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form as to subject the party making it to a prosecution for perjury in case the matter sworn to proves to be false. The usual form of verification of bills in equity is that the party verifying has read the bill subscribed by him (or has heard them read) and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true. [Citing authorities.] The statute should have a reasonable construction in order to accomplish the purpose intended. To hold that a petition to contest an election should only contain such statements as were within the contestant's own personal knowledge would be impracticable, since from the very nature of the proceeding the contestant must rely largely on information obtained from others, and as to such information the contestant could only make oath that he believed the statements to be true."

[2,3] The verification and allegations of the petition were sufficient, and this contention must be overruled.

The only point urged by the appellant that we need consider is that with reference to the validity of ballots initialed by one judge with the initials of another judge of election.

The contestant showed that a few persons voted who were not entitled to vote; that in several precincts the ballots issued by the county clerk to persons who sought to vote in accordance with the Absent Voters Act were put into the respective ballot boxes by election judges without being initialed, and that in two precincts, referred to later, one of the judges initialed ballots with the initials of another judge. In the first of these precincts (Camargo No. 2) contestant claimed there were 140 such ballots, and in the other (Garrett precinct No. 1) that there were 46. However, the number of ballots cast by persons not entitled to vote and of uninitialed ballots was not sufficient to upset the returns, in view of the division of the two kinds of ballots between the two candidates. In the Camargo precinct the trial court found 47 ballots cast for Waters had been initialed by one judge with the initials of the other, and that 80 cast for Heaton should be excluded for the same reason. In the Garrett precinct, Waters lost 17 and Heaton 29 votes on this account. This net loss of 45 votes to Heaton reversed the result of the election.

Appellant contends that the provisions of the act with reference to the initialing of ballots are not mandatory but are directory, and that, where there is no fraud shown, as in the case before us, a non-compliance by the judges of election does not invalidate the ballots. In *Perkins v. Bertrand*, 192 Ill. 58, 61 N.E. 405, 85 Am.St. Rep. 315, we held that the indorsing of a single initial of a judge on a ballot was sufficient. We also held in that case that indorsing the judge's full name on a ballot did not furnish cause to throw out that ballot. And in *Gill v. Shurtleff*, 183 Ill. 440, 56 N.E. 164, ballots bore indorsements as follows: "Defective Ballots." "This ballot objected to. W. M. B." "This ballot objected to, and sworn in. T. J. P." In the *Gill Case* we said: "It was proven these words were marked on the ballots by the election officers before they were placed in the ballot box, and that the voters who prepared and presented them in nowise participated in the indorsement of the writing on the ballots. The court ruled these ballots should be counted as legal ballots for the appellee. The ballot of one who is legally entitled to vote, and which he has prepared in conformity with the provisions of the statute, and delivered to the judges of the election to be deposited in the box, should not be rejected from the count on the ground some one of the election officers, without the participation of the voter, made some indorsement on the ballot which might serve as a distinguishing mark. To rule otherwise would be to declare it to be within the power of the election officers to disfranchise a legal voter." See, also, *Kerr v. Flewelling*, 235 Ill. 326, 85 N.E. 624.

In *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N.E. 704, it appeared that at one polling place one judge of election made at least ten mistakes in numbering the ballots. There was no evidence of fraud, it appeared that the mistakes were purely accidental, and the election officers also took the ballots, after the election was over, into a different room from that where the voting was done and there canvassed the votes. There were additional irregularities, none of which affected the result of the election. At page 608 of 135 Ill., 26 N.E. 704, 707, we said: "In *Hodge, Jr. v. Linn*, 100 Ill. 397, there was a failure to number any of the ballots cast at the election, and various other irregularities of a character quite as serious as those here involved, and it was there held that the pro-

visions of the statute as to the mode and manner of conducting the details of an election are not mandatory, but directory merely, and that irregularities in conducting an election, and counting the votes, not proceeding from any wrongful intent, and which deprive no legal voter of his vote, and do not change the result, will not vitiate the election, or justify the rejection of the entire poll of the precinct in which the irregularities occurred."

In *Hehl v. Guion*, 155 Mo. 76, 55 S.W. 1024, the statute required ballots to be initialed by a judge and no ballot not initialed was to be deposited in the ballot box. It was there held that, although a ballot was not initialed, it should be counted, and that the problem was not solved by determining whether the statute was mandatory or directory. The court declared the object of the statute to be to give the judge a means of identifying the ballot when returned by the voter to him, and that, where the ballot shows on its face that it is genuine, the object of initialing was fulfilled. See, also, *Coolehan v. White*, 95 Md. 703, 53 A. 786; *O'Connell v. Mathews*, 177 Mass. 518, 59 N.E. 195; *Bates v. Crumbaugh*, 114 Ky. 447, 71 S.W. 75; and *Gass v. Evans*, 244 Mo. 329, 149 S.W. 628.

We have held in such a case that uninitialed ballots must be rejected (*Slenker v. Engel*, 250 Ill. 499, 95 N.E. 618), but the same question is not presented there as is presented here. In the case before us there is no question that in the two precincts named the initialing was done by one judge with the consent of the judge whose initials were used, and there is no suggestion of any fraudulent or improper motive or act. Every purpose was served by such initialing that would have been served had the judge whose initials were used indorsed them on the ballots. In *Laird v. Williams*, 281 Ill. 233, 237, 118 N.E. 73, 75, we quoted from *Choisser v. York*, 211 Ill. 56, 71 N.E. 940, where it was said: "Every man's handwriting possesses certain peculiarities which tend to distinguish it from every other handwriting. By writing his initials upon ballots the judge doing so should be able to distinguish those which are genuine, and could generally do so." But in the case before us the proof shows that in both precincts the handwriting of the judge who wrote the initials closely resembled the writing of the judge whose initials were used. In fact, the final result reached by the trial court was arrived at by accepting the net change affected by the deductions stated

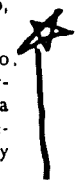
above in Garrett precinct No. 1 and then relying on the testimony of an expert witness who testified as to the signatures of the two judges in Camargo precinct No. 2, at the rate of \$100 per day and expenses, although he had never seen either of the signatures before the date he testified. These two judges were called and disagreed as to what ballots Anglin initialed with Conn's initials and which bore the genuine initials of Conn.

No great ingenuity is required to make use of the holdings that ballots are thus rendered void and to thwart the will of the voters in any political subdivision. In a close election, through seeming courtesy, one judge of either political party in a single precinct could initial ballots with the initials of another unsuspecting judge and hand them to voters whose political party affiliation is known to the judge doing the indorsing until a sufficient number of ballots would thus be made void to change the entire result of the election. It has been said that it is the duty of the voter to determine whether the ballot handed to him is a proper one and that it is properly initialed, etc., but in the case before us the two judges of election and an expert on handwriting could not agree as to what ballots were such as a voter was entitled to receive and to cast.

[4] The section of the statute as to the initialing of ballots contains no words stating that votes shall not be counted if they are not initialed in strict conformity with the statute. In the absence of proof of fraud or other improper conduct which would affect the result of the election, the statutory provisions, and the section itself, should be held to be directory and not mandatory, and this in spite of the fact that we have held ballots initialed by one judge with the initials of another to be illegal and therefore void in many cases. The words of the section, so far as material, are as follows: "One of the judges shall give the voter one, and only one ballot, on the back of which such judge shall indorse his initials in such manner that they may be seen when the ballot is properly folded, and the voter's name shall be immediately checked on the register list." 46 S.H.A. § 311; Ill.Rev.Stat.1935, c. 46, par. 225.

[5-7] Statutes giving directions as to the mode of conducting elections will generally be construed as directory unless a failure to comply therewith is expressly declared to be fatal. If such statute merely

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provides that certain things shall be done in a given manner and time, and there is no declaration that conformity to these provisions is essential to the validity of the election, the statute will be construed to be directory and not mandatory. No discretion is given where the terms of the statute are peremptory and explicit, and, where penalties are imposed against a violation of the terms of the act, the penalties have the same effect as express negative provisions in the statute. 20 Corpus Juris, 181; Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N.E. 232, 8 Am.St.Rep. 349; Perkins v. Bertrand, 192 Ill. 58, 61 N.E. 405, 85 Am. St.Rep. 315; Gill v. Shurtleff, 183 Ill. 440, 56 N.E. 164.

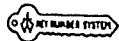
[8] We hold that the ballots in Garrett precinct No. 1 and Camargo precinct No. 2, which were initiated by one election judge with the initials of another such judge, should have been counted for the candidates for whom these ballots were cast and that it was error to exclude them.

Such cases as Laird v. Williams, 281 Ill. 233, 118 N.E. 73, McNabb v. Hamilton, 349 Ill. 209, 181 N.E. 646, and Blattner v. Dietz, 311 Ill. 445, 143 N.E. 92, which hold that ballots initiated by one judge with the initials of another judge are ipso facto illegal, are overruled in so far as they conflict with this opinion.

The judgment of the trial court is reversed, and appellant, Charles E. Heaton, is declared elected county treasurer of Douglas county by 4,087.14 over appellee, Harry L. Waters, who received 4,068.86 votes.

Judgment reversed.

STONE and WILSON, JJ., dissent.



364 Ill. 125

WICKIZER v. WHITNEY.

No. 23463.

Supreme Court of Illinois.

June 10, 1936.

As Modified on Denial of Rehearing Oct. 7, 1936.

1. Wills ⇨440

Court cannot place testatrix' intention on basis of what conjecture might suggest ex-

isted in her mind, but only through that which by words used in will she has expressed.

2. Wills ⇨449

Testatrix would be presumed to have intended to dispose of her entire estate unless such presumption was clearly rebutted by provisions of will.

3. Wills ⇨449

Any reasonable construction consistent with terms of instrument will be adopted so as to dispose of entire estate, rather than to hold intention on part of testatrix to die testate as to portion and intestate as to another portion of her property.

4. Wills ⇨448

Presumption against intestacy was strengthened, where will contained statement of testatrix in beginning of will, in substance, that will was made for purpose of disposing of testatrix' estate.

5. Wills ⇨449

Provision of will that testatrix had "desire to have my property and belongings divided and given as herein written" held to negative intent to dispose of part of her property only, words "property and belongings" being all inclusive in their scope and signifying all her property.

The terms "property and belongings" and "bequeath and devise," both in their ordinary legal meaning as well as in common usage, have reference to and include real estate as well as personal property.

[Ed. Note.—For other definitions of "Belongings," "Bequeath," and "Devise" and "Property," see Words & Phrases.]

6. Wills ⇨559

Term "real estate," in a will, is not necessarily required in order to make disposition of that species of property if any other term or language is used by testatrix broad enough to include realty; word "property" being such term.

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

7. Wills ⇨449

That estate is disposed of in form of pecuniary legacies which are not in express terms charged against realty does not rebut presumption that it was intention of testatrix to dispose of entire estate, since intention to charge payment of legacies against realty may be implied from whole will.

8. Wills ⇨559

Testatrix' realty held to descend as testate property, notwithstanding term "real estate" was not mentioned in will and no disposition thereof was made, where testatrix disposed of "my property and belongings" and, while mentioning the sum of only \$10,000, made general pecuniary legacies totalling \$13,100, and also provided that "if my estate shall exceed this bequest it may be added to each in proportion."

9. Wills ⇨587(1)

Personalty in excess of aggregate amount of specific money legacies held testate property, where provision of will "if my estate shall exceed this bequest it may be added to each in proportion," while not in usual language of residuary clause, expressed clear intention to include all property in excess of that specifically bequeathed, and hence constituted a disposal of residue of testatrix' estate.

Appeal from Circuit Court, Kane County; Frank W. Shepherd, Judge.

Proceeding by Mertell Wickizer against Merritt Whitney and others. From a decree in favor of Frank E. Shopen, executor, and others, plaintiff appeals.

Affirmed.

De Goy B. Ellis and Paul M. Hamilton, both of Elgin, for appellant.

Earl R. Shopen, of Elgin, for appellees.

HERRICK, Chief Justice.

Under appropriate pleadings originated by the filing by the appellant of a complaint for partition of real estate which the decedent owned at her death, a construction of the will of Rachel C. Probert, deceased, was sought in the circuit court of Kane county.

The testatrix, a resident of Kane county, died testate on June 30, 1934, leaving surviving no husband, parents, descendants, brothers, or sisters, but leaving certain next of kin as her only heirs at law. Her will was duly admitted to probate. The first paragraph of her will is as follows: "Be it known that I, Rachel C. Probert, of the town of Campton, State of Illinois, have a desire to have my property and belongings divided and given as herein written do so will, bequeath and devise," etc. Provisions follow for the payment of debts, a bequest of \$150 in trust for the care of a cemetery lot, and

the erection of a monument to cost not more than \$300. The will then continues: "Then if I am possessed of the same or nearly the same as I now have, there will be ten thousand dollars." Immediately succeeding this last statement the testatrix makes general pecuniary bequests to relatives and others totalling \$13,100, and states: "If my estate shall exceed this bequest it may be added to each in proportion, the same be deducted if it falls short. I desire Judge Frank Shopen of Elgin for administrator and to settle with as little show and trouble as possible." At the time of making her will, and also at the time of her decease, the testatrix was the owner of a residence property in the village of Wasco. It is undisputed that the value of the personal estate left by the decedent exceeded by over \$5,000 the total amount of the pecuniary legacies.

Final decree was entered by the circuit court denying partition and finding the equities against the appellant and in favor of appellees; that the legacies of Mrs. Louie Bell, Daniel Whitney, John Whitney, and Max Whitney under the terms of the will had lapsed by reason of their deaths prior to the death of decedent; that Rachel C. Probert died leaving real and personal estate in excess of the aggregate of the specific legacies set forth in her will; and "that by a proper construction of the terms and provisions of the last will and testament of Rachel C. Probert, deceased, all of the property of the said Rachel C. Probert, deceased, both real and personal, was bequeathed and devised to the beneficiaries therein named, title to the real estate vesting in Frank E. Shopen as executor of her last will and testament for the purpose and with the power to make sale and conveyances thereof and to execute deeds or other necessary documents to accomplish the same and proportionately apply the proceeds thereof on the shares bequeathed and devised to the specifically named beneficiaries in the will and that the personal property in excess of the aggregate of the specific legacies is also testate property to be used by the executor to increase the specific legacies proportionately"; and decreeing the rights and interests of the parties in the estate by a proper interpretation of the decedent's will were the fractional parts of the estate as itemized therein, basing such fractional interests according to the amounts of the respective legacies shown in the will; finding that the lapsed leg-

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SIEDSCHLAG
No. 23513.

Supreme Court of Illinois.
June 10, 1936.

1. Elections ¶198

Generally statutes giving directions as to mode of conducting elections will be construed as directory, unless failure to comply therewith is expressly declared fatal, and if statute only provides that certain things shall be done in a given way at certain time and there is no declaration that conformity to statute is essential to validity of election, statute will be construed to be directory and not mandatory.

2. Elections ¶221

Statute providing that absent voters' ballots be placed in ballot box held directory and not mandatory so that absent voter's ballots which were not placed in ballot box but were laid on table, contents of ballot box being placed upon absent voters' ballots, were valid (46 S.H.A. § 470).

3. Elections ¶216

Ballot cast outside voting booth in presence of party who observed for whom voter cast ballot held illegal.

Appeal from McHenry County Court; Charles T. Allen, Judge.

Election contest action by Lester A. Siedschlag against Frank May. From an adverse judgment, the plaintiff appeals.

Affirmed.

D. T. Smiley, of Woodstock (M. A. Carmack, of Woodstock, of counsel), for appellant.

David R. Joslyn, Jr., of Woodstock, for appellee.

FARTHING, Justice.

Lester A. Siedschlag, appellant, opposed Frank May, appellee, for the office of supervisor in the town of Burton, McHenry county, at the election on April 2, 1935. May was declared elected and Siedschlag contested his election in the county court of that county, with the result that May was found to have been duly elected. Siedschlag has appealed.

Appellant questions the ruling of the trial court as to seven ballots which absent

voters attempted to cast and its ruling as to the right of four other voters to vote at the election.

As to the seven ballots, the testimony shows that the seven absent voters obtained ballots from Wagner, the town clerk, and that he retained possession of them until he delivered them at the polling place to the judges on election day. Several witnesses testified on behalf of appellant that when the clerk, Wagner, handed the envelopes to Byron Orvis, one of the judges, the latter opened the envelopes, took out the ballots, unfolded them so that they could see how the voters had marked them, and most of these witnesses testified that six of these ballots were marked for May and one for Siedschlag. They also testified that Orvis did not initial the seven ballots. One witness testified that Orvis made the remark, after the election, that "the ballots were marked the Saturday before the election." Orvis denied having made this remark, and he and Wagner testified that Orvis initialed these seven ballots in the polling place at the election. Orvis also denied unfolding the ballots and looking at them or exposing them to the view of others. When the ballots were counted during the election contest it was found that all of them had been properly initialed. There was no dispute as to the fact that these seven ballots were put on the table, that the ballot box was opened and its contents dumped on top of them, and that all the ballots were mixed together and then counted. These seven ballots were never deposited in the ballot box.

No fraud or improper motive is shown, but appellant contends that the six ballots which his witnesses say they saw and which they say were marked for May, and the one ballot marked for appellant, should be deducted from the number of votes counted for appellee and appellant, respectively. The names of the seven absent voters were the last entered in the pollbook.

Section 9 of the Absent Voters Act (46 S.H.A. § 470; Ill.Rev.Stat.1935, c. 46, par. 158) provides: "At the close of the regular balloting and at the close of the polls the judges of election . . . shall proceed to cast the absent voters' ballot separately, and as each absent voter's ballot is taken shall open the outer or carrier envelope, announce the absent voter's name, and compare the signature upon the application with the signature upon the affida-

vit on the ballot envelope. In case the judges find the affidavits properly executed, that the signatures correspond, that the applicant is a duly qualified elector in the precinct, and the applicant has not been present and voted within the county where he represents himself to be a qualified elector on such election day, they shall open the envelope containing the absent voter's ballot in such manner as not to deface or destroy the affidavit thereon, or mark or tear the ballots therein, and take out the ballot or ballots therein contained without unfolding or permitting the same to be unfolded or examined, and having endorsed the ballot in like manner as other ballots are required to be endorsed, shall deposit the same in the proper ballot box or boxes and enter the absent voter's name in the poll book the same as if he had been present and voted in person." Appellant's contention is that this statutory provision is mandatory, and that a failure to deposit the seven ballots in the ballot box rendered them void.

In *Piatt v. People*, 29 Ill. 54, 72, speaking through Mr. Justice Breese, we said: "The rules prescribed by the law for conducting an election, are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result. Such rules are directory, merely—not jurisdictional or imperative. If an irregularity, of which complaint is made, is shown to have deprived no legal voter of his right, or admitted a disqualified person to vote—if it casts no uncertainty on the result, and has not been occasioned by the agency of a party, seeking to derive a benefit from it—it may well be overlooked in a case of this kind, when the only question is, which vote was the greatest, that for subscription or that against subscription."

In *Bloome v. Hograeff*, 193 Ill. 195, 61 N.E. 1071, the ballots not objected to were deposited in the hat of one of the judges of the election instead of being deposited in a ballot box. The eleven ballots which were questioned were deposited in the hat of the successful candidate. We held that these ballots should be counted, and said, 193 Ill. 195, at page 198, 61 N.E. 1071, 1072: "The hat of the petitioner, Hograeff, was not a ballot box provided by the judges as such, or used or recognized by them as a ballot box or receptacle for ballots. The voters might just as well have deposited

their ballots in any other place as in the hat, and they were never cast as ballots at the election. The only serious question in the case is whether the votes, which were improperly rejected, should be counted in the contest. There were enough of them to change the result of the election, and if they cannot be counted the whole election should be declared void. If they can be counted, the will of the electors will be carried out, and the election will not be defeated. The question is not free from doubt, and some courts have preferred one view and some the other; but we are inclined to adopt as the better doctrine the rule that if there is no difficulty in determining whom the qualified voter attempted to vote for, and the proper result can be reached with certainty, the votes should be counted, and the entire election not be set aside. In this case there is no question whatever as to whom the ballots presented by the women were for. . . . They were preserved, sealed up, and produced at the trial of the contest, and none of these facts are questioned. There were some irregularities in the election, but no one complains of the use of the hat, which was adopted as a ballot box, instead of a regular box. The true result of the election, if the legal ballots had been received, has been determined beyond question, and we think the county court was right in counting the rejected ballots, which were offered for the petitioner and which the voters were prevented from depositing. *Niblack v. Walls, Smith, Election Cas. 101; Bell v. Snyder, Id. 247.*"

In *People v. Graham*, 267 Ill. 426, 108 N.E. 699, Ann.Cas. 1916C, 391, we made an extended review of the decisions of this court in support of the holding that the election there in question was not rendered void by the fact that a single polling place was provided for the three wards of the city, thus making it necessary for all the voters in two wards to go to a polling place outside their wards to vote for the candidates for mayor, alderman, and other city officials. At page 436 of 267 Ill., 108 N.E. 699, 703, Ann.Cas.1916C, 391, we said: "A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the Legislature to be disregarded, but where the con-

For other cases see same topic and KEY NUMBER in all Key Number Digests and indexes

Exhibit B

11-7

sequences of not obeying them in every particular are not prescribed the courts must judicially determine them. In doing so they must necessarily consider the importance of the punctilious observance of the provision in question to the object the Legislature had in view. If it be essential it is mandatory. 2 Lewis' Sutherland on Stat.Const.(2d Ed.) § 610. No universal rule can be given to distinguish between directory and mandatory provisions. The controlling question in this as in all other rules of construction is, what was the intention of the Legislature? Whether a statute is mandatory or directory does not depend upon its form, but upon the legislative intention, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences which would result from construing it one way or the other. * * * In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not considered indispensable to the validity of acts done under them. Endlich on Interpretation of Statutes, § 437. The terms 'mandatory' and 'directory' may be convenient to distinguish one class of irregularities in election matters from the other. 'But strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview, but it does not, therefore, follow that every slight departure therefrom should taint the whole proceedings with a fatal blemish. Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end.' [Citing authorities.] The Supreme Court of one of our sister states has held that: 'All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the votes, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless

it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void.' Jones v. State, 153 Ind. 440, 55 N.E. 229; Norman v. State, 51 Ind.App. 425, 99 N.E. 812."

[1,2] The rule deducible from the decisions is, that statutes giving directions as to the mode of conducting elections will generally be construed as being directory unless a failure to comply therewith is expressly declared to be fatal. If the statute only provides that certain things shall be done in a given way and at a certain time, and there is no declaration that conformity to these provisions is essential to the validity of the election, the statute will be construed to be directory and not mandatory. No discretion is given where, the terms of the statute are peremptory and explicit, and where penalties are imposed for a violation of the act they have the same effect as express negative provisions. 20 Corpus Juris, 181; Behrensmeier v. Kreitz, 135 Ill. 591, 26 N.E. 704; Perkins v. Bertrand, 192 Ill. 58, 61 N.E. 405, 85 Am. St.Rep. 315; Gill v. Shurtleff, 183 Ill. 440, 56 N.E. 164. This section of the statute with reference to the depositing of these ballots is directory, and the trial court did not err in holding that the seven ballots should be counted.

[3] Appellant also complains as to the rulings on the votes of Walter J. Slomer, Virginia Slomer, Mary Stevenson, and Ida Swenson. The trial court erred in its ruling that Edith Skidmore's ballot should be counted for appellant. The proof showed that she voted outside the booth, and that one of the witnesses saw that she voted for appellant. In Choisser v. York, 211 Ill. 56, 71 N.E. 940, we held that such ballots were illegal. With this vote deducted, appellant's total would be 114. If all four of the votes appellant complains about were subtracted from the 121 votes for appellee or added to appellant's total the result would not be changed. It is not necessary, therefore, to pass upon appellant's contentions with reference to these votes.

The judgment of the trial court is right and is affirmed.

Judgment affirmed.

353 Ill. 551

PEOPLE v. BRAUNE et al.
No. 23420.

Supreme Court of Illinois.
June 10, 1936.

result of operation, prosecution for manslaughter by abortion is maintainable.

9. Criminal law ⇨470

In prosecution for manslaughter by abortion, permitting doctor who made post mortem examination to state, when asked, if, as result of his examination, he had opinion as to what caused death, which question called for yes or no answer, that patient died from a condition resultant of a septic abortion, held error.

1. Criminal law ⇨622(3)

Motion for severance must set out grounds showing reason for granting severance, and trial court must pass upon motion upon grounds advanced at time motion is made.

2. Criminal law ⇨1148

Granting of 'separate trial' is within sound judicial discretion of trial court.

3. Witnesses ⇨278

Where defendant has given testimony which tends to incriminate codefendant, codefendant may cross-examine defendant, especially in absence of prior notice of such incriminating testimony.

4. Criminal law ⇨622(2)

Any set of circumstances which is sufficient to deprive defendant of fair trial if tried jointly with another is sufficient to require a separate trial.

5. Criminal law ⇨622(2)

In prosecution for manslaughter by abortion wherein it appeared from petitions for severance that actual and substantial hostility existed between defendants as to nature of defense, that each was protesting his innocence and condemning the other, and that each declared the other would testify to facts which would be exculpatory of witness and condemnatory of his codefendant, refusal to grant motions for severance held reversible error.

6. Homicide ⇨166(1)

In prosecution for manslaughter by abortion, evidence that bastardy charge against one of defendants had been contemplated or that he refused to marry patient held inadmissible.

7. Criminal law ⇨81

Where death results from a criminal abortion, accessory, under sufficient set of facts and circumstances, may be prosecuted as principal and found guilty of manslaughter.

8. Homicide ⇨65

Where uterus is punctured in a criminal abortion and involves intestine through incision or otherwise, and death follows as

Error to Criminal Court, Cook County; Harry B. Miller, Judge.

Frank R. Braune and Maurice L. Dale were convicted of manslaughter, and they bring error.

Reversed and remanded, with directions.

Grenville Beardsley, of Chicago, for plaintiff in error Frank R. Braune.

Wm. Scott Stewart, of Chicago, for plaintiff in error Maurice L. Dale.

Otto Kerner, Atty. Gen., Thomas J. Courtney, State's Atty., of Chicago, and A. B. Dennis, of Danville (Edward E. Wilson, John T. Gallagher, Richard H. Devine, Melvin Rembe, E. I. Harrington, Irwin B. Clorfene, and Benjamin Nelson, all of Chicago, of counsel), for the People.

JONES, Justice.

A writ of error was sued out of this court to the criminal court of Cook county to review a conviction of Frank R. Braune and Maurice L. Dale. The indictment against them contained five counts. A nolle prosequi was entered as to the last count. The other four counts charged the defendants committed a criminal abortion on Marie Dwyer, whereby they did kill and murder her. Both defendants were found guilty of manslaughter.

At the outset of the trial a serious error was committed, which substantially affected the rights of both defendants as well as the fairness of the trial. This error was one of law, and we will not make a greater recital of the evidence than is necessary for a proper decision of the case.

The defendants were physicians. Marie Dwyer was a patient of Dr. Dale and also kept company with him. She became pregnant, of which fact she and Dr. Dale be-

1 DOROTHY L. BOHRER,
2 of lawful age, having been first duly sworn on her oath to
3 state the truth, and nothing but the truth, testifies as
4 follows:

5 DIRECT EXAMINATION

6 MR. RUCKER:

7 Q. Ma'am, if you would, state your name again for the
8 record.

9 A. Dorothy L. Bohrer.

10 Q. Miss Bohrer, are any of the individuals that served
11 with you at the polling place on November 8th out in the
12 hall?

13 A. No.

14 Q. All right. Miss Bohrer, if you would, state your
15 address.

16 A. 1320 North Fourth, Arkansas City, Kansas, 67005.

17 Q. And ma'am, have you ever served as an election judge
18 or clerk in a general -- at the general election in 1994?

19 A. Did I?

20 Q. Did you, ma'am?

21 A. Yes.

22 Q. It was an awkward question, but yes, thank you very
23 much. And what precinct, ma'am, did you?

24 A. 4D.

25 Q. Did you serve at 4D? All right. And where is that,

Exhibit C
4-13

1 ma'am?

2 A. At the Presbyterian Manor, Arkansas City.

3 Q. During your working hours as an election judge on
4 November the 8th, 1994 at 4D, did you encounter Judith,
5 pardon me, Edith J. Dickerson?

6 A. Yes, I did.

7 Q. Would you explain to the Court under what
8 circumstances you had contact with Miss Dickerson.

9 A. She came in, wanted to vote, her name was not in the
10 book so I challenged her ballot.

11 Q. Did she indicate why it is that she presented
12 herself to Presbyterian Manor?

13 A. Because she was at work and she wanted to go ahead
14 and continue working but she wanted to vote while she was
15 there and she wouldn't have had time to have done it after
16 work.

17 Q. Okay. All right. And your response, ma'am, was
18 what?

19 A. That I would challenge her vote.

20 Q. All right. And allow her to vote?

21 A. To vote.

22 ~~Q. Correct. And why did you follow that sort of a
23 procedure, ma'am?~~

24 A. ~~Because that was the instructions given to us by Joe
25 Gaston.~~

1 

Q. Okay. And specifically, if you could, relate to the Court what those instructions were, ma'am.

2

A. To allow anyone to vote that came in that wanted to vote and to allow no one to leave unless they voted.

3

4

5

Q. All right. So you --

6

A. If they wanted to vote.

7

Q. You bet.

8

(An off-the-record discussion was here had.)

9

MR. RUCKER:

10

Q. Ma'am, I would hand you now what has been marked as Petitioner's Exhibit No. 15D, as in dog, and ask for you to identify it for the Court.

11

12

13

A. This was the challenge envelope No. 12 that Edith Dickerson signed herself. This is her signature. This is my signature here with Terri Lee Stamper as a witness and this is her address. She lives right across the street from me (indicating throughout).

14

15

16

17

18

Q. All right, ma'am. And I notice this is in a white envelope.

19

20

A. Because we did not have anymore yellow envelopes so we borrowed some from the Presbyterian Manor.

21

22

Q. You just made do with what you had?

23

A. He said improvise and that's what we did.

24

Q. When you say "he," you mean?

25

A. Mr. Gaston.

1 CASE NO. 94C 00201W

2 JONES vs. SHRIVER

3 TESTIMONY OF EDITH DICKERSON and DOROTHY BOHRER

4
5 MR. RUCKER: Your Honor, I'd like to call
6 to the stand Edith Dickerson.

7 EDITH DICKERSON,
8 of lawful age, having been first duly sworn on her oath to
9 state the truth, and nothing but the truth, testifies as
10 follows:

11 DIRECT EXAMINATION

12 MR. RUCKER:

13 Q. If you would, state your full name for the Court.

14 A. Edith Jean Dickerson.

15 Q. Miss Dickerson, where are you employed?

16 A. Presbyterian Manor in Arkansas City.

17 Q. And how long have you been employed at Presbyterian
18 Manor?

19 A. About 11 years.

20 Q. Ma'am, what is your current address?

21 A. 1321 North Fourth Street.

22 Q. In Arkansas City?

23 A. Yes, sir.

24 Q. All right. Where did you live prior to living at
25 that address, ma'am?

Exhibit D


4-16

1 vote?

2 A. At the voting polls at Presbyterian Manor.

3 Q. All right. And you've already indicated that you
4 also work at Presbyterian Manor, is that accurate?

5 A. Yes.

6  Q. Why did you present yourself to the polls at
7 Presbyterian Manor, ma'am?

8 A. I really went down to see if I was eligible to vote
9 because I had not changed my place of residence and I had
10 previously voted at Northwest Community Center, and I
11 wanted to know if I needed to go over there or because I
12 had changed was I -- did I have eligibility to vote and
13 they said yes, I could vote but right there so --

14 Q. Did you, in fact, cast your ballot that day?

15 A. Yes, I did.

16 Q. Between the 3rd of October and the 14th of October,
17 where did you consider your residence?

18 A. Both places.

19 Q. Okay. Well, at that time -- an honest answer. You
20 maintained -- did you continue to go back to the residence
21 at 810 North Third Street?

22 A. Oh, yes, from early morning till late at night.

23 Q. You spent a great deal of time there?

24 A. Yes.

25 Q. Did you know for a fact, ma'am, whether or not the

1 obviously it is within the Court's appropriate domain since
 2 foundation is so essential, we would, in fact, be
 3 proffering now where we would be introducing foundation who
 4 signed the poll card, you know, who she had a conversation
 5 with, so on, so forth. I know it's a hardship on Miss
 6 Dickerson.

7 THE COURT: Well, we can do this. We can
 8 apply the testimony subject to hearsay objection and if you
 9 don't connect it up later with the proper people, than the
 10 Court very well could order it to be deleted on the basis
 11 of hearsay.

12 MR. RUCKER: Yes, Your Honor.

13 THE COURT: Proceed.

14 MR. RUCKER: Yes, Your Honor.

15 MR. RUCKER:

16 Q. What did you learn from the poll workers about where
 17 you should cast your ballot, ma'am?

18 A. Well, when I went in, I asked if I should go back to
 19 Northwest Community Center or could I vote there.

20 Q. What was their response, ma'am?

21 A. And they said --

22 MR. MILLER: Your Honor --

23 MR. RUCKER:

24 Q. And what, if anything, did you learn?

25 MR. RUCKER: I'll rephrase.

1 MR. MILLER: Or if we could make at least
2 some attempt or at least some preliminary inquiry if she
3 could identify who it was who told her.

4 THE COURT: That could be helpful.

5 MR. RUCKER: Yes, Your Honor.

6 MR. RUCKER:

7 * Q. Do you recall who indicated that to you, ma'am?

8 THE COURT: Male, female, old, young?

9 A. I think it was three of the election board
10 members --

11 THE COURT: Okay.:

12 * A. -- said that it would be possible for me to vote
13 there and they gave me a card to change -- to give me a
14 change of address and I filled that out, and then they gave
15 me the ballot that was in a brown envelope.

16 Q. All right. And you cast that ballot, ma'am?

17 A. I did, and beyond that I can't tell you what they
18 said word by word.

19 Q. But at no time did they indicate to you that you
20 should present yourself at your precinct of residence at
21 the other location?

22 A. No.

23 THE COURT: You want to inquire?

24 MR. RUCKER: Your Honor, if I may
25 approach.

IN THE DISTRICT COURT OF COWLEY COUNTY, KANSAS

DANNY P. JONES,

Contestant,

vs.

94 C 201-W

JOE D. SHRIVER,

Contestee.

ORDER DENYING MOTION FOR RECONSIDERATION

This court held a teleconference hearing upon the Contestee's motion for reconsideration on January 5, 1995. The Contestant was represented by Mr. Douglas P. Witteman and Eric K. Rucker. The Contestee was represented by Mr. Victor W. Miller.

In his motion for reconsideration Shriver, the Contestee, seeks to persuade the court to change its' ruling where the vote of Edith Dickerson was included in the totals in this case. He advances three arguments. Shriver argues that the statute requiring voters who have moved within thirty days preceding an election to vote in the precinct of their former residence is mandatory and therefore a voter must comply strictly with the letter of the law, K.S.A. 25-3701 and 25-3702. He states that these statutes are a legislative expression of a provision from the Kansas Constitution, Article 5, Sec. 1. Shriver also argues that it was Ms. Dickerson's own desire to vote at her new polling place that led to this predicament and not some error of the election board. And finally, he argues that the court is

inconsistent in its' rulings if it permits Dickerson's vote to count.

There is no doubt that K.S.A. 25-3701 and 3702 require a voter who has moved out of the precinct within 30 days of the election to vote in their former precinct and fill out an appropriate affidavit. Edith Dickerson went to her new polling place, which also happens to be her place of employment, and asked about voting. She was informed that she could vote there and they would challenge her ballot. She was given an affidavit to fill out. It was the affidavit for a voter who has moved within the precinct and not from outside the district. She filled out the affidavit, voted, and submitted the documents to the election board. There is no evidence that she was informed by the election board that she should vote in her former precinct.

Contestant argues that mandatory election laws must be followed and cites *Hooper v. McNaughton*, 113 Kan. 405, (1923). That case states at page 407:

The distinction between mandatory and directory provisions of a statute lies in consequence of nonobservance. An act done in disobedience of a mandatory provision is void. While a directory provision should be obeyed, an act done in disobedience of it may still be valid. Even although the doing of an act contrary to a directory provision be punishable criminally, still the act itself may not be nugatory. Deviations from instructions contained in directory provisions are usually termed irregularities.

The primary object of an election law, which transcends all other objects in importance, is to provide means for effective exercise of suffrage.

A reasonable interpretation of the law and the constitution concerning voters who have recently moved is that they should be permitted to vote. They are qualified electors. The constitutional provision preserves their status. The statute gives life to the constitution. Edith Dickerson was a qualified elector in the November 1994 election.

As the Kansas Supreme Court stated "[A]n 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." Kinsey v. Board of Education, 211 Kan. 619, Syl. 11 (1973).

This court holds the opinion that the failure to count Edith Dickerson's vote was such an irregularity as contemplated by the caselaw of Kansas.


Edith Dickerson, according to her testimony, wanted to know if she could vote at her new polling place. She was told she could. She filled out a change of address affidavit and voted. She was incorrectly given by the election board an affidavit for a voter who moves within the district. She was never told to vote at her former precinct. To say, as the Contestee avers, that Edith Dickerson was the only person to make a mistake in

that situation is inaccurate.

In Shriver's last argument he states that the court is inconsistent in its' rulings concerning votes if it permits Edith Dickerson's vote to be counted. This is not true. The court is attempting to be consistent in all of its rulings. Legally qualified voters should have their votes counted. Mistakes of election officers should not disfranchise an otherwise qualified voter. Voters who are not legally registered should not have their votes counted. Edith Dickerson was a legally qualified voter and her vote should count.

The motion of the Contestee to reconsider is denied.

LET THIS ORDER ISSUE.


STEPHEN D. HILL
District Judge,
assigned.

K
IN THE DISTRICT COURT OF COWLEY COUNTY, KANSAS

DANNY P. JONES,
Contestant,

vs.

94 C 201-W

JOE D. SHRIVER,
Contestee.

ORDER

Now on this 27th and 29th of December 1994, the District Court of Cowley County, Kansas, tries this matter as an election court. The parties appear in person and by their respective counsel as recorded in the file.

After hearing the testimony of the witnesses for both the contestant and the contestee, and after examining all questioned ballots, and hearing the arguments and statements of the attorneys, this election court determines that the number of legal votes cast in the general election of November 8, 1994, for the office of Kansas State Representative for the 79th District is as follows:

Danny P. Jones	3031
Joe D. Shriver	3031

Previously, on December 21, 1994, the court appointed a board of inspectors pursuant to K.S.A. 25-1447(a). Their inspection and recount of the ballots in this contest yielded the

same results as the previous recount upon which the certificate of election was issued. The Kansas Secretary of State issued a certificate of election to Joe D. Shriver.

INSPECTION AND RESOLUTION BALLOTS

The board of inspectors reserved ruling upon nine (9) ballots that they wanted this court to inspect, along with four (4) resolution ballots. At the trial of this matter, the court admitted the nine inspection ballots as exhibits WI 1-9, inclusive. The court admitted the resolution ballots as exhibits RB 1-4, inclusive.

It is the conclusion of this court that none of the nine inspection ballots should be added to the vote totals for either candidate. Three of the nine inspection ballots are votes for Danny Jones cast from the 78th State Representative district. Cowley County, Kansas, contains both the 78th and 79th districts. Votes from the 78th district should not be added to votes cast in the 79th district. The remaining six inspection ballots have the ovals filled next to a blank line provided on the ballot for a write in vote. No names are written in on any of the six ballots. It is impossible to tell the intention of the voters from such ballots and the court did not count them.

Of the four resolution ballots submitted to the court, the

court counted three and did not count one. The law that pertains to questioned ballots is as follows:

K.S.A. 25-3002(b)(1) No ballot, or any portion thereof, shall be invalidated by any technical error unless it is impossible to determine the voter's intention. Determination of the voter's intention shall rest in the discretion of the board canvassing in the case of a canvass and in the election court in the case of an election contest.

One of the resolution ballots has the oval next to the name of Danny Jones filled with a dark pencil mark. On that same ballot there is also a very small pencil mark in the oval next to the name of Joe Shriver. It appears that the intention of this voter is to vote for Jones, and that should be added to the totals.

On another resolution ballot, the voter filled with a dark pencil mark the oval next to the name of Joe Shriver. On that same ballot there is also a light pencil mark in the oval next to the name of Danny Jones. It appears that the intention of this voter is to vote for Shriver and that should be added to the totals.

On a third resolution ballot, the voter filled with a dark pencil mark the oval next to the name of Danny Jones. Also on the ballot the name "J. Mulheim" has been written in on every line provided for write in votes in every election. The voter did not mark the ovals next to the write in lines in any race,

while in all races where a vote is cast on the ballot, the voter filled the oval with a dark pencil mark next to a candidate, or candidates name(s). It appears to this court that it is the intention of the voter to vote for Danny Jones and that vote should be added to the totals.

At the trial of this matter the contestant offered the testimony of Jacqueline Mulheim, an older lady, stricken with muscular dystrophy and a resident of a nursing home in Arkansas City, Kansas. This court holds the opinion that such testimony is inadmissible at an election contest. When determining a voter's intent, the same rules bind this election court and a board of canvassers. Parole evidence should not be admitted to decide these issues. The election court should determine the intent of the voter from the ballot itself. If the court cannot decide the intent of the voter from the ballot then that vote is invalid. To rule otherwise, would subject every election court to any number of witnesses that would offer testimony concerning their intent when they voted. This would lead to all sorts of uncertainty and possible claims of influence. Elections are to be decided by legal votes that are legally cast and not testimony of witnesses taken weeks after the election.

In the final resolution ballot, the voter filled the oval next to Danny Jones' name with a dark pencil mark. That same ballot has the oval next to the write in line for the 79th State

Representative race partially filled in with a dark pencil mark along with a large dark "x" penciled through the write in oval. A specific statute deals with this situation.

K.S.A. 25-3002((b) states:

. . .

(2) The occurrences listed in this subpart (2) shall not invalidate the whole ballot but shall invalidate that portion, and that portion only, in which the occurrence appears. The votes on such portion of the ballot shall not be counted for any candidate listed or written in such portion, but the remainder of the votes in other portions of the ballot shall be counted. The occurrences to which this subpart (2) shall apply are:

. . .

(B) Whenever a voting mark is placed in the square at the left of a space where no candidate is listed.

This statute is controlling in this instance. The voter placed a voting mark in the oval at the left of a space where no candidate is listed. This election court did not count this vote as a legal vote.

VOTES CHALLENGED AND NOT COUNTED

There are three votes in this category. Donna Schalk f/k/a Donna Lloyd, Ruby Schalk, and Edith Dickerson all cast votes in this election for the 79th District State Representative. None of their challenged votes were counted in any vote count made

prior to this election court being convened. Such cases are different and are listed separately.

Donna Schalk, f/k/a Donna Lloyd. Because of a divorce Donna Lloyd, a qualified elector of the 79th State Representative district, had her former name of Schalk restored. She registered to vote under her former name of Lloyd. On election day she voted and filled out an affidavit as required by law and the election board sealed her ballot as a challenged vote. The Board of Canvassers did not count her vote since the affidavit concerning her name change was inadvertently not forwarded with her challenged ballot. That affidavit has since been found and is an exhibit in this trial.

The law permits her to vote and this court counted her vote. K.S.A. 25-2316c(a) provides that:

"When a registered voter changes name by marriage, divorce or legal proceeding, if such voter is otherwise qualified to vote at such voting place such voter shall be allowed to vote at any election on the condition that such voter first gives an affidavit to the election judges stating the facts relevant to such change of name and authorizes the county election officer to change the voter's registration records to reflect such change.

. . . "

Donna Schalk is a qualified elector able to vote at her



polling place. She filled out the appropriate affidavit and voted. The court counted her vote in the totals. (Her vote has been counted by this election court in camera in order to preserve the anonymity of her vote.)

Ruby Schalk. In this instance, Ruby Schalk's voter registration record revealed her address as 1420 S. C Street, Arkansas City, Kansas. Unfortunately, Ruby Schalk had moved from that residence into her new residence at 305 E. Windsor Road, Arkansas City, Kansas, in September 1992. Those two addresses are in different voting precincts and she moved prior to 30 days next proceeding the election. Although she claims to be registered at the new address no such registration can be found or presented as evidence to this court. Ruby Schalk is not a registered voter eligible to vote in this election and her vote should not be counted in these totals. K.S.A. 25-2316c(b) states "When a registered voter changes residence, such voter must reregister in order to be eligible to vote . . . "

Edith Dickerson. In this case, Edith Dickerson, a qualified elector of the 79th State Representative District moved her residence within 30 days next proceeding this election. For twenty years she resided at 810 N Third Street in Arkansas City.

As a result of a divorce on April 28, 1994, she was forced to sell her home at 810 N. Third Street, Arkansas City, Kansas,

and gave up possession of her house at five p.m. on October 14, 1994. The closing of the sale occurred on October 11, 1994. Ms. Dickerson rented an apartment on October 1, 1994, at 1321 N. Fourth Street, Arkansas City, Kansas, and finished moving her belongings to that address on October 14. Edith Dickerson emphatically and unequivocally stated that if the sale had fallen through she would have returned to her home of twenty years on Third Street. These two addresses are in different voting precincts.

Although Ms. Dickerson testified that she considered both addresses as her residence, legally, a person can have but one legal residence but can have many domiciles. Residency is a matter of intent. " . . . one does not lose one's residence by mere physical presence elsewhere unless that presence is accompanied by an intention to abandon the old residence and adopt the new." *PERRY v. PERRY*, 5 Kan. App. 2d 636 (1981). "Once a residency is established, it is presumed to continue until a new residency is established. . . . To effect a change of residence, there must be a transfer of bodily presence to the new location coupled with the intention to abide therein either permanently or indefinitely." *IN RE ESTATE OF PHILLIPS*, 4 Kan. App. 2d 256 (1980).

Edith Dickerson intended her residence to be her home of

twenty years and only changed when forced to give up possession of the dwelling. This means she legally moved her residence on October 14, 1994, which is within thirty days of the election held November 8, 1994.

The statutes contained in K.S.A. 25-3701, et seq. permit a qualified voter who moves within thirty days of the election to

" . . . vote in such election in such precinct of his former residence to the same extent and in the same manner as if he had retained his residence in such precinct, except as otherwise provided in this act."

This statute displays a legislative intent not to disfranchise a voter who moves just prior to an election. The law in K.S.A. 25-3702 goes on to provide the form of an affidavit that a voter must execute in order to vote in this fashion. This affidavit is then used by the election officer to update the voter registration lists.

In the case of Edith Dickerson, she appeared at her new polling place and informed the election board of her predicament. She voted and the election board challenged the ballot. Edith Dickerson filled out a change of address affidavit but it was the type of affidavit used when a voter moves within the same precinct, not to a new precinct. The court further notes that both parties presented a large amount of testimony at the trial

of this contest to the effect that it is the avowed policy of the Cowley County election office not to turn away any elector from the polls. Election board workers received explicit instructions to allow everyone to vote and to challenge those ballots of the people whose names were not on that precinct's lists. Later, then, the board of canvassers would decide the fate of all challenged ballots.

In following the policy of the election office, the election board did not allow Edith Dickerson to follow the law and go to her original polling place to vote. Edith Dickerson did as she was instructed, voted at the new polling place and filled in the affidavit she was given. Edith Dickerson is a legally qualified elector that should have been permitted to vote at her original polling place. Due to the policy of the Cowley County election office she was not permitted to follow the law. Her vote was counted by the court and included in the totals. (This has been accomplished by an *in camera* inspection in order to preserve the anonymity of her vote.)

As it has been stated by the Kansas Supreme Court, "They who voted were legal electors. They claimed and sought to exercise their right to vote. They voted at the place the officers designated. They voted in the manner prescribed by law. Why should the mistakes of any officers operate to disfranchise them?" *WILDMAN v. ANDERSON*, 17 Kan. 344, 349, (1876).

Similarly, why should the mistakes of the election officers in allowing Edith Dickerson to vote in the wrong precinct disfranchise an otherwise legally qualified elector?

ILLEGAL VOTES CAST

In order to be a qualified elector a voter must register. Their registration must list the address of their residence. (See K.S.A. 25-2302 et seq. and 25-2305). An examination of the voters, the registration rolls in the Cowley County election office, and all other appropriate documents, revealed that several voters illegally voted in this election.

Walter Eugene Simmons. Curtis Richards. Donita Richards. Russel Wayne Keefe. All four of these voters have changed their residences to new voting precincts without registering in the new precinct. Furthermore, their change of residences occurred prior to thirty days next preceding the November 1994 election. All four voted for Shriver and the court deducted their votes from the totals.

Kirk Branscom, Phillip Coplen, Mary J. Lenix, Gladys Weigand, and Norman Weigand. All of these individuals have moved their residences to another voting precinct prior to the election and had not reregistered to vote. Their change of residences occurred more than thirty days next preceding the election of

November 8, 1994. All voted for Jones. Since they were not qualified electors, this court did not count their votes and deducted them from the totals.

Filomena Garcia. Ms. Garcia resided at 1424 S. C Street in Arkansas City, Kansas. Because of her failure to vote in two November elections (for the years 1988 and 1990), her name was placed on the "inactive list" of voters by the Cowley County election office. This means the Cowley County election office purged her name from the voter registration lists as provided by the law K.S.A. 25-2316d. Nonetheless, she voted illegally, without registering, in the general election held in November 1992. Furthermore, she voted in November 1994, also without registering. Her vote was counted. She voted for Shriver. Ms. Garcia was not a legally qualified elector since she was not registered to vote. The court did not count her vote and deducted it from the totals.

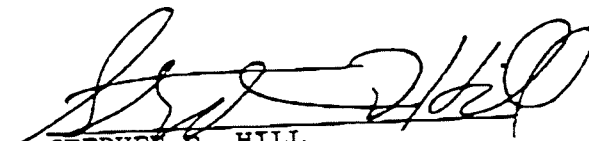
It is therefore by the court ordered, adjudged and decreed, that:

1. The clerk of this court shall, upon receipt of this order, file the same and transmit a copy of the same along with all the files and records of these proceedings, along with all of the evidence taken at this election court to the Speaker of the House of Representatives of the State of Kansas.

2. The clerk of this court shall forward a copy of this order to the Secretary of State of the State of Kansas.

3. In the interests of justice, the costs of this contest are hereby waived and should therefore be paid by the State of Kansas in a special appropriation made therefore, pursuant to K.S.A. 25-1452. It is the specific recommendation of this court that the costs of this case include a reasonable sum for attorney fees for both parties. There are many complex questions of law, including election law, evidence, and civil procedure that the parties to this contest had to overcome in an extremely short period of time, namely twenty days.

LET THIS ORDER ISSUE.


 STEPHEN B. HILL
 Judge of the District Court,
 assigned.

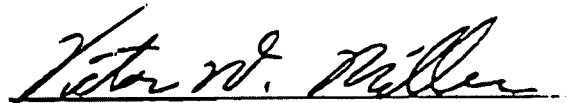
VICTOR W. MILLER
SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF MOTION FOR RECONSIDERATION
CASE NO. 94-C201-W
BY FAX/PAGE 2

rooted in the Kansas Constitution. Contestee calls the Court's attention to the provisions of the Article 5, §1 of the Kansas Constitution reading in pertinent part:

A person who is otherwise a qualified elector may vote in the voting area of his or her former residence either in person or by absentee ballot notwithstanding the fact such person may have become a nonresident of such voting area during a period prescribed by law next preceding the election at which he or she seeks to vote, if his new residence is in another voting area in the State of Kansas." (Emphasis added.)

Failure to comport to the requirements of the Constitution can hardly be categorized as "technical error".

Respectfully submitted,



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(913) 233-9950
ATTORNEY FOR CONTESTEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Supplemental Memorandum in Support of Motion for Reconsideration was telefaxed on the 5th day of January, 1995, to the following:

The Honorable Stephen D. Hill
Judge of the District Court
Miami County Courthouse
Paola, Kansas 66071
Telefax: (913) 294-2535

Clerk of the District Court
Cowley County Courthouse
Winfield, Kansas 67156
Telefax: (316) 221-1097

VICTOR W. MILLER
SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF MOTION FOR RECONSIDERATION
CASE NO. 94-C201-W
BY FAX/PAGE 3

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Kp

VICTOR W. MILLER #10055
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700 SW Jackson, Ste. 404
Topeka, Kansas 66603
(913) 233-9950
Fax: (913) 233-2613

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, COWLEY COUNTY, KANSAS

In the Matter of the Election of)
Joe D. Shriver to the Position of)
State Representative, 79th District)

DANNY P. JONES,)

Contestant,)

v.)

JOE D. SHRIVER,)

Contestee.)

Case No. 94-C201-W

Pursuant to K.S.A. 25-1434 et seq.

MOTION FOR RECONSIDERATION

Comes now the Contestee and moves the Court reconsider its oral ruling with regard to the ballot of Edith J. Dickerson. In considering his motion, the Contestee requests the Court regard the ballot as though it had not been opened or counted.

ARGUMENT AND AUTHORITY

The Contestee renews his claim that the language of K.S.A.

VICTOR W. MILLER
MOTION FOR RECONSIDERATION
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25-3701 and 25-3702 controls and that the language contained in those statutes is mandatory.

Voters changing residence within thirty (30) days of an election have but one location from which to cast a legal ballot -- their former precinct.

Contestee would call the Court's attention to the language of *Hooper v. McNaughton*, 113 Kan. 405, (1923). There the court drew the distinction between mandatory and directory provisions of election statutes. As noted on page 407 of *McNaughton*:

The distinction between mandatory and directory provisions of a statute lies in consequence of nonobservance. An act done in disobedience of a mandatory provision is void. While a directory provision should be obeyed, an act done in disobedience of it may still be valid. Even although the doing of an act contrary to a directory provision be punishable criminally, still the act itself may not be nugatory. Deviations from instructions contained in directory provisions are usually termed irregularities.

(*Emphasis added.*)

The Court in *McNaughton* went on to note that, "Generally a voter may be held to strict compliance with rules laid down for his own guidance." (Pg. 407, *Emphasis added.*) There the Court found that a statute so innocuous as requiring a pencil as the writing instrument voided a ballot because of the use of the word "shall" in the statute.

Courts have noted that where the terms of the statute are absolute, explicit and peremptory, no discretion is given. Wa-

VICTOR W. MILLER
MOTION FOR RECONSIDERATION
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ters v. Heaton, 4 N.E. 2d 41, 46, 364 Ill. 150 and *Siedschlag v. May*, 2 N.E. 2d 836, 838, 363 Ill. 538. Such is the case at bar.

The Contestee would also note the voter's ballot being challenged here is due to her own actions, not the actions of election officials. No one instructed the voter to vote in her new precinct. She chose to do so. She chose not to reregister which she could have done between October 14, 1994, upon having changed residence, until the close of registration on October 24, 1994. Instead, she chose to vote in the new precinct as a matter of convenience and because she had not set aside time to vote in her former precinct. Please consider this excerpt from the trial transcript:

TESTIMONY OF DOROTHY BOHRER UNDER DIRECT EXAMINATION

MR. RUCKER:

Q. Would you explain to the Court under what circumstances you had contact with Miss Dickerson?

A. She came in, wanted to vote, her name was not in the book so I challenged her ballot.

Q. Did she indicate why it is that she presented herself to Presbyterian Manor?

A. Because she was at work and she wanted to go ahead and continue working but she wanted to vote while she was there and she wouldn't have had time to have done it after work.

VICTOR W. MILLER
MOTION FOR RECONSIDERATION
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The Contestant argues that because election officials allowed the voter to cast a challenged ballot in her new precinct, they somehow acquiesced in her improper action. The very essence of a "challenged" ballot is to call it into question, not to sanction its legality.

Indeed, had the voter gone to her former precinct to vote and filled out the prescribed affidavit, there would have been no need to even challenge her ballot. Two such votes were cast in this very election. (See Exhibits A and B attached.)

The Contestant argues that *Lambeth v. Levens*, 237 Kan.614 (1985) controls. That case can be easily distinguished. In *Lambeth*, the contestant sought to have the entire election declared void on the basis of a ballot not challenged at the time it was cast and already counted before the Court considered the matter.

Finally, the Contestee would note that the Court's ruling on Edith J. Dickerson's ballot is inconsistent with its earlier rulings regarding the application of K.S.A. 25-2316c(b). K.S.A. 25-2316c(b) deals with voters moving within a precinct. K.S.A. 25-3701 and K.S.A. 25-3702 deal with voters moving out-of-precinct but within thirty (30) days of an election. The requirements of the statutes are, however, equally compelling.

VICTOR W. MILLER
 MOTION FOR RECONSIDERATION
 CASE NO. 94-C201-W
 BY FAX/PAGE 5

The Contestee respectfully requests the Court reconsider its oral ruling and asks that the ballot of Edith J. Dickerson not be counted as it was not legally cast.

Respectfully submitted,

Victor W. Miller

VICTOR W. MILLER #10055
 700 SW Jackson, Suite 404
 Topeka, Kansas 66603
 (913) 233-9950
 ATTORNEY FOR CONTESTEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Motion for Reconsideration was telefaxed on the 3rd day of January, 1995, to the following:

The Honorable Stephen D. Hill
 Judge of the District Court
 Miami County Courthouse
 Paola, Kansas 66071
 Telefax: (913) 294-2535

Clerk of the District Court
 Cowley County Courthouse
 Winfield, Kansas 67156
 Telefax: (316) 221-1097

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 Wichita, KS 67226
 Telefax: (316) 687-2572

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 Attorney at Law
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 Herrington, KS 67449
 Telefax: (913) 258-3238

Victor W. Miller

Victor W. Miller

HENRY M. ADKINS & SON, INC. • CLIFTON, MO A-1284

AFFIDAVIT OF FORMER PRECINCT RESIDENT

EXHIBIT A

STATE OF KANSAS

COUNTY OF Cowley } ss

I, Glenda Bunch, now residing at number 5360 Astley Rd
on Astley Rd street (or R.F.D.), city (or post office) of Wamego KS
in the county of Pottawattomie, state of Kansas, do solemnly swear (affirm) that on

Nov 3rd ¹⁹⁹⁴ I removed my residence from number _____ on _____
street (or R.F.D.), city (or post office) of R# 3 Box 51, in the county of

Cowley, state of Kansas, such move occurring within the thirty (30) days immediately preceding this election, that I was a qualified elector at the time of my removal, and that I have not voted elsewhere in this election.

Glenda Bunch

Subscribed to before me this 8th day of November, 1994

Barbara A. Cain
Election Judge

Prescribed by Secretary of State; K.S.A. 25-3702.

(to Be Used at Polling Place)

4-45

AFFIDAVIT OF FORMER PRECINCT RESIDENT

STATE OF KANSAS

COUNTY OF

Cowley

} ss:

Dorothy M. Little
(Please print name)

now residing at number 102 Indiana

on

street (or R.F.D.), city (or post office) of Winfield Ks

in the county of

Cowley

state of Kansas, do solemnly swear (affirm) that on

Nov 3, 1994
(Date)

I removed my residence from number

~~102~~

on

street (or R.F.D.), city (or post office) of

R#3 Box 51

PV

Winfield

In the county of

Cowley

state of Kansas, such move occurring within the thirty (30) days

immediately preceding this election, that I was a qualified elector at the time of my removal, and that I have not voted elsewhere in this election.

Subscribed to before me this

Nov. 8th

day of

November, 1994

Dorothy M. Little

Barbara A. Cain
Election Judge

Prescribed by Secretary of State; K.S.A. 25-3702

(To Be Used at Polling Place)

EXHIBIT
B

4-46

FACSIMILE TRANSMISSION COVER SHEET

DATE: January 3, 1995

TO: Clerk of the District Court, Cowley County
FAX Number: (316) 221-1097

Case No.: 94-C201-W

Caption: In the Matter of the Election of
Joe D. Shriver to the Position of
State Representative, 79th District

FROM: Victor W. Miller
700 SW Jackson, Suite 404
Topeka, KS 66603

Kansas Supreme Court Registration Number: 10055
Telephone Number: (913) 233-9950
Fax Number: (913) 233-2613

Attorney for: Joe D. Shriver, Contestee

1. Please file the following transmitted document. NOTE:
Document length is limited to 10 pages. A cover sheet must
separate each document filed.

<u>Document Name</u>	<u>No. of Pages</u>
Motion for Reconsideration	7

2. Docket Fee: \$ N/A

I authorize the above fees to be charged to the following account:

VISA MASTERCARD Account No. _____
 Expiration Date: _____

Printed Name of Cardholder

Signature of Cardholder

WITNESS REGISTER

FILED DISTRICT COURT

VS

Plaintiff

Defendant

Dec 29 4 18 PM '94

Cause of Action _____

DOCKET PAGE BY 4

No. _____ Appearance Docket _____

M.F. DRAGE

STATE OF KANSAS, COWLEY COUNTY, SS:

94-C-201-W

I, the undersigned, being duly sworn that I am legally entitled to the number of days attendance and number of miles travel as witness for the party in the case as set out below, for attendance in the District Court of Cowley County, Kansas and on the dates as set forth to which I have hereto subscribed my signature as claimant for such Fees and Mileage, and that I have not claimed or been paid witness fees in any other case covering or included in this said time, nor have I been a juror during any of said time. So help me God.

NAME OF WITNESS	ADDRESS	PLFF.	DEFT.	MILES	DATE	AMT.	SIGNATURE OF WITNESS
1 Betty Palmer	4-100, 74 RR3 Box 161			37			Betty Palmer
2 Jack Mulhlein	Ark City 203 E Osage			37			Jack Mulhlein
3 Lewis E. Kramer	1334 W 5th A.C.			37			Lewis E. Kramer
4 Bernice W. Rush	R.R. 1, Box 18A Dexter, Ks., 67058			28 one way	12 29 94		Bernice W. Rush
5 Virginia Boyd	1315 Mansfield Mansfield			?	12 29 94		Virginia Boyd
6 Loris Madden	1314 So B St Ark City, Ks.			32	12 28 94		Loris E. Madden
7 Lucille Koch	2221 Edgemont Ark City, Ks.			37	12 29 94		Lucille Koch
8 Jessie Lerner	R# 3 Box 111 Ark City, Ks.			44	12 29 94		Jessie Lerner
9 Phyllis J. Utz	Rte 3 Box 313 Ark City, Ks.			44			Phyllis J. Utz
10 Carrie Bowman	415 W. Washing Ark City			26			Carrie Bowman
Maxine Prother	520 N. B. Ark City			26			Maxine Prother
11 Amber Turner							
12 Gladys Weigand	1210 N 7th Ark City			26			Gladys Weigand
13 Mabel Howell	1222 Millington Windsor			C	12 29 94		Mabel Howell
14 Norman Weigand	1210 N 7th Ark City, Ks.			26			Norman Weigand

Subscribed and sworn to before me this _____ day of _____ A.D., 19 _____

Clerk of the District Court. By _____ Deputy. 4-48

WITNESS REGISTER

_____ VS _____
 Plaintiff Defendant

Cause of Action _____

No. _____ Appearance Docket _____ Page _____

STATE OF KANSAS, COWLEY COUNTY, SS:

I, the undersigned, being duly sworn that I am legally entitled to the number of days attendance and number of miles travel as witness for the party in the case as set out below, for attendance in the District Court of Cowley County, Kansas and on the dates as set forth to which I have hereto subscribed my signature as claimant for such Fees and Mileage, and that I have not claimed or been paid witness fees in any other case covering or included in this said time, nor have I been a juror during any of said time. So help me God.

NAME OF WITNESS	ADDRESS	PLFF.	DEFT.	MILES	DATE	AMT.	SIGNATURE OF WITNESS
1 <i>Penny Danell</i>	<i>1222 Millington Winfield, Ks.</i>			<i>0</i>	<i>12 29 94</i>		<i>Penny d. Danell</i>
2							
3							
4							
5							
6							
7							
8							
9							
0							
1							
2							
3							
4							
5							

Subscribed and sworn to before me this _____ day of _____ A.D., 19 _____

Clerk of the District Court. By _____ Deputy. *4-49*

WITNESS REGISTER

DANNY P. JONES

VS

JOE D. SHRIVER

Plaintiff

Defendant

Cause of Action _____

No. 94 C201 W

Appearance Docket _____

Page _____

FILED DISTRICT COURT
 DEC 27 9 22 AM '94
 DOCKET - Paid
 M.F. DATE

STATE OF KANSAS, COWLEY COUNTY, SS:

I, the undersigned, being duly sworn that I am legally entitled to the number of days attendance and number of miles travel as witness for the party in the case as set out below, for attendance in the District Court of Cowley County, Kansas and on the dates as set forth to which I have hereto subscribed my signature as claimant for such Fees and Mileage, and that I have not claimed or been paid witness fees in any other case covering or included in this said time, nor have I been a juror during any of said time. So help me God.

NAME OF WITNESS	ADDRESS	PLFF.	DEFT.	MILES	DATE	AMT.	SIGNATURE OF WITNESS
1 Filomena Garcia	1424 Soc 911 N. C Street Arkansas City, Ks			14	12 27 94		Filomena Garcia
2 Russell Keefe	517 Cedar Lane Dr Winfield, Ks 1321 N. 4th			10	12 27 94		Russell Keefe
3 Donna Swartz	Arkansas City, Ks			2	12 27 94		Donna Swartz
4 Edith J Dickerson	214 N. B ARK CITY R.R. 1, Box 187			14			Edith Dickerson
5 Alexander Garcia	Dexter, Ks, 67038			28	12 27 94		Alexander Garcia
6 Bernice W. Rush	115 S. C ARK. CITY			26	12 27 94		Bernice W. Rush
7 WALTER SIMMONS	906 S. A A.C. Apt. 410			28	12 27 94		Walter Simmons
8 Donna Schalk	305 E. Windsor Ark City, Ks			24	12 27 94		Donna Schalk
9 Ruby Schalk	315 E. Pine			28	12 27 94		Ruby Schalk
10 Donita Richards	315 E PINE ARK CITY			28	12 27 94		Donita Richards
11 CURTIS RICHARDS	1523 E. 12th Winfield, Ks			1	12 27 94		Curtis Richards
12 Lucy Otte	1407 E 11 Winfield			1	12 27 94		Lucy Otte
13 Barbara E. Warren	1210 N 2nd Ark. City, Ks			25	12 27 94		Barbara E. Warren
14 Gladys Weigand	1210 N 2nd			25	12 27 94		Gladys Weigand
15 Norman Weigand	Ark City, Ks			25	12 27 94		Norman Weigand

Subscribed and sworn to before me this _____ day of _____ A.D., 19 _____

Clerk of the District Court. By _____ Deputy. 4-50

WITNESS REGISTER

_____ VS _____
 Plaintiff Defendant

Cause of Action _____

No. _____ Appearance Docket _____ Page _____

STATE OF KANSAS, COWLEY COUNTY, SS:

I, the undersigned, being duly sworn that I am legally entitled to the number of days attendance and number of miles travel as witness for the party in the case as set out below, for attendance in the District Court of Cowley County, Kansas and on the dates as set forth to which I have hereto subscribed my signature as claimant for such Fees and Mileage, and that I have not claimed or been paid witness fees in any other case covering or included in this said time, nor have I been a juror during any of said time. So help me God.

NAME OF WITNESS	ADDRESS	PLFF.	DEFT.	MILES	DATE	AMT.	SIGNATURE OF WITNESS
1. Moddie Graham	307 S. 1st St Ark City, Kan P.O. Box 521				12 28 94		Moddie L. Graham
2. RAY L. VICK	Winfield KS 67156				12 28 94		Ray L. Vick
3. Norris E. Madden	319 S B Ark KS 67005				12 27 94		Norris E. Madden
4. Dorothy L. BOHNER	1320 N. 4th Ark 67005				12 27 94		Dorothy L. Bohner
5. Hal Bumgarner	RA2 BOX 532			10	12 27 94		Hal Bumgarner
6. Carrie Bowman	415 W. Wash. Ark City			12	12 27 94		Carrie Bowman
7. Mairne Frather	520 N. B Ark City				12 27 94		Mairne Frather
8. Donna Swartz	517 Cedar Lane Winfield			2	12 28 94		Donna Swartz
9.							
0.							
1.							
2.							
3.							
4.							
5.							

Subscribed and sworn to before me this _____ day of _____ A.D., 19 _____

Clerk of the District Court. By _____ Deputy. 4-51

PATTERSON, NELSON, NOLLA
& WITTEMAN, L.C.
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Fax: (913) 258-3238

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, COWLEY COUNTY, KANSAS

FILED DISTRICT COURT
DEC 27 8 55 AM '94
DOCKET PAGE 011
M.F. DATE

In the matter of the election of)
Joe D. Shriver to the position of)
State Representative, 79th District)
)
DANNY P. JONES,)
)
Contestant,)
)
v.)
)
JOE D. SHRIVER,)
)
Contestee.)
)

Case No. 94-C201-W

Pursuant to K.S.A. 25-1434 et seq.

MEMORANDUM CONTEST HEARING BRIEF

COMES NOW the Contestant, Danny P. Jones, by and through his attorneys Douglas P. Witteman and Eric K. Rucker, and offers this Memorandum Contest Hearing Brief in support of his contest to the election of Joe D. Shriver to the Kansas House of Representatives for the 79th District.

STATEMENT OF FACTS

For the purposes of the instant Brief, the Contestant incorporates herein his Amended Notice of Contest filed November 22, 1994, as a factual summary. In further support of

specific issues to be determined at the Contest Hearing and specifically addressed herein, the following additional facts are summarized for the Court.

On Thursday, December 22, 1994, pursuant to Contestant's Motion for Inspection of Ballots, an inspection board was convened to canvass the election and to identify any ballots to which the inspectors could not agree as to which candidate the ballot should be counted for. There were only thirteen (13) ballots which could not be agreed upon by the inspectors. Nine (9) of the ballots came from the "write-in" ballots. these nine (9) ballots have never been counted in any previous canvass of the election and specifically not in the final certified canvass.

Four (4) of the ballots came from the "resolution" ballots which have been counted in all previous canvasses of the election and which were counted in the final certified canvass. Based on the ballots themselves, the resolution of these votes should take little of the Court's time.

On the day of the election, November 8, 1994, there were numerous ballots challenged at the individual precinct polling places, as provided for by Kansas law. Subsequently, election office workers reviewed the challenged ballots, performed a cursory investigation of the challenged ballots and made determinations regarding which challenged ballots should be counted and which should not. After these determinations were made, the Cowley County Board of Canvassers met on Thursday, November 11, 1994, and accepted the determinations made by the Cowley County Clerk's office regarding the challenged ballots. There is no evidence the Cowley County Board of Canvasser's made any determinations independent of those made by the Clerk's office. The challenged ballots were then either opened and counted or were not opened and not counted.

Based on an investigation of the relevant facts, Contestant believes that several of the challenged ballots which were counted were illegal, as the voters were not properly registered to vote in the election. These illegal votes must be determined and subtracted from the appropriate candidate's vote total. Furthermore, Contestant's investigation indicates that several legal votes which were cast and challenged were improperly not counted in the election. These votes must be determined, opened and added to the appropriate candidate's vote total.

ARGUMENT AND AUTHORITY

I. Ballots Questioned by the Inspection Board

As indicated above, there are thirteen (13) ballots which were set aside by the Inspection Board. Based on information currently available, it is the Contestant's contention that the four (4) ballots previously counted in the certified canvass of the election should be counted, whether a Shriver vote or a Jones vote. Likewise, based on information currently available, it is the Contestant's contention that the nine (9) ballots not counted previously in the certified canvass, should not now be counted, whether a Shriver vote or a Jones vote.

To determine the validity of the thirteen (13) questioned ballots, K.S.A. 25-3002 must be considered, which in pertinent part reads as follows:

Rules for canvassers; validity of ballots or parts thereof. (a) The rules prescribed in this section shall apply to:

...

(4) All election contests.

...

(b)(1) No ballot, or any portion thereof, shall be invalidated by any technical error unless it is impossible to determine the voter's intention. Determination of the voter's intention shall rest in the discretion of the board canvassing in the case of a canvass and in the election court in the case of an election contest.

...

K.S.A. 25-3002 (1993). The issue before the court regarding the ballots questioned by the inspection board is simply a matter of determining the voter's intention.

Prior to 1992 the language of K.S.A. 25-3002 tended to invalidate votes when a voter inadvertently erred when marking a ballot. In response to the injustice created by such an interpretation of K.S.A. 25-3002, the Kansas legislature amended the statute in order to make the intent and spirit of the law clear. Prior to amendment K.S.A. 25-3002 contained the following provisions:

(2) Any ballot upon which an identifying mark has been made shall be wholly void and no vote thereon shall be counted. Determination of whether a mark is an identifying mark shall rest in the discretion of the board canvassing in the case of a canvass and in the election court in the case of an election contest. The secretary of state may adopt rules and regulations describing certain types of marks upon ballots which may be considered identifying marks, but such rules shall not be considered as either all inclusive or as conclusive.

(3) Any ballot which has been defaced, mutilated or torn shall be wholly void and no vote thereon shall be counted.

K.S.A. 25-3002 (Supp. 1991)(the 1992 Session Laws, Chap. 291 is attached hereto as Attachment A). The legislature clearly intended to insure that a vote would not be voided on the basis of some inadvertent or extraneous marking on a ballot. Therefore, the Court's task is simply to determine the intent of the voter and count the ballot accordingly.

One of the "resolution" ballots questioned by the inspection board contained a mark on the ballot in the oval where a write-in vote would be marked. There was no name in the write-in blank and the voter made a heavy "X" through this obviously inadvertent mark. The voter then appropriately darkened the oval (as was done in all other races marked on the ballot) next to the name of Danny Jones. The voter's intent is clear; he accidently marked the write-in box,

then crossed the mark out to indicate his error and then marked the candidate of his choice, Danny Jones. In accordance with the voter's clear intent, this vote should count for Jones.

On another "resolution" ballot, the voter appropriately darkened the oval next to the name of Danny Jones. A minute mark was made in the oval next to the name of Joe Shriver. A simple review of the ballot will indicate the voter's clear intention to cast his vote for Jones. Likewise, on a similar "resolution" ballot the voter made a small mark in the oval next to the name of Danny Jones, however, the voter then darkened the oval next to the name of Joe Shriver. Based on the analysis applied to the previous ballot, it would appear the voter's intention was to vote for Joe Shriver and the vote should be counted for Shriver.

The final "resolution" ballot at issue involves a ballot that contains the signature of "J. Mulheim" in each of the spaces provided for a write-in vote. This elector, however, voted each of the respective races contained thereon and no oval was darkened near this signature. This ballot was cast for Danny Jones. Based on his investigation, the Contestant knows the ballot to have been voted by Jacqueline Mulheim, an older resident of an Arkansas City nursing home. During an interview, Ms. Mulheim indicated she intended to vote for Danny Jones and that she only signed her name as she did because she thought that is what she was supposed to do. The intent of this voter is clear; Ms. Mulheim cast her vote for Danny Jones. The technical irregularity should not disenfranchise this voter's voice.

Of the nine (9) questioned ballots from the write-in group, three (3) are 78th legislative district ballots which contained the name of Danny Jones as a write-in. The other six ballots simply did not vote the instant race and instead darkened the oval next to the blank line provided for a write-in. The Contestant has no facts to indicate that the initial three (3) ballots are

anything but irrelevant 78th district ballots. Contestant will therefore not argue that the Jones votes contained thereon should be counted in the 79th district race. Likewise, there are absolutely no facts to indicate that the six (6) undervoted ballots should be counted for either candidate. The court should therefore eliminate these nine (9) ballots from further consideration.

II. Legal Votes Which Were Cast But Not Counted

Based on Contestant's investigation, there appear to be legal votes that were cast and challenged at individual polling places which erroneously have not been counted in the instant election. These ballots were cast by Donna Schalk, Ruby Schalk and Edith Dickerson.

A. Donna Schalk

Donna Schalk cast here ballot in precinct 2B where she was a registered voter under the name of Donna Lloyd. Because her name had changed, Ms. Schalk's vote was challenged and on the challenged ballot envelope it was noted that Ms. Schalk had changed her name in 1992 as a result of a divorce. Ms. Schalk filled out the appropriate change of name registration form and cast her ballot. This perfectly legal vote has yet to be counted.

The statute relevant to determining the validity of Ms. Schalk's ballot is K.S.A. 25-2316c(a). In relevant part this statute reads as follows:

When a registered voter changes name by marriage, divorce or legal proceeding, if such voter is otherwise qualified to vote at such voting place such voter shall be allowed to vote at any election on the condition that such voter first gives an affidavit to the election judges stating the facts relevant to such change of name and authorizes the county election officer to change the voter's registration records to reflect such change. The county election officer shall send, by nonforwardable first-class mail, a new certificate of registration to any voter giving such affidavit.

K.S.A. 25-2316c(a)(1993). Ms. Schalk changed her name pursuant to a divorce, was otherwise qualified to vote and filled out the appropriate affidavit. Although everything necessary to open

and count her challenged ballot was, and is, in place, the ballot was overlooked and not counted. This is a legal vote that must be counted and the vote added to the appropriate candidate's vote total.

2. Ruby Schalk

Ruby Schalk cast her ballot in precinct 1D. Because the poll worker did not find Ms. Schalk's name in the poll book, Ms. Schalk voted a challenged ballot. Ms. Schalk's present address, as indicated on the challenged ballot envelope, is 305 E. Windsor Rd., Apt. 410, Arkansas City, Kansas. Ms. Schalk indicates she moved approximately three (3) years ago and subsequent to her move, she reregistered to vote. The registration card which was filed subsequent to her move, inadvertently lists her previous address. Ms. Schalk's testimony will indicate her vivid recollection of reregistering after she moved and that she filed this registration because of the fact she had moved. The listing of her previous address is an indication of an inadvertent error made by either Ms. Schalk or the registration worker who assisted her in completing her registration card.

Based on Ms. Schalk's circumstances it is apparent that Ms. Schalk registered while she resided at her current address and that she has not moved from that address since the time of her registration. The fact her registration card inadvertently reflects an address where she resided prior to registering to vote should be viewed as a technical irregularity and should not be permitted to disenfranchise this qualified elector. The Kansas Supreme Court has noted that substantial compliance with the law regulating elections is sufficient and that a minor irregularity should not invalidate the vote of an otherwise qualified elector. See Lambeth v.

Levens, 237 Kan. 614, 617, 702 P.2d 320 (1985). Ms. Schalk's vote should be counted and the vote added to the appropriate candidate's vote total.

3. Edith Dickerson

Edith Dickerson cast her ballot at precinct 4D, at the polling place located at her place of employment. Ms. Dickerson indicated to the poll worker that she had recently moved and asked whether she should vote there or go back to her old polling place to vote. The poll worker indicated that Ms. Dickerson should vote at here present precinct and offered her a challenged ballot envelope and an in-precinct move registration card, pursuant to K.S.A. 25-2316c(b).

Ms. Dickerson previously had moved from her residence in located in precinct 4C. She commenced her move on October 3, 1994, and actually vacated this residence and completed her move on October 14, 1994, the date when the new owners of the home were to take possession.

Kansas law permits a registered voter to vote without reregistering, if that voter moves within 30 days of the election. K.S.A. 25-3701 states;

For the purposes of this act, a "former precinct resident" shall mean a person who is otherwise qualified elector of the state of Kansas, who has removed from the precinct of his former residence in this state and established residence in another precinct in this state during the thirty (30) days next preceding any election held in the precinct of his former residence. Such person may vote in such election in such precinct of his former residence to the same extent and in the same manner as if he had retained his residence in such precinct, except as otherwise provided in this act.

K.S.A. 25-3701 (1993). Ms. Dickerson completed her move and obtained her new residence within 30 days of the date of the instant election. Although, at the errant instruction of a poll worker, she voted in the precinct of her new residence, Ms. Dickerson was a qualified elector

and should not be disenfranchised because she voted at the wrong polling place. The records of this election are replete with references to qualified electors who cast their ballots at the wrong precincts, but which were nevertheless counted in this election. A technical irregularity should not disenfranchise this voter. Ms. Dickerson was within the contemplation of the aforementioned statute, therefore her vote should be counted and the vote added to the appropriate candidate's vote total.

III. Illegal Votes That Were Cast And Improperly Counted.

Based on Contestant's investigation, there appear to be illegal votes that were cast and challenged at individual polling places and which were erroneously counted in the instant election. These apparent illegal ballots were cast by Filomena Garcia, Russell Wayne Keefe, Hal Bumgarner, Moddie G. Graham, Curtis Richards and Donita Richards.

1. Filomena Garcia

Filomena Garcia cast her ballot at the polling place designated for precinct 2C. Because Ms. Garcia was not in the 2C poll book, she voted a challenged ballot. Her ballot was later deemed properly cast by the election office and was accepted by the Cowley County Board of Canvassers as such. The ballot was opened and the vote counted. The vote, however, was clearly illegal because Ms. Garcia was not a properly registered voter qualified to vote in the election. Kansas election law indicates that "[v]oting or attempting to vote at any election when not a lawfully registered voter" is illegal. K.S.A. 25-2416(a)(1993).

The election office records indicate that Ms. Garcia's registration was voided and purged because she failed to vote in two (2) consecutive state general elections. This determination is consistent with the provisions of K.S.A. 25-2316d, which indicates that when a voter that fails

to vote in two state general elections "the voter registration is hereby declared to be void." Ms. Garcia's voter registration card is marked "NN" which is the election office's notation that a voter failed to vote in two general elections. The poll books indicate that Ms. Garcia did not vote in either the 1988 or 1990 election.

In Lambeth v. Levens, 237 Kan. 614, 618, 702 P.2d 320 (1985)(attached hereto as Attachment B), the Kansas Supreme Court determined that a district court hearing an election contest is authorized to determine the legality of votes that have been cast and counted. "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." Lambeth at 619 (citing Campbell v. Ramsey, 150 Kan. 368, 92 P.2d 819 (1939)). The court noted that "[w]hile a legal voter cannot be compelled to disclose for which candidate he voted, the law does not protect those who violate the election laws." Lambeth at 619. Ms. Garcia's vote was clearly illegal and it must be determined for whom she cast her vote and that vote must then be subtracted from the appropriate candidate's vote total.

2. **Russell Wayne Keefe**

On December 12, 1992, Mr. Keefe registered to vote and listed his residence as 610 N. 8th, Arkansas City, Kansas which is located in precinct 4A. Approximately 1 1/2 years ago Mr. Keefe moved to 911 N. C St., Arkansas City, Kansas which is located in precinct 1B. Despite the move from one precinct to another, Mr. Keefe failed to reregister to vote as required by the clear language of K.S.A. 25-2316c(b), which states that "[w]hen a registered voter changes residence, such voter must reregister in order to be eligible to vote. . . ." Mr. Keefe was not

a properly registered elector and his vote was therefore illegal. It must be determined for whom Mr. Keefe cast his vote and the vote must be subtracted from the appropriate candidate's vote total.

3. Hal Bumgarner

Mr. Bumgarner registered to vote on October 19, 1992, and gave his address as Route 2, Box 1068, Arkansas City, Kansas which is located in the West Cresswell precinct. Mr. Bumgarner voted at the East Cresswell precinct polling place and indicated on the challenged ballot envelope that his residence had changed to Route 2, Box 532-16. It would appear that Mr. Bumgarner moved since registering to vote and was therefore not a properly qualified elector eligible to vote in the election. Mr. Bumgarner did not comply with the aforementioned provisions of K.S.A. 25-2316c(b) and it must be determined for whom Mr. Bumgarner cast his vote and the vote must be subtracted from the appropriate candidate's vote total.

4. Moddie G. Graham

Ms. Graham registered to vote on August 27, 1992, and listed her residence as 614 N. 5th, Arkansas City, Kansas which is located in precinct 4A. In this election Ms. Graham cast a challenged ballot at the polling place for precinct 3A. On her challenged ballot envelope, Ms. Graham gave her residence as 307 S. 1st, Arkansas City, Kansas which is located in precinct 3A. Ms. Graham moved subsequent to the time of her registration and was therefore an unqualified elector whose vote was illegally cast. It must be determined for whom Ms. Graham cast her vote and the vote must be subtracted from the appropriate candidate's vote total.

5. Curtis & Donita Richards

Mr. and Mrs. Richards registered to vote on October 19, 1992, when they lived at 1207 N. D Street, Arkansas City, Kansas, which is located in precinct 1C. Both of the Richards voted a challenged ballot at the 1B precinct. Noted on their challenged ballot envelopes is their current address of 315 E. Pine, Arkansas City, Kansas which is located in precinct 1B. The Richards moved to the new address in June, 1994 and failed to reregister as required by K.S.A. 25-2316c(b). Neither of these voters were properly registered to vote and their illegal votes must be determined and subtracted from the appropriate candidate's vote totals.

CONCLUSION

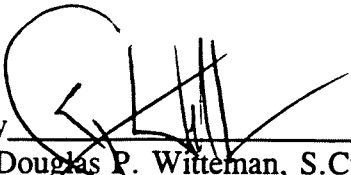
Based on the canvass accomplished by the statutory inspection board it would appear that there is no significant change in the vote count which was previously canvassed and certified. In regard to the ballots which have been questioned by the inspection board, the voters' intention thereon is clear; those ballots which previously have been counted should remain counted and those ballots which previously have not been counted, should remain uncounted. The evidence indicates that illegal votes have been cast and counted in this election. These votes must be determined and the votes deducted from the appropriate candidate's vote total. Similarly, legal votes have been cast and not counted in this election and these votes must be determined, counted and added to the appropriate candidate's vote totals.

WHEREFORE, the Contestant, Danny P. Jones, respectfully requests the Court determine the number of legally cast votes each of the candidates to the Election received, pursuant to K.S.A. 25-1451; the Court take and preserve further evidence upon the additional

points specified in the Amended Notice of Contest, pursuant to K.S.A. 25-1451; and for any other and further relief the Court deems equitable, just and proper.

Respectfully submitted,

PATTERSON, NELSON, NOLLA & WITTEMAN, L.C.

By 

Douglas P. Witteman, S.Ct. No. 15023
Attorneys for the Contestant
Danny P. Jones

ERIC K. RUCKER

By _____
Eric K. Rucker, S. Ct. No. 11109
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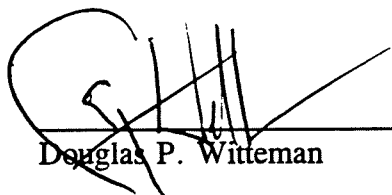
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing MEMORANDUM CONTEST HEARING BRIEF was served on this 27th day of December, 1994 by hand delivering the same to the following:

Ms. Wah-Leeta Rogers
Clerk of the Cowley County Court
Cowley County Courthouse
Winfield , Kansas 67156

Victor W. Miller
Attorney at Law
700 SW Jackson, Suite 404
Topeka, Kansas 66603

The Honorable Stephen D. Hill
Judge of the District Court
P.O. Box 187
Paola, Kansas 66071



Douglas P. Witteman

county, by the sheriff's deputy, by an attorney admitted to the practice of law before the supreme court of Kansas or by some person appointed as a process server by a judge or clerk of the district court, except that a subpoena may also be served by any other person who is not a party and is not less than 18 years of age. Process servers shall be appointed freely and may be authorized either to serve process in a single case or in cases generally during a fixed period of time. A process server or an authorized attorney may make the service anywhere in or out of the state and shall be allowed the fees prescribed in K.S.A. 28-110, and amendments thereto, for the sheriff and such other fees and costs as the court shall allow. All persons authorized under this subsection to serve, levy and execute process shall be considered an "officer" as used in K.S.A. 60-706 and 60-2401 and amendments thereto.

(4) In all cases when the person to be served, or an agent authorized by the person to accept service of process, refuses to receive copies thereof, the offer of the duly authorized process server to deliver copies thereof, and the refusal, shall be a sufficient service of the process.

(d) *Acknowledgment or appearance.* An acknowledgment of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance.

Sec. 4. K.S.A. 60-2401 and K.S.A. 1991 Supp. 60-303 and 61-1803 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

Approved May 21, 1992.

CHAPTER 291

House Bill No. 2876

AN ACT relating to elections; amending K.S.A. 25-601, 25-605, 25-615, 25-618, 25-620, 25-621 and 25-2902 and K.S.A. 1991 Supp. 25-305, 25-616, 25-617 and 25-3002 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 25-601 is hereby amended to read as follows: 25-601. *The secretary of state shall prescribe the ballot format but ballots shall contain the information required by this section and be substantially in the form set out in this section.* The official general ballot for national ~~and~~, state ~~offices shall be printed upon one~~

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~~ballot, and the official general ballot for~~, county and township offices ~~shall may~~ be printed upon ~~another one~~ ballot. All official general ballots shall be printed in black ink on paper through which the printing or writing cannot be read. Such ballots shall be printed on white paper or paper colored as authorized by rules and regulations adopted by the secretary of state.

On the back or outside of each official general ballot, so as to appear when folded, shall be printed the words "official general ballot," followed by the words "national ~~and~~, state ~~offices~~" or "county and township offices," followed by the voting place for which the ballot is prepared and the date of the election. No person's name shall appear on the back or outside of a ballot. All nominations made and certified as provided by law, and none other, shall be printed on ~~either~~ the official general ballot. The names of candidates for every office to be voted for at the general election shall be arranged under the office to which each has been nominated.

Sec. 2. K.S.A. 25-605 is hereby amended to read as follows: 25-605. When a constitutional amendment is to be submitted to the voters of the state, a separate ballot ~~shall may~~ be provided by the county election officers: ~~or the proposition may be combined with the official general ballot provided for in K.S.A. 25-601 and amendments thereto.~~ If such propositions are printed on a separate ballot, such ballot shall comply with the requirements for ballots for election of officers insofar as such requirements are applicable. *The secretary of state shall prescribe the ballot format but a ballot shall include the information required by this section and be substantially in the form specified in this section.* The constitutional amendment as a whole followed by the prescribed statement of intent or purpose of the proposition with explanation of the effect of voting for or against it shall be printed on the ballot. Each proposition to amend the constitution shall be preceded by the words, "Shall the following be adopted?" If there is more than one constitutional amendment to be voted upon, the different amendments shall be separately numbered and printed, and be separated by a broad solid line 1/8th inch wide or by double lines approximately 1/8th inch apart.

Opposite and after each amendment, submitted shall be printed two squares, one above the other. To the ~~left~~ right of the upper one of the squares shall be printed the word "Yes," and to the ~~left~~ right of the lower one of the squares shall be printed the word "No." Across the entire width of the ballot, ~~at the top~~ preceding such proposition or propositions, shall be printed the following instructions: "To vote in favor of any question submitted upon this ballot, make a cross or check mark in the square to the ~~right~~ left of the word 'Yes'; to vote against it, make a cross or check mark in

Attachment "1"

the square to the ~~right~~ left of the word 'No.'" On the back of each ballot shall be printed, in addition to other required matters, the words "questions submitted." *If such propositions are printed on a separate ballot*, county election officers may cause to be printed on the outside of ~~question submitted~~ such ballots "Ballot No. _____" with the blank filled with a number to aid in distinguishing such ballots when more than one question submitted ballot is voted upon at a voting place.

Sec. 3. K.S.A. 25-615 is hereby amended to read as follows: 25-615. The surnames of the candidates of each political party for the offices of president and vice-president, with the political designation thereof placed at the right of the surnames, shall be in one line. ~~There shall be a square placed at the right of such political designation in which each voter may designate by a cross or check mark such voter's choice for presidential electors.~~ *The secretary of state shall prescribe the ballot format but the foregoing shall be substantially as shown in the sample form of the official general ballot in K.S.A. 25-616 and amendments thereto.*

Sec. 4. K.S.A. 1991 Supp. 25-616 is hereby amended to read as follows: 25-616. *The secretary of state shall prescribe the ballot format but the national offices part of the official general ballot for national and state offices shall be substantially in the form shown in this section and the state offices part of such ballot shall be substantially in the form shown in K.S.A. 25-617, and amendments thereto.*

STATE OF KANSAS
OFFICIAL GENERAL BALLOT
National and State Offices
County of _____
November _____, 19____

NATIONAL OFFICES

To vote for presidential electors for candidates for president and vice-president make a cross or check mark in the square at the ~~right~~ left of the names of the candidates. To vote for presidential electors to be selected by candidates for president and vice-president whose names are not printed on the ballot, write the persons' names in the appropriate blank spaces and make a cross or check mark in the square at the ~~right~~ left of the names of the candidates.

- FOR PRESIDENTIAL ELECTORS FOR PRESIDENT AND VICE-PRESIDENT JONESTERN AND DOE Republican
 - FOR PRESIDENTIAL ELECTORS FOR PRESIDENT AND VICE-PRESIDENT ROEHHEAD AND RICHARDBY Democrat
 - FOR PRESIDENTIAL ELECTORS FOR PRESIDENT AND VICE-PRESIDENT JANEBRAND AND JOHNBERG Independent
- Nominations

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- FOR PRESIDENTIAL ELECTORS FOR PRESIDENT AND VICE-PRESIDENT _____ and _____

To vote for a person make a cross or check mark in the square at the ~~right~~ left of the person's name. To vote for a person whose name is not printed on the ballot, write the person's name in the blank space and make a cross or check mark in the square to the ~~right~~ left.

FOR UNITED STATES SENATOR Vote for One

- Vote for One
- DAN BOBING, Brussell Republican
 - ROBERTA SMITH, Salina Democrat

FOR UNITED STATES REPRESENTATIVE _____ DISTRICT Vote for One

- Vote for One
- ELMER O'BRIEN, Wichita Democrat
 - WM. T. MILLER, Maple City Republican

When any office is not to be elected, it shall be omitted from the ballot.

Sec. 5. K.S.A. 1991 Supp. 25-617 is hereby amended to read as follows: 25-617. *The secretary of state shall prescribe the ballot format but the state offices part of the official general ballot for national and state offices shall follow the national offices part substantially as is shown in this section.*

STATE OFFICES

To vote for the pair of candidates, make a cross or check mark in the square at the ~~right~~ left of the names of the candidates for governor and lieutenant governor. To vote for persons for governor and lieutenant governor whose names are not printed on the ballot, write the names of such persons in the blank spaces and make a cross or check mark in the square to the ~~right~~ left.

FOR GOVERNOR AND LIEUTENANT GOVERNOR Vote for One Pair

- Vote for One Pair
- Sam Jones, Wichita Republican
 - and Bob Smith, Arkansas City Republican
 - Carol Johnson, Mahaska Democrat
 - and Roger Wright, Penalosa Democrat

To vote for a person, make a cross or check mark in the square at the ~~right~~ left of the person's name. To vote for a person whose name is not printed on the ballot, write the person's name in the blank space and make a cross or check mark in the square to the ~~right~~ left.

FOR SECRETARY OF STATE
 Vote for One *Vote for One*

ELIZABETH JUANITA MOORE, Zoomer Republican
 RUSSEL ADAM, Topeka Democrat
 JOAN SAYLOR, Goodland Prohibition
 CHARLES (CHUCK) BROWNING, Kansas City Independent
 _____ Nomination

FOR ATTORNEY GENERAL
 Vote for One *Vote for One*

(and continuing in like manner for any other officers
 elected from the state as a whole)

FOR STATE SENATOR
 _____ DISTRICT *Vote for One*

Vote for One

FOR STATE REPRESENTATIVE
 _____ DISTRICT *Vote for One*

Vote for One

FOR DISTRICT JUDGE
 _____ DISTRICT *Vote for One*

Vote for One

FOR DISTRICT MAGISTRATE JUDGE
 _____ DISTRICT *Vote for One*

Vote for One

FOR DISTRICT ATTORNEY
 _____ JUDICIAL DISTRICT *Vote for One*

Vote for One

FOR STATE BOARD OF EDUCATION MEMBER
 _____ DISTRICT *Vote for*

Vote for One

When any office is not to be elected, it shall be omitted from the ballot.

When a voting machine does not provide sufficient space to accommodate the full names of the candidates for governor and lieutenant governor, only the surname of such candidates shall be required to be printed on the ballot label unless surnames of one or more of the candidates are the same.

Sec. 6. K.S.A. 25-618 is hereby amended to read as follows: 25-618. The official general ballot for county and township offices ~~shall~~ *may* be separate from the official general ballot for national and state offices ~~and~~ *or may be combined with the official general ballot provided for in K.S.A. 25-601 and amendments thereto. The secretary of state shall prescribe the ballot format but the ballot shall be substantially in the form shown in this section and K.S.A. 25-611, as amended and amendments thereto.*

STATE OF KANSAS
 OFFICIAL GENERAL BALLOT
 County and Township Offices

County of _____, City (or Township) of _____
 November _____, 19____

To vote for a person, make a cross or check mark in the square at the ~~right~~ *right* left of the person's name. To vote for a person whose name is not printed on the ballot, write the person's name in the blank space and make a cross or check mark in the square to the ~~right~~ *right* left.

FOR COUNTY COMMISSIONER
 _____ DISTRICT *Vote for One*

Vote for One

FOR COUNTY CLERK *Vote for One*

Vote for One

FOR COUNTY TREASURER *Vote for One*

Vote for One

And continuing in like manner for all county and township offices to be elected.

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 87-14

Sec. 7. K.S.A. 25-620 is hereby amended to read as follows: 25-620. Except for propositions to amend the constitution, when a proposition or question is to be submitted to the voters of the state or any part thereof, a separate ballot shall be provided by the county election officers; *except that when such proposition or question is to be submitted at an election conducted at the time of the holding of an election of officers such proposition may be printed on the ballot for the election of such officers. The secretary of state shall prescribe the ballot format but the ballot shall substantially comply with the requirements for ballots for election of officers insofar as such requirements are applicable and the provisions of this section.* On the ballot there shall be printed the proposition or question to be voted on. Each proposition or question shall be preceded by the words, "Shall the following be adopted?" If there is more than one proposition or question to be voted on, the different propositions or questions shall be separately numbered and printed, and be separated by a broad solid line $\frac{1}{8}$ th inch wide or by double lines approximately $\frac{1}{8}$ th inch apart.

Opposite and after each proposition and question shall be printed two squares, one above the other. To the ~~left~~ right of the upper one of the squares shall be printed the word "Yes," and to the ~~right~~ left of the lower one of the squares shall be printed the word "No." Across the entire width of the ballot, at the top, shall be printed the following instructions: "To vote in favor of any question submitted upon this ballot, make a cross or check mark in the square to the ~~right~~ left of the word 'Yes'; to vote against it, make a cross or check mark in the square to the ~~right~~ left of the word 'No'." On the back of each such ballot shall be printed, in addition to other required matters, the words "questions submitted." County election officers shall cause to be printed on the outside of question submitted ballots "Ballot No. _____" with the blank filled with a number to aid in distinguishing such ballots when more than one question submitted ballot is voted upon at a voting place.

Sec. 8. K.S.A. 25-621 is hereby amended to read as follows: 25-621. (a) *The secretary of state shall prescribe the ballot format but whenever the proposition of the method of selection of judge of the district court is submitted to the voters, the form of the ballot shall substantially be as provided in K.S.A. 20-2901 and amendments thereto and may be combined with the official general ballot provided for in K.S.A. 25-601 and amendments thereto.*

(b) This section shall be part of and supplemental to chapter 25 of the Kansas Statutes Annotated.

Sec. 9. K.S.A. 1991 Supp. 25-3002 is hereby amended to read as follows: 25-3002. (a) The rules prescribed in this section shall apply to:

- (1) The original canvass by election boards.
- (2) Intermediate and final canvasses by county boards of canvassers.
- (3) Final canvass by the state board of canvassers.
- (4) All election contests.
- (5) All other officers canvassing or having a part in the canvass of any election.

(b) Rules for canvassers:

- (1) No ballot, or any portion thereof, shall be invalidated by any technical error unless it is impossible to determine the voter's intention. Determination of the voter's intention shall rest in the discretion of the board canvassing in the case of a canvass and in the election court in the case of an election contest.

~~(2) Any ballot upon which an identifying mark has been made shall be wholly void and no vote thereon shall be counted. Determination of whether a mark is an identifying mark shall rest in the discretion of the board canvassing in the case of a canvass and in the election court in the case of an election contest. The secretary of state may adopt rules and regulations describing certain types of marks upon ballots which may be considered identifying marks, but such rules shall not be considered as either all inclusive or as conclusive.~~

~~(3) Any ballot which has been defaced, mutilated or torn shall be wholly void and no vote thereon shall be counted.~~

(4) (2) The occurrences listed in this subpart ~~(4)~~ (2) shall not invalidate the whole ballot but shall invalidate that portion, and that portion only, in which the occurrence appears. The votes on such portion of the ballot shall not be counted for any candidate listed or written in ~~said~~ such portion, but the remainder of the votes in other portions of the ballot shall be counted. The occurrences to which this subpart ~~(4)~~ (2) shall apply are:

(A) Whenever a voting mark shall be made in the square at the ~~right~~ left of the name of more than one candidate for the same office, except when the ballot instructs that more than one candidate is to be voted.

(B) Whenever a voting mark is placed in the square at the ~~right~~ left of a space where no candidate is listed.

(c) A write-in vote for those candidates for the offices of governor and lieutenant governor shall not be counted unless the pair of candidates have filed an affidavit of candidacy pursuant to K.S.A. 25-305 and amendments thereto, and:

- (1) Both candidates' names are written on the ballot; or
 (2) only the name of the candidate for governor is written on the ballot.

(d) A write-in vote for those candidates for the offices of president and vice-president shall not be counted unless the pair of candidates have filed an affidavit of candidacy pursuant to K.S.A. 25-305 and amendments thereto, and:

- (1) Both candidates' names are written on the ballot; or
 (2) only the name of the candidate for president is written on the ballot.

Sec. 10. K.S.A. 25-2902 is hereby amended to read as follows: 25-2902. (a) It shall be unlawful to make any mark upon a ballot except a cross or check mark in a voting square opposite the name of a person for whom the voter desires to vote. It shall be unlawful to deface or tear a ballot or to erase any printed figure or letter thereon. It shall be unlawful for any person other than the voter to erase any mark or name written on a ballot by a voter.

(b) If a voter tears, defaces or wrongfully marks a ballot, the voter shall return it to the election board and receive a new ballot or set of ballots. The voter may successively obtain additional ballots or sets of ballots (but not more than one ballot or set of ballots at a time), but no voter shall be provided more than three sets in all.

(c) In all elections in which printed paper ballots are utilized, there shall be printed on the ballot and posted in each polling place a notice containing the following information and in substantially the following form:

Notice

If you tear, deface or make a mistake and wrongfully mark any ballot, you must return it to the election board and receive a new ballot or set of ballots

Sec. 11. K.S.A. 1991 Supp. 25-305 is hereby amended to read as follows: 25-305. (a) Certificates of nomination by convention or caucus for the nomination of candidates for national, state, county and township offices shall be filed with the secretary of state, or the county election officer, not later than 12:00 noon, June 10, preceding the national, state, county and township general election, except when such date falls on Saturday, Sunday or a holiday, and then not later than 12:00 noon the following day that is not a Saturday, Sunday or a holiday.

(b) Independent nomination petitions for the nomination of candidates for national, state, county and township offices shall be filed with the secretary of state or the county election officer no later than 12:00 noon on the Monday preceding the first Tuesday of August preceding a national, state, county or township general election.

(c) An affidavit of write-in candidacy for the offices of governor and lieutenant governor shall be filed with the secretary of state no later than 12:00 noon on the 2nd Monday preceding the general election for those offices.

(d) An affidavit of write-in candidacy for the offices of president and vice-president shall be filed with the secretary of state no later than 12:00 noon on the second Monday preceding the general election for those offices.

New Sec. 12. Persons who desire to be write-in candidates for president and vice-president of the United States or governor and lieutenant governor shall file an affidavit of write-in candidacy with the secretary of state no later than 12:00 noon on the second Monday preceding the general election for those offices.

Sec. 13. K.S.A. 25-601, 25-605, 25-615, 25-618, 25-620, 25-621 and 25-2902 and K.S.A. 1991 Supp. 25-305, 25-616, 25-617 and 25-3002 are hereby repealed.

Sec. 14. This act shall take effect and be in force from and after its publication in the statute book.

Approved May 21, 1992.

CHAPTER 292

House Bill No. 3115

AN ACT relating to the regulation of commercial guide services; amending K.S.A. 1991 Supp. 32-964 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1991 Supp. 32-964 is hereby amended to read as follows: 32-964. (a) As used in this section:

(1) "Commercial guide services" means providing, offering to provide, arranging for or assisting with hunting or fishing activities for others on a commercial basis, including but not limited to providing any one or more of the following when used in conjunction with or for hunting or fishing activities: Pack or riding livestock, transportation other than by commercial carrier, equipment or facilities.

(2) Terms defined in K.S.A. ~~1989~~ 1991 Supp. 32-701 and amendments thereto have the meanings provided by that section.

(b) ~~On and after January 1, 1991,~~ A valid commercial guide permit is required to provide commercial guide services in this state.

(c) The provisions of subsection (b) do not apply to a person who:

(1) Possesses a controlled shooting area license and commercial guide services performed by the person are confined to the licensed controlled shooting area;

Lambeth v. Levens

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, Oshorn, 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.

Lambeth v. Levens

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

Attachment "B"

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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.

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-

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.

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 Mr. 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

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 (c) 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 deprivation could change the result of the election; or

(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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Lambeth v. Levens

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

Lambeth v. Levens

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.

FILED DISTRICT COURT

DEC 27 8 29 AM '94
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M.F. DATE

VICTOR W. MILLER #10055
Attorney at Law
700 SW Jackson, Ste. 404
Topeka, Kansas 66603
(913) 233-9950
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IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, COWLEY COUNTY, KANSAS

In the Matter of the Election of)
Joe D. Shriver to the Position of)
State Representative, 79th District)

DANNY P. JONES,)
)
Contestant,)

Case No. 94-C201-W

v.)

JOE D. SHRIVER,)
)
Contestee.)

Pursuant to K.S.A. 25-1434 et seq.

CONTESTEE'S ANSWER TO CONTESTANT'S
AMENDED NOTICE OF CONTEST

COMES NOW the Contestee, Joe D. Shriver, by and through his attorney, Victor W. Miller, and files this Answer to Contestee's Amended Notice of Contest.

Contestee states and alleges that if any of the people listed in paragraph 5(t) of Contestee's Amended Notice are deemed to have cast legal ballots and their ballots are included in the election results or if any of the people listed in paragraph 5(u) of the contestee's Amended Notice are deemed to have

VICTOR W. MILLER
CONTESTEE'S ANSWER TO CONTESTEE'S
AMENDED NOTICE OF CONTEST
CASE NO. 94-C201-W
PAGE 2


cast illegal votes and their votes are not included in the election results, then the following ballots should be considered as illegally cast votes which were erroneously counted by the Cowley County Board of Canvassers because the ballots were cast by individuals who were not properly registered voters qualified to vote for 79th District State Representative in this election:

1. Kirk Branscom;
2. Penny Dorrell;
3. Michael Dorrell;
4. Phillip Coplen;
5. Mary J. Lenix;
6. Ray Vick;
7. Gladys Weigand; and
8. Norman Weigand.

WHEREFORE, Contestee prays that Contestant take naught by his Amended Notice of Contest; that the Certificate of Election stand as determined by the State Board of Canvassers; that, in the alternative, in the event that the Court permits relief pursuant to the Amended Notice of Contest that the Court shall ascertain the lawfulness of all ballots cast for State Representative in the 79th District and shall make findings and conduct hearings pursuant to K.S.A. 25-1434, et. seq.; that Contestee be entitled to costs and any attorney's fees; and that Contestee have such other and further relief as the Court deems just in the premises.

VICTOR W. MILLER
CONTESTEE'S ANSWER TO CONTESTEE'S
AMENDED NOTICE OF CONTEST
CASE NO. 94-C201-W
PAGE 3

Respectfully submitted,


VICTOR W. MILLER #10055
700 SW Jackson, Suite 404
Topeka, Kansas 66603
(913) 233-9950
ATTORNEY FOR CONTESTEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Contestee's Answer to Contestant's Amended Notice of Contest was served on this 27th day of December, 1994, by hand delivering the same to the following:

Ms. Wah-Leeta Rogers
Clerk of the Cowley County Court
Cowley County Courthouse
Winfield, Kansas 67156

Douglas P. Witteman
Patterson, Nelson, Nolla & Witteman, L.C.
8100 E. 22nd St. North
Building 800, Suite 102
Wichita, Kansas 67226

The Honorable Stephen D. Hill
Judge of the District Court
P.O. Box 187
Paola, Kansas 66071


Victor W. Miller

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IN THE NINETEENTH JUDICIAL DISTRICT
 DISTRICT COURT, COWLEY COUNTY, KANSAS

FILED DISTRICT COURT
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 M.F. DATE

In the matter of the election of)
 Joe D. Shriver to the position of)
 State Representative, 79th District)
)
 DANNY P. JONES,)
)
 Contestant,)
)
 v.)
)
 JOE D. SHRIVER,)
)
 Contestee.)
)

Case No. 94-C201-W

 Pursuant to K.S.A. 25-1434 et seq.

AMENDED NOTICE OF CONTEST

COMES NOW the Contestant, Danny P. Jones, by and through his attorneys Douglas P. Witteman and Eric K. Rucker, and pursuant to K.S.A. 25-1446 files this Amended Notice of Contest, contesting the election of Joe D. Shriver to the office of State Representative for the 79th District.

In support of this Amended Notice of Contest, the Contestant hereby notifies the Court and all interested parties of the following:

1. Contestant is a registered voter of the 79th Legislative District, residing at 212 Highland Drive, Arkansas City, Kansas 67005.

2. On November 8, 1994, a duly constituted election was held in Cowley County, Kansas to determine, among other things, who would be elected as the representative to the Kansas House of Representatives for the 79th District ("the Election"). Danny P. Jones was listed on the ballot as the Republican Party candidate. Joe D. Shriver was listed on the ballot as the Democratic Party candidate.

3. As a result of the final canvass of votes conducted on November 30, 1994, Contestee was declared as the winner of the Election by the State Board of Canvassers and he was issued the certification of election.

4. As grounds for contesting this election, Contestant states and alleges as follows:

a. Illegal votes were received by Contestee and/or legal votes for Contestant were rejected which could change the results of the election, as contemplated by K.S.A. 25-1436 (c).

b. Error occurred in computing the results of the election which could change the results of the election, as contemplated by K.S.A. 25-1436 (d).

c. There were ballots that were previously counted during the November 11, 1994, canvass of the Election that could not be accounted for in subsequent recounts of the votes cast in the Election and which affected the correct and proper outcome of the Election, all of which constitute other cause tending to show that the certificate of election should have been issued to Danny P. Jones, as contemplated by K.S.A. 25-1436 (f).

d. That one or more poll workers and/or election office workers either were not properly instructed, or failed to follow proper instructions, concerning the procedures applicable to the receiving of challenged ballots, which affected the correct and proper outcome of the Election, all of which constitute other cause tending to show that the certificate of election should have been issued to Danny P. Jones, as contemplated by K.S.A. 25-1436 (f).

5. In support of the grounds for this election contest, Contestant states and alleges the following:

a. Cowley County, which encompasses the 79th Legislative District, utilizes an optical scanning system to count and tabulate votes. This optical scanning system was utilized in conjunction with the November 8, 1994, election, pursuant to K.S.A. 25-4601 et seq.

b. Upon the close of the polls on November 8, 1994, this optical scanning system was used to count the ballots cast in the Election, as well as the other election races in Cowley County on that date.

c. Upon completing the November 8, 1994, count of ballots, Danny P. Jones led Joe D. Shriver in the Election by two (2) votes. At this time, 2,989 votes had been cast and counted for Jones and 2,987 votes had been cast and counted for Shriver, for a total of 5,976 votes cast and counted.

d. On November 11, 1994, the Cowley County Board of Canvassers, pursuant to K.S.A. 25-3104, met to determine which challenged ballots cast during the Election should be counted and which should not. After making their determinations concerning

the contested ballots, the Cowley County Board of Canvassers opened those challenged ballot envelopes which they determined should be counted and added these votes to the respective candidates' totals.

e. Upon adding these challenged ballots, Danny P. Jones led Joe D. Shriver in the Election by nine (9) votes. At this time, 3,040 votes had been cast and counted for Jones and 3,031 had been cast and counted for Shriver, for a total of 6,071 votes cast and counted.

f. On November 11, 1994, after opening and counting the challenged ballots the total votes cast and counted for both candidates increased by 95 over the amount of votes cast and counted prior to the inclusion of the challenged ballots.

g. On November 14, 1994, Joe D. Shriver subsequently requested a hand recount of the ballots cast and counted in the Election, pursuant to K.S.A. 25-3107. On November 15, 1994, a special election board met to recount the ballots by hand. Upon completion of this hand recount, Joe D. Shriver led Danny P. Jones in the Election by thirty two (32) votes. At this time, 3,005 votes had been cast and counted for Jones and 3,037 votes had been cast and counted for Shriver, for a total of 6,042 votes cast and counted.

h. As a result of the November 15, 1994, hand recount the total amount of votes cast and counted in the Election decreased by 29 when compared to those votes which had been cast and counted on November 11, 1994. Additionally, only 85 challenged ballots were shown as having been cast and counted, a decrease of ten (10) when compared to those counted on November 11, 1994.

the contested ballots, the Cowley County Board of Canvassers opened those challenged ballot envelopes which they determined should be counted and added these votes to the respective candidates' totals.

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f. On November 11, 1994, after opening and counting the challenged ballots the total votes cast and counted for both candidates increased by 95 over the amount of votes cast and counted prior to the inclusion of the challenged ballots.

g. On November 14, 1994, Joe D. Shriver subsequently requested a hand recount of the ballots cast and counted in the Election, pursuant to K.S.A. 25-3107. On November 15, 1994, a special election board met to recount the ballots by hand. Upon completion of this hand recount, Joe D. Shriver led Danny P. Jones in the Election by thirty two (32) votes. At this time, 3,005 votes had been cast and counted for Jones and 3,037 votes had been cast and counted for Shriver, for a total of 6,042 votes cast and counted.

h. As a result of the November 15, 1994, hand recount the total amount of votes cast and counted in the Election decreased by 29 when compared to those votes which had been cast and counted on November 11, 1994. Additionally, only 85 challenged ballots were shown as having been cast and counted, a decrease of ten (10) when compared to those counted on November 11, 1994.

i. On November 17, 1994, the Cowley County Board of Canvassers refused to certify the Election as a consequence of the counting discrepancies. Instead, the Board of Canvassers ordered a further recount of the ballots cast in the Election by both the optical scanning system and by hand count to be held on November 21, 1994.

j. On November 21, 1994, the ballots were again counted by both the optical scanning system and by hand. As a result, the optical scanning system recount determined that Danny P. Jones led Joe D. Shriver by two (2) votes. By this recount Jones had 3,030 votes cast and counted and Shriver had 3,028 votes cast and counted for a total of 6,058 votes cast and counted.

k. As a result of the November 21, 1994, hand recount it was determined that Joe D. Shriver led Danny P. Jones by one (1) vote. By this recount Jones had 3,037 votes cast and counted and Shriver had 3,038 votes cast and counted for a total of 6,075 votes cast and counted.

l. During the November 21, 1994, hand recount, five (5) precincts and/or sets of ballots were counted twice. These precincts and/or sets were precincts 3A, 3C, 4D, the "challenged ballots," and the "hand counts." Of these five (5) precincts and/or sets that were twice hand counted on November 21, 1994, three of the five resulted in inconsistent numbers on each count.

m. The November 21, 1994, hand recount(s) of the challenged ballots again only totalled 85 votes cast and counted. Again, there were 10 votes less than had been accounted for when the challenged ballots were initially opened and counted on November 11, 1994.

n. On November 21, 1994, the "hand counts" were initially tallied and announced as eighteen (18) for Jones and nine (9) for Shriver, which was consistent with the totals from both the initial canvass of November 11, 1994, and the initial hand recount which occurred on November, 15, 1994. However, the "hand counts" were subsequently tallied and announced as seventeen (17) for Jones and nine (9) for Shriver.

o. On the November 11, 1994, the absentee ballots that were cast and counted tallied 138 for Jones and 149 for Shriver, totaling 287 absentee ballots cast and counted. On the two subsequent hand counts of the absentee ballots, the tally was 130 for Jones and 146 for Shriver, for a total of 276 absentee ballots cast and counted, 11 less total absentee ballots than cast and counted on November 11, 1994.

p. In addition to the aforementioned discrepancies there were numerous inconsistencies in individual precincts between the initial canvass taken on November 11, 1994, the initial hand recount taken on November, 15, 1994, the optical scanning system recount on November 21, 1994, and the hand recount(s) on November 21, 1994.

q. On November 23, 1994, the Cowley County Board of Canvassers met to consider and canvass the Election. On a two (2) to one (1) vote the Board of Canvassers certified the intermediate canvass of the Election by accepting the final hand count wherein Joe D. Shriver led Danny P. Jones by one (1) vote, 3,037 to 3,036. However, the dissenting Board member refused to vote for certifying the results of the Election because of his concerns over the accuracy of the count and he also refused to sign the certification of intermediate canvass that was forwarded to the State Board of Canvassers for final canvassing.

r. On November 30, 1994, the State Board of Canvassers certified the final canvass of the Election, accepting the intermediate canvass of the Cowley County Board of Canvassers.

s. In an informal interview with the Cowley County Board of Commissioners (who sat as the Cowley County Board of Canvassers) during a regular meeting of the Commission on December 5, 1994, a majority of the Commissioners indicated they would not be surprised if a subsequent court supervised count of the votes yielded a different vote count than the count they had certified to the State Board of Canvassers.

t. There are specific ballots that were challenged at the individual precinct polling places which were legally cast votes, however, these votes were erroneously not counted by the Cowley County Board of Canvassers. Said ballots are as follows:

1. The ballot of Donna Schalk was a legal vote as Ms. Schalk was a properly registered voter qualified to vote in the Election.

2. The ballot of Ruby L. Schalk was a legal vote as Ms. Schalk was a properly registered voter qualified to vote in the Election.

3. The ballot of Amber ^{L. Su} Turner should be a legal vote as Ms. Turner should be considered a properly registered voter qualified to vote in the Election.

4. The ballot of William J. Turner should be a legal vote as Mr. Turner should be considered a properly registered voter qualified to vote in the Election.

u. There are specific ballots that were challenged at the individual precinct polling places which were illegally cast votes, however, these votes were erroneously counted by the Cowley County Board of Canvassers. Said ballots are as follows:

1. The ballot of Filomena Garcia was an illegal vote as Ms. Garcia was not a properly registered voter qualified to vote in the Election.

2. The ballot of Russell Wayne Keefe was an illegal vote as Mr. Keefe was not a properly registered voter qualified to vote in the Election.

3. The ballot of Lucy Otte was an illegal vote as Ms. Otte was not a properly registered voter qualified to vote in the Election.

4. The ballot of Hal Bumgarner was an illegal vote as Mr. Bumgarner was not a properly registered voter qualified to vote in the Election.

5. The ballot of Moddie G. Graham was an illegal vote as Ms. Graham was not a properly registered voter qualified to vote in the Election.

v. One or more poll workers and/or election office workers either were not properly instructed, or failed to follow proper instructions, concerning the procedures applicable to the receiving of challenged ballots, which affected the correct and proper outcome of the Election.

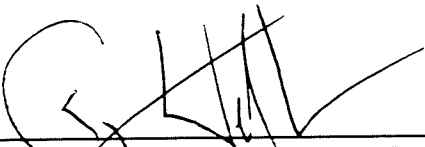
6. Contestant specifically reserves the right to amend the Amended Notice of Contest to include additional grounds for the contest and additional facts supporting the present or additional grounds for the contest, pursuant to K.S.A. 25-1446.

WHEREFORE, the Contestant, Danny P. Jones, respectfully requests the appointment of a district court judge to sit as a court of contest, pursuant to K.S.A. 25-1442; the Court to determine the number of legally cast votes each of the candidates to the Election received, pursuant to K.S.A. 25-1451; the Court take and preserve further evidence upon the additional points specified herein or in any amended Notice of Contest, pursuant to K.S.A. 25-1451; the Court subsequently direct the Clerk of the District Court to transmit all the files and records of the proceedings herein to the Speaker of the Kansas House of Representatives in order that the Kansas House of Representatives may determine who is elected as the State Representative for the 79th District, pursuant to K.S.A. 25-1451; the Court waive the costs of this matter pursuant

to K.S.A. 25-1452; and for any other and further relief the Court deems equitable, just and proper.

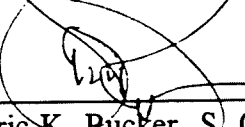
Respectfully submitted,

PATTERSON, NELSON, NOLLA & WITTEMAN, L.C.

By 

Douglas P. Witteman, S.Ct. No. 15023
Attorneys for the Contestant
Danny P. Jones

ERIC K. RUCKER

By 

Eric K. Rucker, S. Ct. No. 11109
Attorney for the Contestant
Danny P. Jones

CERTIFICATE OF SERVICE

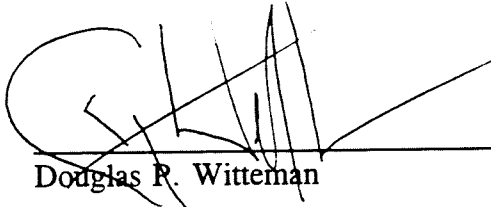
The undersigned hereby certifies that a copy of the above and foregoing AMENDED NOTICE OF CONTEST was served on this 22th day of December, 1994 by hand delivering the same to the following:

Ms. Wah-Leeta Rogers
Clerk of the Cowley County Court
Cowley County Courthouse
Winfield , Kansas 67156
Facsimile No. (316) 221-1097

Victor W. Miller
Attorney at Law
700 SW Jackson, Suite 404
Topeka, Kansas 66603
Facsimile No. (913) 233-2613

and one copy via facsimile to the following:

The Honorable Stephen D. Hill
Judge of the District Court
P.O. Box 187
Paola, Kansas 66071
Facsimile No. (913) 294-2535


Douglas R. Witteman

IN THE DISTRICT COURT OF COWLEY COUNTY, KANSAS

DANNY P. JONES,
Contestant,

vs.

94 C 201-W

JOE D. SHRIVER,
Contestee.

ORDER

Now on this 21st. day of December, 1994, the court holds a teleconference in the above entitled matter. The parties appear through their counsel of record.

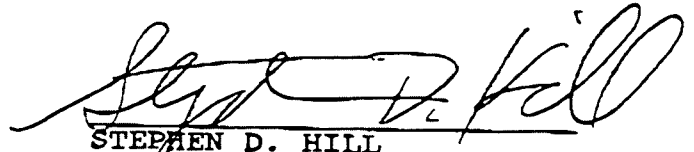
Thereupon, the court grants the contestant's motion for inspectors to be appointed in this case pursuant to K.S.A. 25-1447(a). The following individuals are hereby appointed by this Court as inspectors: David Helsel, Winfield, Kansas; R. J. Wilson, Topeka, Kansas; Karl Faidley, Arkansas City, Kansas.

The inspectors are hereby ordered to make an inspection of the ballots and recanvass the votes cast for the parties to this action in all precincts other than those to which the parties have agreed to the vote totals. The inspection of these ballots should be made in the presence of the legal custodian of the ballots. The inspectors should make a written report of their recanvass to this Court which discloses the number of votes cast for each of the parties to this contest for each precinct that is recounted and report to this Court any disputed votes upon which

the inspectors cannot agree.

This inspection should take place beginning at 9:00 A.M. Thursday, December 22, 1994, at the Cowley County Courthouse in Winfield, Kansas, at such place designated by the Hon. H. Joe Gaston, Cowley County Clerk/Election Officer.

LET THIS ORDER ISSUE.



STEPHEN D. HILL
Judge of the Dist. Court,
assigned

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Order was telefaxed on the 21st day of December, 1994, to the following:

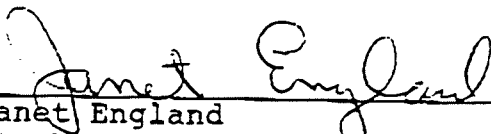
Victor W. Miller
Telefax: (913) 233-2613

Douglas P. Witteman
Telefax: (316) 687-2572

David Helsel
Telefax: (316) 221-1097

Clerk of the District Court
Telefax: (316) 221-1093

County Clerk
Telefax: (316) 221-5448



Janet England
Clerk of District Court
Miami County, Kansas

kp

PATTERSON, NELSON, NOLLA
& WITTEMAN, L.C.
8100 E. 22nd Street North
Building 800, Suite 102
Wichita, Kansas 67226
Telephone: (316) 687-2400
Fax: (316) 687-2572

ERIC K. RUCKER
Attorney at Law
110 North Broadway
Herington, Kansas 67449
Telephone: (913) 258-3777
Fax: (913) 258-3238

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, COWLEY COUNTY, KANSAS

In the matter of the election of)
Joe D. Shriver to the position of)
State Representative, 79th District)
DANNY P. JONES,)
Contestant,)
v.)
JOE D. SHRIVER,)
Contestee.)

Case No. 94-C201-W

Pursuant to K.S.A. 25-1434 et seq.

MOTION FOR INSPECTION OF BALLOTS

COMES NOW the Contestant, Danny P. Jones, by and through his attorneys Douglas P. Witteman and Eric K. Rucker, and pursuant to K.S.A. 25-1447, moves the Court for its Order authorizing the inspection of the ballots cast in the contested election prior to the parties preparing for trial. In support of his Motion the Contestant states and alleges as follows:

1. The contestant cannot properly prepare his case for trial without an inspection of the ballots cast in the contested election in all precincts wherein votes were cast in the contested election.

BY FAX
Page 1

4-92

Motion for Inspection of Ballots

Jones v. Shriver

Cowley County District Court

Case No. 94-C201-W

Page 2

2. The inspection is needed for the following reasons:
 - a. As indicated in the Notice of Contest previously filed herein, which is incorporated herein by reference pursuant to K.S.A. 60-210(c), there have been four (4) different counts and/or recounts of the ballots cast in this election. All of the aforementioned counts and/or recounts have yielded different results in not only who won the election and by what margin, but also each count and/or recount has yielded a different number in regard to the total amount of ballots cast and counted.
 - b. A court authorized inspection and canvassing of the ballots cast in all precincts wherein votes were cast in the contested election, as contemplated by K.S.A. 25-1447(d), is the only feasible manner to fully resolve the issues raised by the discrepant ballot counts and to determine the question of what number of legally cast votes each of the candidates to the contested office received.

WHEREFORE, the Contestant respectfully requests the Court sustain his Motion For Inspection Of Ballots; to appoint three (3) inspectors, as authorized by K.S.A. 25-1447(a); to require the inspection be made in the presence of the legal custodian of the ballots and direct the inspectors to recanvass the votes cast for the parties in all precincts wherein votes were cast in the contested election, as authorized by K.S.A. 25-1447(d); to require the inspectors to make a written report of such recanvass and report the number of votes cast for each of the parties to the contest for each precinct that is recounted and report any disputed votes upon which the

Motion for Inspection of Ballots

Jones v. Shriver

Cowley County District Court

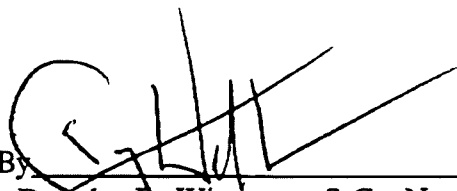
Case No. 94-C201-W

Page 3

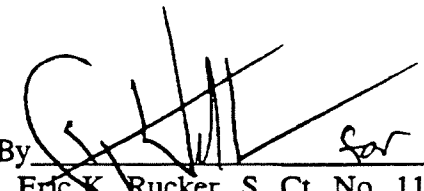
inspectors cannot agree, as authorized by K.S.A. 25-1447(d); and for any other and further relief the Court deems equitable, just and proper.

Respectfully submitted,

PATTERSON, NELSON, NOLLA & WITTEMAN, L.C.

By 
 Douglas P. Witteman, S.Ct. No. 15023
 Attorneys for the Contestant
 Danny P. Jones

ERIC K. RUCKER

By 
 Eric K. Rucker, S. Ct. No. 11109
 Attorney for the Contestant

Motion for Inspection of Ballots
Jones v. Shriver
Cowley County District Court
Case No. 94-C201-W
Page 4

NOTICE OF HEARING

Please take notice that the above and foregoing MOTION FOR INSPECTION OF BALLOTS will be heard at such time and place as the Court subsequently directs the hearing thereof.

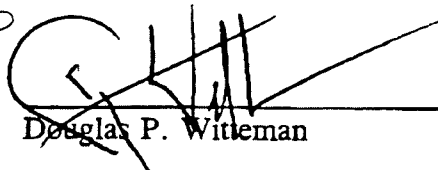
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing MOTION FOR INSPECTION OF BALLOTS was served on this 19th day of December, 1994 by facsimile transmission from fax no. (316) 687-2572 and said transmission was reported complete and without error and the facsimile machine complies with Supreme Court Rule 119(d)(3), on the following persons at the indicated fax no.:

Ms. Wah-Leeta Rogers
Clerk of the Cowley County Court
Cowley County Courthouse
Winfield , Kansas 67156
Facsimile No. (316) 221-1097

Victor W. Miller
Attorney at Law
700 SW Jackson, Suite 404
Topeka, Kansas 66603
Facsimile No. (913) 233-2613

Phone no. 913-233-9950



Douglas P. Witteman

K

VICTOR W. MILLER #10055
Attorney at Law
700 SW Jackson, Ste. 404
Topeka, Kansas 66603
(913) 233-9950
Fax: (913) 233-2613

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, COWLEY COUNTY, KANSAS

In the Matter of the Election of)
Joe D. Shriver to the Position of)
State Representative, 79th District)

DANNY P. JONES,)

Contestant,)

v.)

JOE D. SHRIVER,)

Contestee.)

Case No. 94-C201-W

Pursuant to K.S.A. 25-1434 et seq.

ANSWER OF CONTESTEE TO NOTICE OF CONTEST

COMES NOW the Contestee, Joe D. Shriver, by and through his attorney, Victor W. Miller, and pursuant to K.S.A. 25-1444 for his Answer to the Notice of Contest states and alleges as follows:

1. All allegations contained in the Notice of Contest are generally denied unless specifically admitted to herein.

VICTOR W. MILLER
ANSWER OF CONTESTEE TO
NOTICE OF CONTEST
CASE NO. 94-C201-W
BY FAX/PAGE 2

2. Contestee is without sufficient knowledge to admit or deny paragraphs 1, 5a., and 5b.

3. Contestee admits the allegations in paragraphs 2, 3, 5d., 5i., 5k. and 5q.

4. Contestee denies the allegations in paragraphs 4, 5c., 5e., 5f., 5g., 5h., 5j., 5l., 5m., 5n., 5o., 5p., 5r., 5s., 5t., and 5u.

5. Contestee further states and alleges that the Notice of Contest does not comply with the requirements of K.S.A. 25-1437 in that it does not "specify with particularity the facts and circumstances in support of the grounds alleged for the contest." Contestant should be required to give Contestee written notice sufficient to allow Contestee to prepare for trial or the complaint should be dismissed.

WHEREFORE, Contestee prays that Contestant take naught by his Notice of Contest; that the Certificate of Election stand as determined by the State Board of Canvassers; that, in the alternative, in the event that the Court permits relief pursuant to the Notice of Contest that the Court shall ascertain the lawfulness of all ballots cast for State Representative in the 79th District and shall make findings and conduct hearings pursuant

VICTOR W. MILLER
ANSWER OF CONTESTEE TO
NOTICE OF CONTEST
CASE NO. 94-C201-W
BY FAX/PAGE 3

to K.S.A. 25-1434, et. seq.; that Contestee be entitled to costs and any attorney's fees; and that Contestee have such other and further relief as the Court deems just in the premises.

Respectfully submitted,



VICTOR W. MILLER #10055
700 SW Jackson, Suite 404
Topeka, Kansas 66603
(913) 233-9950
ATTORNEY FOR CONTESTEE

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a copy of the above and foregoing Answer of Contestee to Notice of Contest was telefaxed on the 15th day of December, 1994, to the following:

Clerk of the District Court
Cowley County Courthouse
Winfield, Kansas 67156
Telefax: (316) 221-1097

and deposited in the U.S. Mail, postage prepaid, addressed to the following:

Douglas P. Witteman
Patterson, Nelson, Nolla & Witteman, L.C.
8100 E. 22nd St. North
Building 800, Suite 102
Wichita, KS 67226

Eric K. Rucker
Attorney at Law
110 N. Broadway
Herrington, KS 67449



Victor W. Miller

FILED DISTRICT COURT

DEC 13 3 40 PM '94

DOCKET PAGE BY

M.F. DATE

94-C201-W

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Chief Justice, Richard W. Holmes
Kansas Judicial Center
301 S.W. 10th Ave.
Topeka, Kansas 66612-1507

4a. Article Number
P 223 496 636

4b. Service Type

<input type="checkbox"/> Registered	<input type="checkbox"/> Insured
<input checked="" type="checkbox"/> Certified	<input type="checkbox"/> COD
<input type="checkbox"/> Express Mail	<input type="checkbox"/> Return Receipt for Merchandise

Date of Delivery: DEC 09 1994

5. Signature (Addressee) *[Signature]*

6. Signature (Agent) *[Signature]*

8. Addressee's Address (Only if requested and fee is paid)
RESTRICTED DELIVERY

PS Form 3811, December 1991 ☆ U.S.G.P.O. : 1992-307-530

Thank you for using Return Receipt Service.

Is your RETURN ADDRESS completed on the reverse side? DOME RETURN RECEIPT

PS Form 3800, June 1991

Sent to Chief Justice, Richard W. Holmes Kansas Judicial Center 301 S.W. 10th Ave. Topeka, KS. 66612-1507	Hotlines
Postage	\$5.02
Certified Fee	1.00
Special Delivery Fee	
Restricted Delivery Fee	2.50
Return Receipt Showing to Whom & Date Delivered	1.00
Registration Fee (Required for Whom, Date, Signature, Address)	
Delivery Charge (Required for Whom, Date, Signature, Address)	
Postage	\$5.02

TOPEKA, KS. 66612-1507
DEC 13 1994

Receipt for Certified Mail

No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

P 223 496 636

69-17

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, COWLEY COUNTY, KANSAS

FILED DISTRICT COURT
COWLEY COUNTY, KANSAS

DEC 9 10 49 AM '94

DOCKET PAGE BY *LP*
M.F. DATE _____

In the matter of the election of)
Joe D. Shriver to the position of)
State Representative, 79th District)
DANNY P. JONES,)
Contestant,)
v.)
JOE D. SHRIVER,)
Contestee.)

Case No. 94-C201-W

AFFIDAVIT OF BILL GRAVES

State of Kansas)
County of Shawnee)

Bill Graves, Secretary of State of the State of Kansas, upon oath,
states:

1. Pursuant to K.S.A. 25-3211, I am the official authorized to
issue the certificate of election to the person elected as the
representative to the Kansas House of Representatives for the 79th
District.

2. On November 30, 1994, a certificate of election was issued to
Joe D. Shriver.

3. On December 8, 1994, a copy of the notice of contest filed by
contestant Danny P. Jones pursuant to K.S.A. 25-1434 et seq. was sent
by restricted mail to contestee Joe D. Shriver at his last known
address, 820 North 9th, Arkansas City, KS 67005.

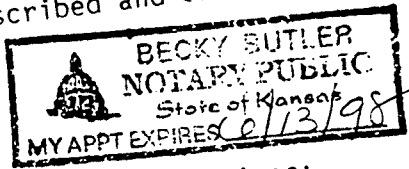
FURTHER, the affiant says not.

Bill Graves
Bill Graves

Brad Bryant
by Brad Bryant
Deputy Assistant Secretary
of State

Subscribed and Sworn to before me this eighth day of December, 1994,

Becky Butler
Notary Public



My commission expires:

IN THE MATTER OF THE ELECTION ETC.
DANNY P. JONES

Plaintiff/Petitioner

vs.

JOE D. SHRIVER
820 North 9th
Arkansas City, Kansas 67005

Defendant/Respondent

- A. Ch. 60 In-State
- B. Ch. 60 Out-State
- C. Ch. 60 By Mail
- D. Ch. 61 In-State
- E. Ch. 61 Out-State
- F. Ch. 61 By Mail

FOR CLERK'S USE ONLY

FILED DISTRICT COURT
 COWLEY COUNTY
 DEC 8 8 32 AM '94
 DOCKET PAGE BY
 M.F. DATE

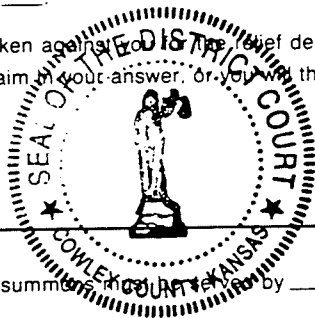
SUMMONS

You are hereby notified that an action has been commenced against you in this court. You are required to file your answer to the petition with the court and to serve a copy upon Douglas P. Witteman plaintiff's attorney, at 8100 E. 22nd St. North, Bldg. 800, Suite 102, Wichita, Kansas 67226

- A. within 20 days after service of summons upon you.
- B. within 30 days after service of summons upon you.
- C. within 30 days after the return of registered or certified mail receipt signed or refused by you.
- D. prior to the court's hearing set for _____ M. on the _____ day of _____, 19____, or you must be present at that time.
- E. within 30 days after service of summons upon you or appear at _____ M. on the _____ day of _____, 19____.
- F. within 30 days after the return of registered or certified mail receipt signed or refused by you, or appear at _____ M. on the _____ day of _____, 19____.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition. Any related claim which you may have against the plaintiff must be stated as a counterclaim in your answer, or you will thereafter be barred from making such claim in any other action.

Dated: December 7, 1994



By [Signature] Deputy Clerk of the District Court

TO THE SHERIFF OR PROCESS SERVER. This summons is to be served by _____ and your return made within _____ days thereafter.

RETURN OF SERVICE OF SUMMONS

I hereby certify that on the 7 day of Dec, 1994 I served the foregoing summons, together with a copy of the petition, and

upon the defendant/respondent JOE SHRIVER by delivering to

MINDI SHRIVER
Name (and relationship or title if not defendant/respondent)

at 820 N 9th Ark City
Address

at 724 M. in the County of Cowley State of KS
Personal Service Residential Service Residential & 1st Class Mailing (KSA 60-269) No Service

Sheriff or Process Server of Cowley County, State of KS
[Signature]

(SEE BACK: OUT OF STATE CLERK'S CERTIFICATE AND CERTIFICATE OF MAILING)

DEC 06 1994
4-102

B or E—Only

OUT OF STATE CLERK'S CERTIFICATE

Subscribed and sworn to before me this _____, day of _____, 19____, by above deputy, who I certify was at the date of such service and now is _____ of _____ County in the State of _____ and is authorized to serve process in civil actions within said state and is an officer of the court of which I am the clerk.

Witness my hand and the seal of the _____ Court, within and for the County and State aforesaid.

Clerk

CERTIFIED MAIL SERVICE

I hereby certify that I have served the within summons (1) By mailing on the _____ day of _____, 19____, a copy of the summons and a copy of the petition in the above action as certified mail return receipt requested to each of the within-named defendants; (2) the name and address on the envelope containing the process mailed as certified mail return receipt requested were as follows:

By _____ Deputy

PATTERSON, NELSON, NOLLA
& WITTEMAN, L.C.
8100 E. 22nd Street North
Building 800, Suite 102
Wichita, Kansas 67226
Telephone: (316) 687-2400
Fax: (316) 687-2572

ERIC K. RUCKER
Attorney at Law
110 North Broadway
Herington, Kansas 67449
Telephone: (913) 258-3777
Fax: (913) 258-3238

IN THE NINETEENTH JUDICIAL DISTRICT
DISTRICT COURT, COWLEY COUNTY, KANSAS

FILED DISTRICT COURT
Dec 7 3 13 PM '94
DOCKET
M.F. DATE

In the matter of the election of)
Joe D. Shriver to the position of)
State Representative, 79th District)
)
DANNY P. JONES,)
)
Contestant,)
)
v.)
)
JOE D. SHRIVER,)
)
Contestee.)
)

Case No. 94-C-201-W

Pursuant to K.S.A. 25-1434 et seq.

NOTICE OF CONTEST

COMES NOW the Contestant, Danny P. Jones, individually and by and through his attorneys Douglas P. Witteman and Eric K. Rucker, and pursuant to K.S.A. 25-1437 files this Notice of Contest, contesting the election of Joe D. Shriver to the office of State Representative for the 79th District.

In support of this Notice of Contest, the Contestant hereby notifies the Court and all interested parties of the following:

4-104

1. Contestant is a registered voter of the 79th Legislative District, residing at 212 Highland Drive, Arkansas City, Kansas 67005.

2. On November 8, 1994, a duly constituted election was held in Cowley County, Kansas to determine, among other things, who would be elected as the representative to the Kansas House of Representatives for the 79th District ("the Election"). Danny P. Jones was listed on the ballot as the Republican Party candidate. Joe D. Shriver was listed on the ballot as the Democratic Party candidate.

3. As a result of the final canvass of votes conducted on November 30, 1994, Contestee was declared as the winner of the Election by the State Board of Canvassers and he was issued the certification of election.

4. As grounds for contesting this election, Contestant states and alleges as follows:

a. Illegal votes were received by Contestee and/or legal votes for Contestant were rejected which could change the results of the election, as contemplated by K.S.A. 25-1436 (c).

b. Error occurred in computing the results of the election which could change the results of the election, as contemplated by K.S.A. 25-1436 (d).

c. There were ballots that were previously counted during the November 11, 1994, canvass of the Election that could not be accounted for in subsequent recounts of the votes cast in the Election and which affected the correct and proper outcome of the Election, all of which constitute other cause tending to show that the certificate of election should have been issued to Danny P. Jones, as contemplated by K.S.A. 25-1436 (f).

d. That one or more poll workers and/or election office workers either were not properly instructed, or failed to follow proper instructions, concerning the procedures applicable to the receiving of challenged ballots, which affected the correct and proper outcome of the Election, all of which constitute other cause tending to show that the certificate of election should have been issued to Danny P. Jones, as contemplated by K.S.A. 25-1436 (f).

5. In support of the grounds for this election contest, Contestant states and alleges the following:

a. Cowley County, which encompasses the 79th Legislative District, utilizes an optical scanning system to count and tabulate votes. This optical scanning system was utilized in conjunction with the November 8, 1994, election, pursuant to K.S.A. 25-4601 et seq.

b. Upon the close of the polls on November 8, 1994, this optical scanning system was used to count the ballots cast in the Election, as well as the other election races in Cowley County on that date.

c. Upon completing the November 8, 1994, count of ballots, Danny P. Jones led Joe D. Shriver in the Election by two (2) votes. At this time, 2,989 votes had been cast and counted for Jones and 2,987 votes had been cast and counted for Shriver, for a total of 5,976 votes cast and counted.

d. On November 11, 1994, the Cowley County Board of Canvassers, pursuant to K.S.A. 25-3104, met to determine which challenged ballots cast during the Election should be counted and which should not. After making their determinations concerning

the contested ballots, the Cowley County Board of Canvassers opened those challenged ballot envelopes which they determined should be counted and added these votes to the respective candidates' totals.

e. Upon adding these challenged ballots, Danny P. Jones led Joe D. Shriver in the Election by nine (9) votes. At this time, 3,040 votes had been cast and counted for Jones and 3,031 had been cast and counted for Shriver, for a total of 6,071 votes cast and counted.

f. On November 11, 1994, after opening and counting the challenged ballots the total votes cast and counted for both candidates increased by 95 over the amount of votes cast and counted prior to the inclusion of the challenged ballots.

g. On November 14, 1994, Joe D. Shriver subsequently requested a hand recount of the ballots cast and counted in the Election, pursuant to K.S.A. 25-3107. On November 15, 1994, a special election board met to recount the ballots by hand. Upon completion of this hand recount, Joe D. Shriver led Danny P. Jones in the Election by thirty two (32) votes. At this time, 3,005 votes had been cast and counted for Jones and 3,037 votes had been cast and counted for Shriver, for a total of 6,042 votes cast and counted.

h. As a result of the November 15, 1994, hand recount the total amount of votes cast and counted in the Election decreased by 29 when compared to those votes which had been cast and counted on November 11, 1994. Additionally, only 85 challenged ballots were shown as having been cast and counted, a decrease of ten (10) when compared to those counted on November 11, 1994.

i. On November 17, 1994, the Cowley County Board of Canvassers refused to certify the Election as a consequence of the counting discrepancies. Instead, the Board of Canvassers ordered a further recount of the ballots cast in the Election by both the optical scanning system and by hand count to be held on November 21, 1994.

j. On November 21, 1994, the ballots were again counted by both the optical scanning system and by hand. As a result, the optical scanning system recount determined that Danny P. Jones led Joe D. Shriver by two (2) votes. By this recount Jones had 3,030 votes cast and counted and Shriver had 3,028 votes cast and counted for a total of 6,058 votes cast and counted.

k. As a result of the November 21, 1994, hand recount it was determined that Joe D. Shriver led Danny P. Jones by one (1) vote. By this recount Jones had 3,037 votes cast and counted and Shriver had 3,038 votes cast and counted for a total of 6,075 votes cast and counted.

l. During the November 21, 1994, hand recount, five (5) precincts and/or sets of ballots were counted twice. These precincts and/or sets were precincts 3A, 3C, 4D, the "challenged ballots," and the "hand counts." Of these five (5) precincts and/or sets that were twice hand counted on November 21, 1994, three of the five resulted in inconsistent numbers on each count.

m. The November 21, 1994, hand recount(s) of the challenged ballots again only totalled 85 votes cast and counted. Again, there were 10 votes less than had been accounted for when the challenged ballots were initially opened and counted on November 11, 1994.

n. On November 21, 1994, the "hand counts" were initially tallied and announced as eighteen (18) for Jones and nine (9) for Shriver, which was consistent with the totals from both the initial canvass of November 11, 1994, and the initial hand recount which occurred on November, 15, 1994. However, the "hand counts" were subsequently tallied and announced as seventeen (17) for Jones and nine (9) for Shriver.

o. In addition to the aforementioned discrepancies there were numerous inconsistencies in individual precincts between the initial canvass taken on November 11, 1994, the initial hand recount taken on November, 15, 1994, the optical scanning system recount on November 21, 1994, and the hand recount(s) on November 21, 1994.

p. On November 23, 1994, the Cowley County Board of Canvassers met to consider and canvass the Election. On a two (2) to one (1) vote the Board of Canvassers certified the intermediate canvass of the Election by accepting the final hand count wherein Joe D. Shriver led Danny P. Jones by one (1) vote, 3,037 to 3,036. However, the dissenting Board member refused to vote for certifying the results of the Election because of his concerns over the accuracy of the count and he also refused to sign the certification of intermediate canvass that was forwarded to the State Board of Canvassers for final canvassing.

q. On November 30, 1994, the State Board of Canvassers certified the final canvass of the Election, accepting the intermediate canvass of the Cowley County Board of Canvassers.

r. In an informal interview with the Cowley County Board of Commissioners (who sat as the Cowley County Board of Canvassers) during a regular meeting of the

Commission on December 5, 1994, a majority of the Commissioners indicated they would not be surprised if a subsequent court supervised count of the votes yielded a different vote count than count they had certified to the State Board of Canvassers.

s. There are specific ballots that were challenged at the individual precinct polling places which were legally cast votes, however, these votes were erroneously not counted by the Cowley County Board of Canvassers.

t. There are specific ballots that were challenged at the individual precinct polling places which were illegally cast votes, however, these votes were erroneously counted by the Cowley County Board of Canvassers.

u. One or more poll workers and/or election office workers either were not properly instructed, or failed to follow proper instructions, concerning the procedures applicable to the receiving of challenged ballots, which affected the correct and proper outcome of the Election.

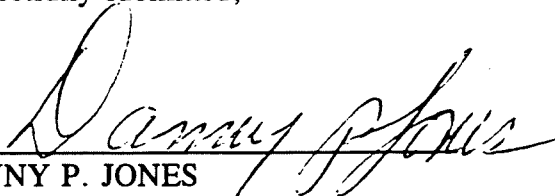
6. Contestant specifically reserves the right to amend the Notice of Contest to include additional grounds for the contest and additional facts supporting the present or additional grounds for the contest, pursuant to K.S.A. 25-1446.

7. Contestant specifically reserves the right to subsequently submit a Motion requesting the inspection(s) authorized by K.S.A. 25-1447.

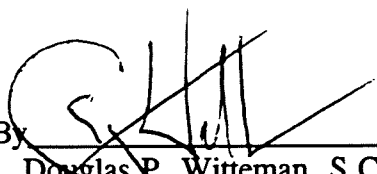
WHEREFORE, the Contestant, Danny P. Jones, respectfully requests the appointment of a district court judge to sit as a court of contest, pursuant to K.S.A. 25-1442; the Court to determine the number of legally cast votes each of the candidates to the Election received, pursuant to K.S.A. 25-1451; the Court take and preserve further evidence upon the additional

points specified herein or in any amended Notice of Contest, pursuant to K.S.A. 25-1451; the Court subsequently direct the Clerk of the District Court to transmit all the files and records of the proceedings herein to the Speaker of the Kansas House of Representatives in order that the Kansas House of Representatives may determine who is elected as the State Representative for the 79th District, pursuant to K.S.A. 25-1451; the Court waive the costs of this matter pursuant to K.S.A. 25-1452; and for any other and further relief the Court deems equitable, just and proper.

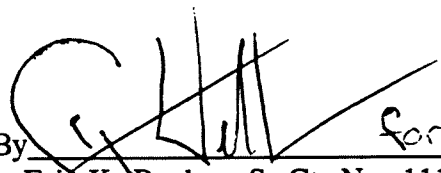
Respectfully submitted,


DANNY P. JONES

PATTERSON, NELSON, NOLLA & WITTEMAN, L.C.


By 
Douglas P. Witteman, S.Ct. No. 15023
Attorneys for the Contestant
Danny P. Jones

ERIC K. RUCKER

By  for
Eric K. Rucker, S. Ct. No. 11109
Attorney for the Contestant
Danny P. Jones

TO THE CLERK OF THE DISTRICT COURT

Please cause a copy of the above and foregoing NOTICE OF CONTEST to be served pursuant to K.S.A. 25-1439 within five (5) days upon the Contestee, Joe D. Shriver, 820 North 9th, Arkansas City, Kansas 67005; and pursuant to K.S.A. 25- 25-1439 and K.S.A. 25-1441, two (2) copies to William Graves, Secretary of State, 2nd Floor, State Capital, Topeka, Kansas 66612-1594; and pursuant to K.S.A. 25-1442, by restricted mail within three (3) days upon the Chief Justice of the Kansas Supreme Court, Richard W. Holmes, Kansas Judicial Center, 301 S.W. 10th Avenue, Topeka, Kansas 66612-1507.



DOUGLAS P. WITTEMAN

IN THE DISTRICT COURT OF COWLEY COUNTY, KANSAS

DANNY P. JONES,
Contestant,

vs.

94 C 201-W

JOE D. SHRIVER,
Contestee.

ORDER

Now on this 21st. day of December, 1994, the court holds a teleconference in the above entitled matter. The parties appear through their counsel of record.

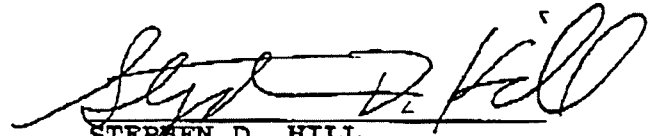
Thereupon, the court grants the contestant's motion for inspectors to be appointed in this case pursuant to K.S.A. 25-1447(a). The following individuals are hereby appointed by this Court as inspectors: David Helsel, Winfield, Kansas; R. J. Wilson, Topeka, Kansas; Karl Faidley, Arkansas City, Kansas.

The inspectors are hereby ordered to make an inspection of the ballots and recanvass the votes cast for the parties to this action in all precincts other than those to which the parties have agreed to the vote totals. The inspection of these ballots should be made in the presence of the legal custodian of the ballots. The inspectors should make a written report of their recanvass to this Court which discloses the number of votes cast for each of the parties to this contest for each precinct that is recounted and report to this Court any disputed votes upon which

the inspectors cannot agree.

This inspection should take place beginning at 9:00 A.M. Thursday, December 22, 1994, at the Cowley County Courthouse in Winfield, Kansas, at such place designated by the Hon. H. Joe Gaston, Cowley County Clerk/Election Officer.

LET THIS ORDER ISSUE.


STEPHEN D. HILL
Judge of the Dist. Court,
assigned

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Order was telefaxed on the 21st day of December, 1994, to the following:

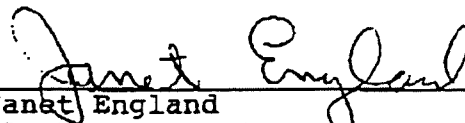
Victor W. Miller
Telefax: (913) 233-2613

Douglas P. Witteman
Telefax: (316) 687-2572

David Helsel
Telefax: (316) 221-1097

Clerk of the District Court
Telefax: (316) 221-1097

County Clerk
Telefax: (316) 221-5448


Janet England
Clerk of District Court
Miami County, Kansas