THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

NOTE FOR MOTION

**TO:** THE CLERK OF THE COURT

**AND TO:** All parties and counsel of record



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NOTE FOR SPECIAL SETTING

Please note that this matter has been set before the Honorable John E. Bridges on the 2nd day of May, 2005 at 8:30 a.m.

Nature of hearing: **Washington State Democratic Central Committee's Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes**

DATED: April 13, 2005.


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May 2, 2005 at 8:30 a.m.

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FOR CHELAN COUNTY

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Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION IN LIMINE TO EXCLUDE PETITIONERS' PROPOSED SPECULATIVE ATTRIBUTION OF ILLEGAL VOTES



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## CONTENTS


I. INTRODUCTION ..... 1

II. FACTUAL BACKGROUND ..... 2

A. Petitioners Allege Illegal Votes, But Not Fraud. ..... 2

B. Petitioners' Change in Position on "Proportional Analysis." ..... 3

III. ARGUMENT AND AUTHORITY ..... 4

A. The Court Should Exclude Petitioners' Speculative Attribution of Illegal Votes and It Should Do So Now. ..... 4

B. The Court Should Exclude the Proposed Speculative Attribution of Illegal Votes Because Washington Law Requires a Contestant to Prove Which Candidate Received Such Votes. ..... 6

1. Washington's Election Contest Statutes Require Clear Proof Regarding Illegal Votes. ..... 7

2. *Hill v. Howell* Requires an Election Contestant to Show Which Candidate Received Alleged Illegal Votes. ..... 10

C. There Is, At Best, a Conflict of Authority in Other States Regarding a Speculative Attribution of Illegal Votes. ..... 11

1. Jurisdictions That Permit Speculative Attribution Have Different Election Contest Statutes Than Washington. ..... 11

2. Jurisdictions That Prohibit Speculative Attribution Do So for Reasons Consistent with Washington Law ..... 16

IV. CONCLUSION ..... 21





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## I. INTRODUCTION

Petitioners allege that illegal votes were cast in the 2004 election. They have focused their allegations on King County, a county that favored Governor Gregoire in its overall vote. Assuming Petitioners prove that those votes were actually illegal, Washington law requires them to prove the candidate for which each illegal vote was cast and that enough illegal votes were cast for Governor Gregoire to make Dino Rossi the winner. Unless an illegal vote is proven to have gone to one candidate or the other candidate, it is treated as a legal vote and not subtracted from either candidate's total. *Hill v. Howell*, 70 Wash. 603 (1912). In other words, the Court must treat all such votes as innocent votes as between the parties. The vast bulk of Petitioners' claimed illegal votes and votes allegedly counted or not counted because of election official error fall within this category. Petitioners admit that they do not know – and cannot prove – for whom such votes were cast. Under Washington law, these votes cannot be attributed to either candidate.

Petitioners ask this Court to adopt new law for Washington and allow votes to be attributed to a candidate without proof that the votes were actually cast for the candidate. They ask this Court to assume, rather than have proven to it, how an illegal vote was cast based upon how the legal votes in that precinct were cast. Overturning elections based on such an assumption has never been accepted by any court in the State of Washington. Instead, Washington courts have long embraced the fundamental principle that a successful election contest must be based on a showing that the election is "clearly invalid." *In re Contested Election of Schoessler*, 140 Wn.2d 363, 383 (2000). The Court should reject Petitioners' request that the Court adopt new rules for deciding election contests in the middle of the most significant election contest in the State's history.



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Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC") respectfully requests that the Court grant its Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes.

## II. FACTUAL BACKGROUND

### A. Petitioners Allege Illegal Votes, But Not Fraud.

Petitioners filed their Election Contest Petition on January 7, 2005, challenging the election of Governor Gregoire. Petitioners charge that illegal votes were cast in the 2004 election by felons, by voters who voted more than once, and by persons who voted in the names of deceased persons. Petition at 8, ¶ VI.B.3-6. Petitioners also claim that provisional ballots placed directly into precinct vote counters, ballots counted in excess of the number of lawfully registered voters, and absentee ballots cast by persons other than the registered voter are illegal votes. Declaration of William C. Rava in Support of WSDCC's Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes ("Rava Decl.") ¶ 3, Ex. B (Petitioners' Objections and Responses to Respondent Secretary of State's Interrogatories and Requests for Production of Documents at 27). The Petition does *not* allege that any election official engaged in fraud and – unsurprisingly, given that the Petition does not name Governor Gregoire as a respondent – the Petition does not allege that the Governor had any connection whatsoever to the purported illegal votes.

On February 4, the Court considered motions to dismiss filed by WSDCC and various other respondent counties and county election officials. Rava Decl. ¶ 6, Ex. D. The Court dismissed some of Petitioners' claims, but declined to dismiss the Petition in its entirety. *Id.* at 18-28. In particular, as to Petitioners' "illegal votes" claim, the Court stated:

> Although it may be problematical for petitioners to ultimately prevail based on a theory or cause of illegal votes, 29A.68.090 provides that



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> initially, at least, at this stage of the proceedings, when the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that illegal votes were cast, that, if given to the person whose election is contested in the specified precint or precints, will, if taken from that person, reduce the number of that person's legal votes below the number of legal votes given to some other person for the same office.

*Id.* at 23. In its February ruling on the "illegal votes" claim, the Court also observed that, under Washington law, if there is no proof to show for whom an illegal vote was cast, it must be treated as legitimate:

> This same requirement was recognized early in our state's history when in 1912 our Supreme Court in *Hill v. Howell* held that where there was no evidence to show for whom the elector voted and because both candidates were innocent of wrongdoing, the vote must be treated between the parties as a legitimate vote.

*Id.*

**B. Petitioners' Change in Position on "Proportional Analysis."**

Subsequent to the Court's February ruling, Petitioners informed WSDCC that they do not plan to prove their case in the manner required by *Hill v. Howell.* Rava Decl. ¶¶ 2-3. Instead they intend to ask the Court to use a speculative attribution of alleged illegal votes, employing a method Petitioners refer to as "proportional analysis" and that some non-Washington courts have referred to as "proportionate reduction" or "apportionment." Petitioners intend to rely on a "proportional analysis of for whom votes were cast in a particular precinct" as "circumstantial evidence of the races in which and the candidates for whom the [illegal voters] voted in a particular precinct." Rava Decl. ¶ 2, Ex. A (Objections, Answers, and Responses to WSDCC's First Interrogatories and Requests for Production to Petitioner Rossi For Governor Campaign, *see e.g.* Answer to Interrogatory No. 3).



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Petitioners argued in their February 16, 2005 Response to WSDCC's Proposed Order (and presumably will again argue in response to this motion) that "courts accept circumstantial evidence (including evidence of the proportions in which votes in the affected precincts were cast for each candidate) that the problematic ballots likely affected the outcome, without requiring proof of for whom each vote was cast." Pet. Resp. to WSDCC Prop. Order at 17. Petitioners maintained that "nothing in Washington's statutes or cases prohibits such an approach here." *Id.* at 18. Such a speculative attribution means that if an illegal vote is found to have been cast in a precinct that voted 55% for Rossi, 40% for Governor Gregoire, and 5% for others, Rossi would have .55 votes deducted from his total vote and Governor Gregoire would have .4 votes deducted from her total.

But a mere three weeks earlier, Petitioners had argued that use of the method they now advocate is inappropriate because it is based on "chance." Petitioners told the Court:

> Neither would it be appropriate to deduct a number of illegal votes from each candidate based on the proportion of the votes each candidate received. In contrast to *the "element of chance" raised by allocation of votes by apportionment*, the proper remedy is to void the election to protected the integrity of the election[.]

Pet. Memo. in Opp. to WSDCC's Mot. Dismiss Causes at 26 (emphasis added).

## III. ARGUMENT AND AUTHORITY

### A. The Court Should Exclude Petitioners' Speculative Attribution of Illegal Votes and It Should Do So Now.

Petitioners' "proportional analysis" is speculative, it is based on chance, and it should be excluded. Motions in limine are used to exclude incompetent or prejudicial evidence. 5 TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 9 (1989). They "are designed to simplify trials." *Fenimore v. Drake Constr. Co.*, 87 Wn.2d 85, 89 (1976). In *Fenimore*, the Supreme Court stated:



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> The trial court should grant such a motion if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues drawn or which may develop during trial, and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during the trial.

*Id.* at 91.

Similarly, ER 403 calls for the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The decision whether to admit evidence under ER 403 is within the trial court's sound discretion. *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 926 (1990) ("A trial court has broad discretion in performing the balancing test contemplated in ER 403 and will be reversed only on a showing of abuse of discretion."). A court acts well within its discretion when it excludes speculative evidence. *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 898 (1977) (trial court did not abuse its discretion in excluding testimony where the "conclusions [reached] were completely speculative").

Admission of Petitioners' proposed speculative attribution is inconsistent with the high standard of proof needed to invalidate an election under Washington law. Petitioners bear the burden of proof in this election contest. *Schoessler*, 140 Wn.2d at 392 (party contesting election due to ineligibility of candidate bears the initial burden of proving the candidate did not satisfy the residency requirements). To carry that burden, Petitioners must demonstrate that the results of the election are "clearly invalid." *Dumas v. Gagner*, 137 Wn.2d 268, 283 (1999); *see also Schoessler*, 149 Wn.2d at 383. Here, Petitioners intend to introduce speculative evidence and ask the Court to make findings of fact regarding who



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received *illegal* votes based merely on percentages of *legal* votes cast in the same precinct. This evidence should be excluded because it will not demonstrate whether the 2004 election is "clearly invalid."

The decision on exclusion of Petitioners' speculative attribution is ripe. Petitioners have clearly stated to this Court and in discovery responses that they intend to use speculative attribution to make proof on their illegal votes claim. Rava Decl. ¶¶ 2-3, Ex. A-B. Delaying a ruling on this issue will result in continued discovery and expenditure of public resources that will prove needless if Petitioners' speculative attribution is ultimately rejected at trial. *Id.* ¶ 4. WSDCC does not seek any determination on the merits of Petitioners' claims; it merely seeks a limited evidentiary ruling on a method of proof that is antithetical to the law of our State.

**B. The Court Should Exclude the Proposed Speculative Attribution of Illegal Votes Because Washington Law Requires a Contestant to Prove Which Candidate Received Such Votes.**

Washington law is simple. If you want to take votes away from a winning candidate to overturn an election, you have to prove that the winning candidate actually received more of those illegal votes than your candidate did. Washington election contest statutes RCW 29A.68.100 and RCW 29A.68.110 both contemplate that you provide proof that a particular voter cast an illegal ballot for a particular candidate. A vote cannot be deducted from either candidate unless it can be shown that the vote was cast for the candidate, or that the candidate was involved in the wrongdoing related to the vote. *Hill v. Howell*, 70 Wash. at 610-11, a case that has gone undisturbed for over ninety years, holds that unless an election contestant proves who received an alleged illegal vote, it must be treated as a legal vote in an election contest in order to avoid injustice.



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### 1. Washington's Election Contest Statutes Require Clear Proof Regarding Illegal Votes.

A chief principle in Washington election contests is the "clearly established" requirement that "the right to contest an election 'rests solely upon, and is limited by, the provisions of the statute relative thereto.'" *Becker v. County of Pierce*, 126 Wn.2d 11, 18 (1995) (quoting *Quigley v. Phelps*, 74 Wash. 73, 75 (1913)). Under Washington's election contest statutes, a contestant must provide proof that makes it clear or obvious that a particular candidate received an alleged illegal vote. RCW 29A.68.110, the statute regarding illegal votes, provides as follows:

> No election may be set aside on account of illegal votes, unless *it appears* that an amount of illegal votes has been given to the person whose right is being contested, that, if taken from that person, would reduce the number of the person's legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes that may be shown to have been given to the other person.

(emphasis added). The dictionary meaning of "appears" is: "1. to come into sight; become visible. 2. to have the appearance of being. 3. to be obviously or easily perceived." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 64 (1998 ed.). A fundamental canon of statutory interpretation is that words are given their plain meaning. *Dept' of Licensing v. Lax*, 125 Wn.2d 818, 822 (1995) ("When interpreting a statute, the court must give effect to the plain meaning of the statutory language.") (adopting dictionary definition of disputed term).[1] Given the plain meaning of the word "appears," a contestant must show that it is

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[1] In election contests, courts look to the language of the statute itself to determine its meaning. *Becker*, 126 Wn.2d at 16 ("Where the wording of a statute is unambiguous, the meaning is to be derived from the language of the statute alone."). Here, Petitioners ask this Court to look to the language of election contest statutes and cases from other states to determine the meaning of the



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"obviously or easily perceived" that a candidate received those votes. Instead, Petitioners construe "appear" to mean "possible." This construction is at odds with the plain meaning of the word.

Construing "appear" in RCW 29A.68.110 to mean "clear" or "obvious" not only gives "appear" its plain meaning, it also harmonizes the meaning of that word in the rest of the election contest statutes. The word "appear" is also found in section .050 of the election contest statutes. RCW 29A.68.050. This provision, which sets forth the time and manner for hearings on election contests, states:

> If in any such case it shall *appear* that another person than the one returned has the highest number of legal votes, said court shall declare such person duly elected.

*Id.* (emphasis added). If the word "appear" in the election contest statutes means "possible" or even "probable," as Petitioners suggest, then a judge would have the power under RCW 29A.68.050 to declare a contestant duly elected on the mere possibility that the person received more votes. This reading would grossly dilute the statutory standard for overturning elections, and it would be at odds with the rule in Washington that courts should not lightly interfere with or overturn elections. *See Dumas*, 137 Wn.2d at 283 ("[T]he 'judiciary should exercise restraint in interfering with the elective process which is reserved to the people in the state constitution.'") (internal citations omitted).

"Appear" must mean "obvious or easily perceived" in RCW 29A.68.110 regarding illegal votes, if it is to have the same meaning it has in RCW 29A.68.050. It is well settled that "[w]hen the same word or words are used in different parts of the same statute, it is

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word "appears" in a Washington statute. *See* Pet. Resp. to WSDCC Prop. Order at 16-17. The wording of RCW 29A.68.110 is not ambiguous, however, and the words of the statute itself are sufficient to determine the meaning of "appears" within that provision.



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presumed that the words of the enactment are intended to have the same meaning." *Medcalf v. Dep't of Licensing*, 133 Wn.2d 290, 300-01 (1997). The common sense, and plain language, reading of RCW 29A.68.050 is that it must be clear or obvious that one candidate received the highest number of legal votes before a court may declare that candidate the winner of the election.

Petitioners plan to show only how a geographically nearby group of legal voters – who may or may not have similar characteristics as the illegal voters at issue – voted and then ask this Court to assume that the alleged illegal voters cast their ballots in the same proportion as the legal voters cast theirs. Rava Decl. ¶¶ 2-3. This speculation does not show "obviously or easily" for whom an alleged illegal vote was cast, and so does not comport with the substantive requirements of RCW 29A.68.110. Petitioners' speculative proposed attribution of illegal votes is irrelevant and should be excluded.[2]

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[2] Washington's election contest statutes also contemplate voter testimony, not speculation, as the method to prove which candidate received alleged illegal votes. Washington law requires the contestant to disclose those illegal votes and who gave them prior to the contest hearing. RCW 29A.68.100 provides:

> No *testimony* may be received as to any illegal votes unless the party contesting the elections delivers to the opposite party, at least three days before trial, a written list of the number of illegal votes and *by whom given*, that the contesting party intends to prove at trial.

(emphases added). RCW 29A.68.100 anticipates testimony from alleged illegal voters as the acceptable manner of proof to show for whom a voter voted. Testimonial evidence is also anticipated by RCW 29A.68.050, which specifically grants the clerk of the court power to "issue subpoenas for witnesses in such contested election at the request of either party . . . [and] to issue attachments to compel the attendance of witnesses who shall have been duly subpoenaed to attend if they fail to do so." If, as Petitioners suggest, an election contestant can simply offer his own proportional evidence regarding alleged illegal votes, the Court's subpoena power over alleged illegal voters is superfluous. This section of RCW 29A.68.050 along with RCW 29A.68.100 create the procedural rules needed to obtain voter testimony, which in turn is needed to fulfill Washington's substantive requirement that a contestant prove which candidate received any illegal votes.



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### 2. *Hill v. Howell* Requires an Election Contestant to Show Which Candidate Received Alleged Illegal Votes.

The fundamental flaw in Petitioners' "proportional" theory is that it charges against the vote totals of an innocent candidate illegal votes without proving that the illegal votes were cast for the candidate. This contradicts the Washington Supreme Court's decision in *Hill v. Howell*, 70 Wash. at 610, that an election contestant who bases a challenge on alleged illegal votes must "show for whom the elector voted."

*Hill* also involved allegations of illegal votes. In *Hill*, the contestant, Hill, lost an extremely close election to the winning candidate, Steiner, by a margin of five votes. 70 Wash. at 604-05.[3] Hill claimed that there were irregularities in the election, including illegal votes cast for Steiner. *Id.* at 605, 606-08. After the Court added one vote to Hill's total, making the margin of victory four votes, the Court considered the proof offered regarding the six allegedly illegal votes. *Id.* at 610. Two of the votes were determined to be legal votes and remained part of Steiner's total; another two were shown by testimonial evidence to be cast for Steiner and were deducted from his total. *Id.* at 613. Thus, the remaining margin of Steiner's victory was two votes, with two remaining illegal votes. *Id.* The contestant Hill, however, had no testimony from these two illegal voters to show for whom they voted. *Id* at 610-11, 614.

On these facts, the Court refused to deduct the alleged illegal votes from either candidate's total. The Court concluded:

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[3] As a matter of percentages *Hill* involved significantly more allegedly illegal votes then are alleged here. In *Hill*, out of 2,449 total votes cast for the two leading candidates, Petitioners alleged six illegal votes were cast – .00244% of the total votes. 70 Wash. at 604. That percentage is the equivalent of over 6,700 illegal votes in the 2004 election, where 2,746,593 votes were cast for Governor Gregoire and Mr. Rossi combined. Rava Decl. ¶ 5, Ex. C.



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> *If this was an illegal vote, it was proper to show for whom the elector voted, and, since the fact is not shown, it must be treated between the parties as a legitimate vote.* Neither of the candidates were responsible for the manner in which the vote got into the ballot box, and, both being innocent of wrongdoing, it would be an injustice to charge the error to either of them.

*Id.* at 610-11 (emphasis added).

Just as in *Hill*, there is no allegation that Governor Gregoire was responsible for, or even remotely involved with, any allegedly illegal vote. Charging illegal votes to her by means of speculative attribution would be, in the words of the Supreme Court, "an injustice." 70 Wash. at 610. In these circumstances, *Hill* requires that each such vote "must be treated as between the parties as a legitimate vote." 70 Wash. at 610. Petitioners' proposed manner of proof is clearly inconsistent with *Hill*, and the Court should exclude any evidence offered by Petitioners that attempts to rely on the chance that Governor Gregoire may have received some number of illegal votes.

### C. There Is, At Best, a Conflict of Authority in Other States Regarding a Speculative Attribution of Illegal Votes.

No reported Washington case allows an election contestant to offer "proportional analysis" to show which candidate received alleged illegal votes. Petitioners rely on cases from other states, decided under different election laws, to support their argument that this Court should adopt a new method of proof for Washington election contests. These cases offer little actual support for Petitioners' position.

#### 1. Jurisdictions That Permit Speculative Attribution Have Different Election Contest Statutes Than Washington.

When Petitioners changed course from arguing against the "'element of chance' raised by allocation of votes by apportionment" to arguing in support of such a chance-based approach, Petitioners pointed to a number of cases from other states to argue that this



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method should be a substitute for Washington's requirement that the election contestant must prove who received alleged illegal votes. *Compare* Pet. Memo. in Opp. to WSDCC's Mot. Dismiss Causes at 26 *with* Pet. Resp. to WSDCC Prop. Order at 17-18. These cases are decided under other states' election contest statutes, which are different from Washington's statutes.[4]

As commentators have observed, the fifty states' election contest statutes are characterized by disparity, not uniformity:

> The nature of election contests, and the rules of procedure and evidence relating thereto, are influenced to a great extent by statutes providing for the administration of elections, recounts, and contests. The statutes tend, from jurisdiction to jurisdiction, to be more often unique than standard.

C.C. Marvel, *Admissibility of Parol Evidence of Election Officials to Impeach Election Returns*, 46 A.L.R.2d 1385 (2004); *see also* 29 C.J.S. *Elections* § 247(a) (1965) ("The procedure in election contests, *which varies in different jurisdictions*, is purely statutory and the statute must be strictly followed.") (emphasis added). It is precisely the variation among election contest statutes and the conflicting decisions that these statutory differences create, which has made the Washington Supreme Court reluctant to look to extraterritorial law to settle our own state's election disputes. *See e.g. Hill*, 70 Wash. at 614 ("An examination of the cases, however, has led us to believe that there is a conflict of decision on practically all of the questions involved. This being true, we prefer to follow what seems to us to be the

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[4] Petitioners' suggestion that this Court rely on cases based on other states' election contest statutes also violates the rule in Washington that "the right to contest an election 'rests solely upon, and is limited by, the provisions of the statute relative thereto.'" *Becker*, 126 Wn.2d at 18.



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more liberal and just rule enjoined *by our own statutes and sanctioned by the decisions of this court* hereinbefore rendered.") (emphasis added).

Petitioners directed the Court to election contest decisions from Alaska, Arizona, Illinois, Pennsylvania and Wyoming for the proposition that this Court can accept "evidence of the proportions in which votes in the affected precincts were cast for each candidate[.]" Pet. Resp. to WSDCC Prop. Order at 17. A review of the election contest statutes of those states reveals that there are important substantive differences between the laws of those jurisdictions and Washington's laws.

- *Huggins v. Superior Court*, 163 Ariz. 348 (Ariz. 1990). Arizona provides that illegal votes may form the ground of an election contest, but does not have any statutes that relate to the mode of proof regarding those votes. ARIZ. REV. STAT. § 16.672(4) ("On account of illegal votes" is a ground for contest). Unlike Washington law, Arizona's statutes contain no provisions to subpoena witnesses or that require disclosure of a list of illegal voters. *See* RCW 29A.68.050 and RCW 29A.68.100.

- *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978). Alaska has very cursory election contest statutes, contained in only three sections. ALASKA STAT. §§ 15.20.540 through .560. Its statutes contain no specific provision on illegal votes whatsoever, simply outlawing "any corrupt practice as defined by law sufficient to change the results of the election." § 15.20.540(3). In contrast, Washington's statutes consist of eleven separate sections and many more sub-provisions and explicitly require proof that the contesting candidate received more legal votes than the person elected. *See* RCW 29A.68.110 ("reduce the number of the person's legal votes below the number of votes given to some other person for the same office.").

- *Appeal of Harner*, 62 Pa. D & C 56 (1948). Pennsylvania's election contest statutes are significantly different than Washington's. In Pennsylvania, the rules for election contests differ based on the specific office being contested. *See* PA. STAT. ANN. tit. 25 § 3291. The case relied on by Petitioners involves a local election for district attorney. For statewide offices such as governor, Pennsylvania compels the alleged illegal voters to testify how they voted. *See* PA. STAT. ANN. tit. 25 § 3326 ("When it is proven to the satisfaction of said committee that any person, not a legally qualified voter, voted at any such



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contested election, it shall be lawful for said committee to compel said voter to disclose, under oath, for which of the respective candidates he voted.").

- *Hamilton v. Marshall*, 282 P. 1058 (Wyo. 1929). Wyoming's election contest statutes allow illegal votes to form the basis of a contest, but the statutes contain no provisions regarding the subpoena of witnesses or the disclosure of a list of alleged illegal voters. WYO. STAT. ANN. § 22-17-101(iv).

- *Flowers v. Kellar*, 322 Ill. 265 (1926) (and other Illinois cases cited). Illinois, which has separate provisions for election contests for statewide offices such as governor, also does not contain any provisions related to the mode of proof regarding illegal votes. Its election contest statutes do not touch on illegal votes as a specific basis for suit, and contain no statutory language setting forth how illegal votes may be proven or taken from a particular candidate.

The decisions in these cases, while perhaps appropriate under the unique statutory schemes and court rulings of those states, are inapplicable to and inconsistent with the statutes and law of *this* state.[5] Allowing the admission of speculative attribution by adopting these cases would also conflict with the decision in *Hill* – no surprise given that *Hill* was decided under Washington's election statutes and common law. 70 Wash. at 614.

Even in the decisions cited by Petitioners, proportional attribution of illegal votes evidence is used for very limited purposes, and has not served as the basis for overturning an election as Petitioners ask this Court to do. As Petitioners' cited cases show, the speculative attribution method is typically used as a screening device to validate elections, not as a method to carry the contestant's burden of proof. Pet. Resp. to WSDCC Prop. Order at 16-17 (citing *Huggins*, 163 Ariz. at 353 ("[W]e defer deciding what must be done when

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[5] The only decision cited by Petitioners decided in a state with similar election contest statutes is *Singletary v. Kelly*, 242 Cal.App.2d 611, 612 (1966). In *Singletary*, the court upheld the trial court's use of proportional analysis by citing *Russell v. McDowell*, 83 Cal. 70, 72-74 (1890), but noted "that such a method of disposing of illegal votes can never change the result of the election."



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proration would change an election result[.]")); *Fischer v. Stout*, 741 P.2d 217, 226 n.15 (Alaska 1987) (discussing *Hammond* and noting "we need not, at this time, determine the procedure to be employed if the election result is put in doubt by application of the proportionate reduction rule"); *Singletary*, 242 Cal.App.2d at 612 (citing *Russell*, 83 Cal. 70 at 72-74, which notes that petitioner "argues – and very justly – that such a method of disposing of illegal votes can never change the result of the election"); *Hileman*, 316 Ill.App. 3d at 869 (apportionment did not change election result); *Whitsell v. Davis*, 67 Ill.App.3d 962, 970 (1978) (apportionment would not reverse outcome); *Flowers v. Kellar*, 322 Ill. 265, 270 (applying proportional attribution, "the result will remain unchanged"). Thus, even if the holdings of these cases could be adopted in Washington, they would still be inapplicable to these facts, because Petitioners plan to use proportional analysis to try to overturn the 2004 election.

Petitioners have also alternatively argued for a wholesale reversal of the standard announced in *Hill*, by urging this Court to adopt what they characterize as the holding of a California case, *Gooch v. Hendrix*, 5 Cal. 4th 266 (1993). Petitioners contend that *Gooch* stands for the proposition that an election can be overturned "because there were more illegal [] ballots than the margin of victory." Pet. Resp. to WSDCC Prop. Order at 15. Neither the holding nor reasoning of *Gooch*, where the court based its decision on widespread fraud procured by the defendant-candidates, supports Petitioners' refashioning of that decision in order to overrule *Hill*.[6]

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[6] It should be noted at the outset that *Gooch* did not apply or sanction speculative attribution, and so is not on point regarding the relative admissibility of such evidence, even in California. In *Gooch*, no pro rata deduction of specific votes was possible because the election at issue involved multiple open positions for the same office. 5 Cal. 4th at 276.



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In *Gooch*, the contestants had shown, through "clear and convincing evidence," that there had been systematic and widespread fraudulent procurement of illegal votes in the challenged election. 5 Cal. 4th at 282. The entity that obtained those illegal votes had worked on behalf of the winning candidates. *Id.* at 285 ("nearly all of the [winning] candidates themselves, knowingly or otherwise, took part in the malconduct of 'soliciting' absentee votes in violation of specific Election Code provisions"). In the face of that fraud, initiated by and procured for the benefit of the winning candidates, the Court recognized that the outcome of the election had been affected.

Here, by contrast, Petitioners do not allege, nor could they, that there was fraud in the conduct of the 2004 election, let alone that Governor Gregoire or her representatives procured it. What Petitioners allege are administrative errors on the part of election officials that may have led to the casting of illegal votes, not intentional fraudulent conduct by an interested party meant to obtain a specific outcome. Petition at 2-3 (discussing "errors" and "neglect"). It is therefore *Hill*, a Washington case decided on facts similar to those presented here, that controls, not *Gooch*, a California case decided on different facts. *Compare Hill*, 70 Wash. at 610 ("[*N*]*o charges of fraudulent conduct or willful misbehavior are made or proven* against any of the officers of the election who were guilty of the irregular conduct found by the commissioner.") *with Gooch*, 5 Cal. 4th at 282 ("*clear and convincing evidence established pervasive illegalities* that permeated the election process") (emphases added).

**2. Jurisdictions That Prohibit Speculative Attribution Do So for Reasons Consistent with Washington Law.**

Many states have rejected the use of speculative attribution to prove that a candidate received alleged illegal votes. These states, as does Washington, require an election



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contestant to prove who received alleged illegal votes. These decisions, consistent with the rationale from *Hill* and the language of RCW 29A.68.110, will not deduct alleged illegal votes from a candidate's total unless the contestant has proven that fact.

Supreme Court decisions from Delaware, Idaho, Maryland, and Nebraska have all rejected the use of speculative attribution as a substitute for proof by the contestant that the winning candidate received the alleged illegal votes. *See State ex rel. Brogan v. Boehner*, 174 Neb. 689, 697-98 (Neb. 1963) ("We do not believe that the courts should adopt and apply arbitrary rules which will determine elections on the basis of chance."); *State ex rel. Wahl v. Richards*, 44 De. 566, 581 (Del. 1949) ("As heretofore stated the Board of Canvass applied the proportionate deduction rule. While some courts have adopted that rule we do not regard it as logical or satisfactory under the facts presented."); *Wilkinson v. McGill*, 192 Md. 387, 403 (Maryland 1949) ("[B]ut we think the weight of authority and the better reasoning uphold the view that complainants, desiring to avoid an election because illegal votes are cast, have upon them the burden of proving for whom these votes are cast. They cannot thrust that burden upon the Court by arguing that there is a probability that such votes were cast for the side having the majority. They must prove, or at least attempt to prove, how the illegal voters voted."); *Jaycox v. Varnum*, 226 P. 285, 290 (Idaho 1924) (discussed in detail below).[7] These cases all criticize and reject speculative attribution as an

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[7] Even *Hamilton v. Marshall*, 282 P. 1058, the Wyoming case relied on by Petitioners in support of speculative attribution, recognizes that where an election contestant fails to prove for whom alleged illegal votes were cast, the contest must fail. In dicta, the *Hamilton* court discussed proportionality, but concluded that it "need not decide" whether the rule applied. 282 P. at 1060. Rather, the Court relied on the contestant's failure to prove for whom the alleged illegal votes were cast as a basis for dismissal. *Id.* ("If we assume the facts alleged showed the casting of 14 illegal votes, and that it was impossible to ascertain for whom they were cast, the petition, in our opinion, is defective in failing to show that the plaintiff was prejudiced.").



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acceptable method of proof in election contests, and reveal the lack of consensus among the states regarding such evidence.

*Jaycox v. Varnum* provides the most comprehensive analysis of the rationale to reject speculative attribution – because it is an arbitrary mechanism for the Court to provide proof that a contestant has failed to provide himself. In *Jaycox*, the contestant challenged the election on the basis that illegal votes were cast in the election. 226 P. at 285-86. After the Court adjusted the tally based on the number of legal votes the candidates had received, the winning candidate was still ahead by a margin of 795 to 793. *Id.* at 288. There were three illegal votes, a number greater than the margin of victory. *Id.* But, the challenger failed to offer proof as to who received those illegal votes. *Id.* The court considered whether the vote should be rejected in its entirety and the election set aside, whether the votes should be deducted from the candidates in proportion to the legal votes they received, or whether the illegality should be disregarded because the contestant had failed to meet his burden of proof. *Id.* at 289-90. The court rejected proportionality and upheld the election. Quoting Paine's treatise on election law, the Idaho Supreme Court reasoned:

> "There ought to be no arbitrary presumption of law, either that all illegal votes were cast by the political party in the majority, or that they were cast by the different parties in proportion to their numbers. To take the illegal votes all from one candidate, or pro rata from several candidates, would be, not to decide, but to make a case for the parties." . . . This method is justly open to the criticism made by Paine. It is purely arbitrary and decides nothing.
> …
> There were three candidates. The three illegal votes may have been cast for appellant or for the third candidate, or divided among them. In order to overcome the prima facie effect of the returns, it would seem incumbent on appellant to prove not only the illegal votes, but also for whom they were cast. Both these elements of proof were required to show that the illegal votes affected the result, and but for them appellant would have been elected. It would be neither just nor



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> logical to put the contestee at a disadvantage, because contestant was unable to sustain the burden of poof which rested upon him, contestee not being responsible for that fact. The rule that the party who is seeking affirmative relief has the burden of proof is one which necessarily underlies all our procedure. A party may have a just cause, and lose the benefit of his evidence through causes not of his making and beyond his control; yet we hold he is not entitled to recover because of failure of proof.

*Id.* at 288-89.[8] Notably, the Washington Supreme Court has cited Paine's treatise four times on election law issues. *See State ex rel. Carpenter v. King County*, 118 Wash. 664, 671 (1922) (election officers canvassing votes perform a ministerial duty unless otherwise provided by statute); *State v. Fawcett*, 17 Wash. 188, 199 (1897) (stray markings on ballots, absence proof of fraud, does not invalidate ballot); *State v. Morris*, 14 Wash. 262, 263 (1896) (certificate of election prima facie evidence of entitlement to office, subject to

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[8] The treatise cited to by the Idaho Supreme Court in *Jaycox* is Halbert E. Paine, A TREATISE ON THE LAW OF ELECTIONS TO PUBLIC OFFICES § 513 (1890). The treatise discusses the inequity of proportional attribution as a method to resolve election contests.

> The party who demands the exclusion of votes, actually cast and canvassed for his opponent, on the ground of their illegality, must show, not only that illegal votes were cast, but also that they were canvassed for his competitor. If they were canvassed for the party making the demand, they are not to be subtracted from the vote of his opponent, upon mere proof of their illegality. That would be double robbery.
> ...
> For illustration, if one candidate should receive 220 legal votes and no illegal votes, but the other should receive 210 legal votes and 20 illegal votes, the legal majority of the first candidate would be ten votes. But the apportionment of the 20 illegal votes, between the two candidates, would secure to the second candidate a fictitious majority of not less than ten votes.

Paine's treatise has been relied on by the Supreme Courts of Nebraska, Delaware, and Maryland to reject proportionality. *See Boehner*, 174 Neb. at 697-98; *McGill*, 192 Md. at 403; *State ex rel. Wahl*, 44 De. at 578.



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subsequent challenge by election contest); *Parmeter v. Bourne*, 8 Wash. 45, 51 (1894) (election contests created by and subject to the statute creating the right to contest).

The reasoning of *Jaycox v. Varnum* and *Hill v. Howell* are markedly similar. In both cases, the court acknowledged the inequity of taking a vote away from a candidate without proof that the candidate received that vote. *Compare Jaycox*, 226 P. at 289 ("It would be neither just nor logical to put the contestee at a disadvantage, because contestant was unable to sustain the burden of poof which rested upon him, contestee not being responsible for that fact.") *with Hill*, 70 Wash. at 610-11 ("Neither of the candidates were responsible for the manner in which the vote got into the ballot box, and, both being innocent of wrongdoing, it would be an injustice to charge the error to either of them."). In both cases, the court required a contestant who sought to invalidate an election based on alleged illegal votes to prove that the winning candidate received those illegal votes. *Compare Jaycox*, 226 P. at 289 ("[I]t would seem incumbent on appellant to prove not only the illegal votes, but also for whom they were cast.") *with Hill*, 70 Wash. at 610 ("If this was an illegal vote, it was proper to show for whom the elector voted[.]"). And in both cases, the court was reluctant to create new rules to overturn an election, where no fraud was alleged or proven. *Compare Jaycox*, 226 P. at 289 ("There is a clear distinction between cases of fraud and corruption and a case like the present.") *with Hill*, 70 Wash. at 610 ("[N]o charges of fraudulent conduct or willful misbehavior are made or proven against any of the officers of the election who were guilty of the irregular conduct found by the commissioner.").

The Idaho Supreme Court's decision in *Jaycox* and similar decisions by other state supreme courts – though not binding on or necessary for this Court's decision given the provisions of Washington's election contest statutes and the Washington Supreme Court's decision in *Hill v. Howell* – aptly illustrate the inequity of speculative attribution that would



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permit a court to deduct votes from the sitting Governor to make up for the challenger's failure to provide that proof himself.

## IV. CONCLUSION

Washington election contests are governed by the statutes and decisions of this State. Petitioners ask this Court to adopt a new rule in the middle of this election contest – a rule based on law from other states with different election contest statutes. This Court should follow Washington law. For all the reasons set forth above, the Court should grant the Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes.

DATED: April 13, 2005.

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

DECLARATION OF WILLIAM C. RAVA IN SUPPORT OF WSDCC'S MOTION IN LIMINE TO EXCLUDE PETITIONERS' PROPOSED SPECULATIVE ATTRIBUTION OF ILLEGAL VOTES

I, WILLIAM C. RAVA, state and declare as follows:

1. I am one of the attorneys representing Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC") in this litigation. I am over the age of 18,



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am competent to testify, and make this declaration based on my personal knowledge and the files and records in this matter.

2. Attached to this declaration as Exhibit A is a true and correct copy of relevant excerpts of Petitioner Rossi for Governor Campaign's Objections, Answers, and Responses to WSDCC's First Interrogatories and Requests for Production, dated February 22, 2005.

3. Attached to this declaration as Exhibit B is a true and correct copy of excerpts of Petitioners' Responses and Objections to Respondent Secretary of State's Interrogatories and Requests for Production of Documents, dated April 8, 2005.

4. If the Court were to permit Petitioners to introduce their proposed speculative attribution, WSDCC would need additional discovery from various counties related to voter characteristics – such as age, prior political affiliation, gender, race, and other potentially statistically relevant traits – for legal and alleged illegal voters in identified precincts.

5. Attached to this declaration as Exhibit C is a true and correct copy of a printout of a page from the Secretary of State's website, located at http://vote.wa.gov/general/recout.aspx. The information on this page reflects the final figures for votes cast for the top two vote-getting candidates for governor in the 2004 general election: Governor Christine Gregoire and Dino Rossi. The total number of votes received by these two candidates was 2,746,593 votes.

6. Attached to this declaration as Exhibit D is a true and correct copy of the Verbatim Report of Proceedings (Court's Oral Decision) dated February 4, 2005.

SIGNED and DATED at Seattle, Washington this 13th day of April, 2005

*s/ William C. Rava*
WILLIAM C. RAVA



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# EXHIBIT A

THE HONORABLE JOHN E. BRIDGES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

| | |
|---|---|
| TIMOTHY BORDERS et al.,<br><br>Petitioners,<br><br>v.<br><br>KING COUNTY et al.,<br><br>Respondents,<br><br>and<br><br>WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,<br><br>Intervenor-Respondent. | No. 05-2-00027-3<br><br>**OBJECTIONS, ANSWERS, AND RESPONSES TO** WASHINGTON STATE DEMOCRATIC CENTRAL COMMMITTEE'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION TO PETITIONER ROSSI-FOR-GOVERNOR CAMPAIGN |

Petitioner Rossi-for-Governor Campaign (the "Rossi Campaign") provides the following objections, answers, and responses to the Washington State Democratic Central Committee's First Interrogatories and Requests for Production.

## GENERAL OBJECTIONS

1. The Rossi Campaign objects to Instruction No. 3 with regard to the instruction to "state all factual and legal justifications" supporting any objection or failure to answer as seeking to impose obligations beyond those required by the Civil Rules and as seeking work product. The Rossi Campaign will set forth its objections in compliance with the Civil Rules.



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governed by RCW 29A.68.100. In an effort to expedite the discovery process, however, the Rossi Campaign is willing to discuss and agree to a mutual exchange of such lists, to the extent the parties possess the information, in advance of the statutory deadline. In any event, the final list of illegal votes that will be the subject of this election contest shall be produced in accordance with RCW29A.68.100.

## INTERROGATORIES

**INTERROGATORY NO. 1:** Identify any Challenge you made to any person's right to vote in the 2004 General Election or Gubernatorial Election on or before Election Day.

**ANSWER:** The Rossi Campaign did not make any such challenges.

**INTERROGATORY NO. 2:** For any Challenge identified in response to Interrogatory No. 1, identify the person whose right to vote you Challenged.

**ANSWER:** Please see answer to Interrogatory No. 1.

**INTERROGATORY NO.3:** Do you contend any felon voted in the 2004 General Election. If so, state the basis for that contention and identify the following:

a. The felon;

b. The date that the county in which the felon voted learned of the felon's conviction;

c. Any facts indicating whether the felon has had his or her rights restored and, if they have been, the date the rights were restored;

d. What steps you took, if any, to determine if the person's rights had been restored;

e. Any facts indicating that the felon voted in the Gubernatorial Election; and

f. Any facts indicating which candidate the felon voted for in the Gubernatorial Election.



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**ANSWER:** Yes. The Rossi Campaign contends that at least 1108 felons who were not eligible to vote voted in the 2004 General Election. All felony-conviction records obtained by the Rossi Campaign regarding felons ineligible to vote who voted in the Gubernatorial Election are available for inspection in response to Request for Production No. 2. Alternatively, the Rossi Campaign is willing to make copies of such documents and provide them at the WSDCC's expense. Additional information identifying each felon is contained in the electronic voter databases maintained by the counties (hereinafter "Voter Files").

Subpart (b) is more appropriately directed to counties. If a felon was convicted in a particular county, then that county had notice of the conviction immediately.

Answering subparts (c) and (d), in searching the court records from which information regarding felony convictions was obtained, the Rossi Campaign searched for records indicating that the person's rights had been restored. From the Washington State Office of the Administrator of the Courts, the Rossi Campaign also obtained a list of all felons whose rights had been restored in King County. The list provided by King County is being made available in response to Request for Production No. 2

The Rossi Campaign objects to subparts (e) and (f) as vague and ambiguous in their reference to "any facts indicating" whether the person voted in the Gubernatorial Election or for which candidate the person voted. The Rossi Campaign's belief and contention that at least 1108 felons, who were ineligible to vote, voted is based on a comparison of information contained in conviction records with information contained in voter files. There are many facts that may "indicate" for whom these felons voted and that they cast votes in the Gubernatorial Election, including the particular ballots cast by a felon. If those ballots cannot be identified, a proportional analysis of for whom votes were cast in a particular precinct provides circumstantial evidence of the races in which and the candidates for whom felons voted in a particular precinct. The Rossi Campaign is also



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generally aware of media reports in which some felons purportedly indicated for whom they claim to have voted.

The Rossi Campaign is continuing to identify information regarding felons who voted illegally. The final list of illegal votes that will be the subject of this election contest will be produced in accordance with RCW29A.68.100.

**INTERROGATORY NO. 4:** Identify any communications you have had with any felon identified in response to Interrogatory No. 3.

**ANSWER:** The Rossi Campaign objects to this interrogatory as overbroad, unduly burdensome, and seeking information not likely to lead to admissible evidence. It would be unreasonably burdensome for the Rossi Campaign to attempt to determine if any campaign literature or fund-raising solicitations were directed to any of the felons who voted. Although some felons may have contacted the Rossi Campaign in connection with the election, the Rossi Campaign did not make a record of any such contacts and does not recall any specific communications with anyone known at the time of the communication to be a felon. The Rossi Campaign has not knowingly approached or communicated regarding the election with individuals it knew were felons. It is not aware of any communications with any particular felon as to whether that particular felon voted or for whom that felon claims to have voted.

**INTERROGATORY NO. 5:** Do you contend that any votes were cast in the name of a deceased person in the 2004 General Election? If so, state the basis for that contention, and identify the following:

a. The deceased person;

b. The date of death of the deceased person;

c. The date that the county in which the deceased person was registered learned of the deceased person's death;



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d. The person who voted in the name of the deceased person;

e. Any facts indicating that a vote was cast in the name of the deceased person in the Gubernatorial Election; and

f. Any facts indicating the candidate for which such a vote was cast in the Gubernatorial Election.

**ANSWER:** Yes. The Rossi Campaign contends that at least 45 ballots were cast in the names of deceased persons in the 2004 General Election. All death certificates obtained by the Rossi Campaign for persons identified in the Voter Files as having voted in the Gubernatorial Election are available for inspection in response to Request for Production No. 2. Alternatively, the Rossi Campaign is willing to make copies of such documents and provide them at the WSDCC's expense. Additional information identifying these persons is contained in the Voter Files.

Subpart (c) is more appropriately directed to counties. If the deceased person was registered in the county in which he or she died, then that county had notice of the voter's death on or before the date the county issued the death certificate or the report to the state Department of Health of deaths in that county.

Answering subpart (d), the Rossi Campaign is generally aware of media reports identifying some individuals who apparently cast ballots in the name of deceased individuals, but the Rossi Campaign does not have any personal knowledge as to the identity of any of the people who submitted ballots in the name of the deceased persons.

The Rossi Campaign objects to subparts (e) and (f) as vague and ambiguous in their reference to "any facts indicating" whether the person voted in the Gubernatorial Election or for which candidate the person voted. The Rossi Campaign's belief and contention that at least 45 ballots were submitted in the names of deceased persons and were counted is based on a comparison of information from death certificates with information from voter files. There are many facts that may "indicate" that these ballots contained votes in the Gubernatorial Election and for whom the votes were cast and counted including the



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particular ballots cast in the names of deceased individuals. If those ballots cannot be identified, a proportional analysis of for whom votes were cast in a particular precinct provides circumstantial evidence of the candidates for whom ballots on behalf of deceased persons were cast in that precinct. The Rossi Campaign is also generally aware of media reports identifying some individuals who purportedly cast ballots in the name of deceased individuals and the candidates for whom they claim to have voted.

The Rossi Campaign is continuing to identify information regarding ballots cast in the name of deceased individuals. The final list of illegal votes that will be the subject of this election contest will be produced in accordance with RCW29A.68.100.

**INTERROGATORY NO. 6:** Identify any communications you have had with any person who cast a vote in the name of any deceased person identified in Interrogatory No. 5.

**ANSWER:**

The Rossi Campaign objects to this interrogatory as overbroad, unduly burdensome, and seeking information not likely to lead to admissible evidence. It would be unreasonably burdensome for the Rossi Campaign to attempt to determine if any campaign literature or fund-raising solicitations were directed to unknown persons casting ballots in the name of deceased persons or any individuals identified in media reports as having purportedly voted in the name of a deceased person. Although some such individuals may have contacted the Rossi Campaign in connection with the election, the Rossi Campaign did not make a record of any such contacts and does not recall any specific communications with anyone known at the time of the communication to have cast a ballot in the name of a deceased person. The Rossi Campaign has not approached or communicated regarding the election with individuals it knew cast ballots in the name of a deceased person.



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**INTERROGATORY NO. 7:** Do you contend that any person cast a vote in the 2004 General Election and in an election held in any other state on Election Day? If so, state the basis for that content and identify the following:

a. The person;

b. The county or municipality in which the person was registered in any other state;

c. The date on which the county in Washington that issued a ballot to the person learned of the person's registration in any other state.

d. Any facts indicating that the person voted in the Gubernatorial Election; and

e. Any facts indicating which candidate the person voted for in the Gubernatorial Election.

**ANSWER:** Yes. The Rossi Campaign contends that at least 5 persons cast ballots in the 2004 General Election and an election held in another state on Election Day. The information requested in subparts (a) and (b) is provided in the attached Exhibit A. Subpart (c) is more appropriately directed to counties. The Rossi Campaign does not know the date on which Washington counties may have learned of a person's registration or voting in another state.

The Rossi Campaign objects to subparts (d) and (e) as vague and ambiguous in their reference to "any facts indicating" whether the person voted in the Gubernatorial Election or for which candidate the person voted. The Rossi Campaign's belief and contention that at least 5 people cast votes in the Gubernatorial Election in Washington and in an election in another state is based on a comparison of information in the voter files with information contained in similar records from other states. There are many facts that may "indicate" that these voters voted in the Gubernatorial Election and for whom they voted, including the particular ballots cast by such double voters. If those ballots cannot be identified, a proportional analysis of for whom votes were cast in a particular precinct



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provides circumstantial evidence of the candidates for whom the double voters in that precinct voted. The Rossi Campaign is continuing to identify information regarding ballots cast by double voters. The final list of illegal votes that will be the subject of this election contest will be produced in accordance with RCW29A.68.100.

**INTERROGATORY NO. 8:** Identify any communications you have had with any person identified in response to Interrogatory No. 7.

**ANSWER:**

The Rossi Campaign objects to this interrogatory as overbroad, unduly burdensome, and seeking information not likely to lead to admissible evidence. It would be unreasonably burdensome for the Rossi Campaign to attempt to determine if any campaign literature or fund-raising solicitations were directed to anyone now identified as a double voter. Although some such individuals may have contacted the Rossi Campaign in connection with the election, the Rossi Campaign did not make a record of any such contacts and does not recall any specific communications with anyone known at the time of the communication to have cast multiple votes. The Rossi Campaign has not approached or communicated regarding the election with individuals it knew cast multiple ballots.

**INTERROGATORY NO. 9:** Do you contend that any person cast more than one vote in the 2004 General Election? If so, state the basis for that contention and identify the following:

a. The person;

b. The date that the county in which the person voted learned that the person cast more than one vote;

c. Any facts indicating that the person voted in the Gubernatorial Election; and



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**REQUEST FOR PRODUCTION NO. 5:** Produce all documents referring or relating to training or procedures used by Republican Poll Watchers or Observers regarding the 2004 General Election or Gubernatorial Election, including but not limited to the initial count, machine recount, and hand recount of ballots.

**RESPONSE:** The Rossi Campaign objects to this request as vague and potentially overbroad in its reference to "all documents referring to relating to" the training or procedures identified. The Rossi Campaign also objects to the request as beyond the scope of permissible discovery and not reasonably calculated to lead to the discovery of admissible evidence and seeking information protected as work product or by the attorney-client privilege. The training given to or procedures used by observes has no tendency to make any fact at issue in this action more or less likely. The Rossi Campaign is not producing documents in response to this request.

**REQUEST FOR PRODUCTION NO. 6:** Produce all documents referred to in the Declaration of Julie M. Sund in Support of Election Contest Petition, the Declaration of Christopher L. Yetter in Support of Election Contest Petition, and Declaration of Michael Sheridan in Support of Election Contest Petition, including, but not limited to, any databases, "voter files," or analyses referred to therein.

**RESPONSE:** See objections and response to Request for Production No. 2.

Objections dated this 22nd day of February, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By _____
Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909



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# EXHIBIT B

SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

Timothy Borders, Thomas Canterbury, Tom Huff, Margie Ferris, Paul Elvig, Edward Monaghan, and Christopher Vance, Washington residents and electors, and the Rossi For Governor Campaign, a candidate committee,

Petitioners,

v.

Chelan County; Klickitat County; Klickitat County Auditor Diana Housden; Lewis County Auditor Gary Zandell; Snohomish County; Sam Reed, in his official capacity as Secretary of State for the State of Washington; Frank Chopp, Speaker of the Washington State House of Representatives; and Lieutenant Governor Brad Owen, President of the Washington State Senate,

Respondents,

Washington State Democratic Central Committee,

Intervenor Respondents,

v.

Libertarian Party of Washington State,

Intervenor Respondents.

***Honorable John E. Bridges***

No. 05-2-00027-3

RESPONDENT SECRETARY OF STATE'S

INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

**TO PETITIONERS**

**AND RESPONSES & OBJECTIONS THERETO**

*["Secretary of State's Discovery Requests To Petitioners"]*

TO: Petitioners Timothy Borders, Thomas Canterbury, Tom Huff, Margie Ferris, Paul Elvig, Edward Monaghan, Christopher Vance, and the Rossi For Governor Campaign,

AND TO: Davis Wright Tremaine LLP, Harry Korrell, and Robert Maguire, their attorneys.



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**INTERROGATORY NO. 21**: Please:

(a) identify each unlawful vote you claim was cast in the 2004 election but nonetheless was counted as a result errors, omissions, misconduct, neglect, wrongful acts, irregularities, or improper conduct of elections officials – including, to the extent available to you, the full name of the voter in whose name you claim that vote unlawful vote was cast, that voter's residence address, telephone number, voter ID or registration number, county voting precinct, and date of birth;

(b) for each vote you identify, briefly state the error, omission, misconduct, neglect, wrongful act, irregularity, or improper conduct you claim caused that unlawful vote to be counted (e.g., provisional ballot that was not validated, undervote that was improperly enhanced, ballot that was improperly duplicated, improper correction of error brought to election official's attention, etc.);

(c) for each vote you identify, state the candidate for whom you claim that vote was apparently cast in the 2004 Governor's election; and

(d) for each vote you identify, state every type of direct or circumstantial evidence you rely upon for your claim concerning the gubernatorial candidate for whom that vote was apparently cast (e.g., proportional analysis, statement by the voter, etc.).

To facilitate the prompt and orderly evaluation of the unlawful votes you claim were counted in the 2004 Governor's election, please provide your answers in the matrix format illustrated below.

**ANSWER**:

See the Matrix produced in answer to Interrogatory No. 14 ("Illegitimate, Illegal, & Invalid Votes"). In addition to the table, for which Petitioners have individual names, the following are identified as illegitimate, invalid and/or illegal votes, though Petitioners do not yet have names for the persons casting the ballots (either because the counties have not provided the names or because it is impossible to determine who cast the ballot): Provisional Ballots that were improperly cast directly into precinct vote counters and counted, instead of being sealed in envelopes to be processed and verified with other Provisional Ballots as required by law; ballots counted in excess of the number of lawfully registered voters who cast ballots in the election; Absentee Ballots that were cast by persons other than the registered voters to whom they were sent. Invalid or illegal votes



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counted as a result of these instances of misconduct, error, and irregularity were greater in number than the margin of votes separating Christine Gregoire and Dino Rossi. A proportional analysis of all of these votes, on a precinct by precinct basis, will indicate that this misconduct, error, and irregularity resulted in more votes being counted for Ms. Gregoire than were counted for Mr. Rossi, even though Mr. Rossi received the highest number of valid, legal votes.

| Error, etc. you claim caused that unlawful vote to be counted | County & precinct | Number of Unlawful Votes | Number of Votes to Be Deducted from Gregoire | Number of Votes to Be Deducted from Rossi |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

**INTERROGATORY NO. 22**: Please identify every person with any knowledge concerning your answer to Interrogatory Nos. 17-21 above, along with a brief description of the subject matter of that person's knowledge.

**ANSWER**: Objection. This Interrogatory's reference to "every person with any knowledge" is vague and overbroad and could be interpreted as improperly seeking attorney work product. The interrogatory could be read as seeking the identity of all those who have read media reports of the election have knowledge of the numerous instances of error, misconduct, or neglect that has been reported regarding the election. Similarly, representatives, employees, attorneys, consultants, and volunteers of political parties and campaigns involved in poll watching or in analyzing the election have knowledge of errors, neglect, or misconduct. Petitioners will not list each and every party and campaign representative, employee, attorney, consultant, and volunteer with such knowledge. Doing so would be unduly burdensome. If the Secretary of State provides more specific criteria for this interrogatory, Petitioners will respond accordingly.



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Petitioners interpret "every person with any knowledge" to mean every person with knowledge of the preparation of data for Interrogatory Nos. 17-21.

Without waiving these objections, Petitioners answer as follows:

Chris Yetter, has knowledge regarding the compilation and collection of the data in the Illegitimate, Invalid, & Illegal Vote Matrix attached as Exhibit B which demonstrates that election officials committed error, neglect or misconduct by counting illegal or invalid votes.

Records custodians of all counties, who maintained custody of voter and election records have knowledge of discrepancies, errors, neglect, or misconduct reflected in their records. Petitioners propose that the parties stipulate to the authenticity and admissibility of documents including those in Exhibit A attached hereto; however, if such stipulation cannot be reached, testimony from county officials and other witnesses may be required to establish the authenticity and accuracy of documents that demonstrate errors, neglect, or misconduct.

Dean Logan, Director, King County Records, Elections and Licensing Services, has knowledge of King County's provisional, absentee, and poll site ballot reconciliation efforts, attempts to resolve discrepancies regarding same, front-end polling place procedures, votes by convicted felons and non-citizens and whether King County cancelled the voter registrations of such persons, and votes in the name of deceased persons and whether King County removed such deceased persons from the list of eligible voters.

Bill Huennekens, King County Superintendent of Elections, has knowledge of King County's provisional, absentee, and poll site ballot reconciliation efforts, attempts to resolve discrepancies regarding same, front-end polling place procedures, votes by convicted felons and non-citizens and whether King County cancelled the voter registrations of such persons, and votes in the name of deceased persons and whether King County removed such deceased persons from the list of eligible voters.



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Garth Fell and Nicole Way, King County election workers, have knowledge of King County's provisional, absentee, and poll site ballot reconciliation efforts, attempts to resolve discrepancies regarding same, and uncounted valid ballots. Petitioners expect that discovery will identify other specific King County election workers with similar knowledge of errors, neglect, or misconduct and precinct election board members with knowledge of the counting of unverified provisional ballots and reconciliation discrepancies. Pat McCarthy, Pierce County Auditor, has knowledge regarding Pierce County's discrepancy and the unsuccessful effort to resolve that discrepancy, votes by convicted felons and whether Pierce County cancelled the voter registrations of such persons, ballots cast in name of deceased persons and whether Pierce County removed such persons from voter registration files, and uncounted valid ballots.

Bobbie Gagner, Benton County Auditor, has knowledge regarding votes by convicted felons and whether Benton County cancelled the voter registrations of such persons.

Greg Kimsey, Clark County Auditor, has knowledge regarding votes by convicted felons and whether Clark County cancelled the voter registrations of such persons.

Karen Flynn, Kitsap County Auditor, has knowledge regarding votes by convicted felons and whether Kitsap County cancelled the voter registrations of such persons.

Gary Zandell, Lewis County Auditor, has knowledge regarding votes by convicted felons and whether Lewis County cancelled the voter registrations of such persons and regarding the absentee ballots of Edward Monaghan and Mr. Monaghan's spouse having been cast by someone other than the Monaghans.

Norma Hickock-Brummett, Skagit County Auditor, has knowledge regarding votes by convicted felons and whether Skagit County cancelled the voter registrations of such persons.



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Bob Terwilliger, Snohomish County Auditor, has knowledge regarding votes by convicted felons and whether Snohomish County cancelled the voter registrations of such persons, and ballots cast in name of deceased persons and whether Snohomish County removed such persons from voter registration files.

Vicky Dalton, Spokane County Auditor, has knowledge regarding votes by convicted felons and whether Spokane County cancelled the voter registrations of such persons.

Kim Wyman, Thurston County Auditor, has knowledge regarding votes by convicted felons and whether Thurston County cancelled the voter registrations of such persons, and ballots cast in name of deceased persons and whether Thurston County removed such persons from voter registration files.

Shirley Forslof, Whatcom County Auditor, has knowledge regarding votes by convicted felons and whether Whatcom County cancelled the voter registrations of such persons.

Corky Mattingly, Yakima County Auditor, has knowledge regarding votes by convicted felons and whether Yakima County cancelled the voter registrations of such persons.

Edward Monaghan has knowledge regarding the absentee ballots of Edward Monaghan and Mr. Monaghan's spouse having been cast by someone other than the Monaghans.

Petitioners have the knowledge set forth in their Affidavits, and in the Affidavits of Julie Sund, Chris Yetter, and Michael Sheridan submitted in support of the Election Contest Petition.

Individuals who cast illegal votes (including felons, persons voting in the name of deceased individuals, persons voting more than once, and non-citizens casting ballots), as



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set forth by Petitioners in Exhibit B, have knowledge of the casting of their respective illegal votes.

**INTERROGATORY NO. 23**: Please identify every document that supports, is inconsistent with, or otherwise relates to your answer to Interrogatory Nos. 17-21 above.

**ANSWER**: Objection. This Interrogatory is overbroad in that it does not appear to be reasonably calculated to lead to the discovery of admissible evidence, and it seeks attorney work product. Discovery is ongoing, particularly with respect to documents outstanding from King County, and Petitioners will supplement this Answer and each subpart hereof to the extent required by the Civil Rules. Without waiving these objections and with this understanding, Petitioners identify the documents set forth in the attached Exhibit A.

***More Votes Than Voters***

*Your Election Contest Petition states that "Respondents counted many more votes than were cast by legitimate, registered voters" (2nd para., Sec. IV), that respondents' wrongful acts include "employing procedures that resulted in the counting of votes far in excess of the number of lawfully registered electors who participated in the election" (Sec. VIA, 1), and that "many, potentially thousands, more votes were counted than were cast by lawfully registered voters" (Sec. VI. B.1).*

*The following Interrogatory asks you to fully disclose your facts relating to those allegations in addition to the facts you disclosed in your answers to Interrogatory Nos. 13-23 above.*

**INTERROGATORY NO. 24**: With respect to the 2004 Governor's election, please:

(a) state the name of every county in which you claim more votes were counted than were cast by lawfully registered voters;

(b) for each county you list, state the total number of such votes you claim were counted in excess of the number of votes cast by lawfully registered voters;

(c) state whether you claim any of the gubernatorial candidates or their campaigns were in any way responsible for the counting of more votes than were cast by lawfully registered voters in the 2004 Governor's election – and if you claim any of them were, explain for each candidate or campaign exactly what you claim that responsibility was;



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# EXHIBIT C

Secretary of State SAM REED

## WASHINGTON STATE 2004 GENERAL ELECTIONS

Vote.Wa.Gov » 2004 General Elections » Recount Results

All Offices | Measures | Machine Recount | **Manual Recount** | Federal | Statewide | Legislative | Judicial

« Back

PRINT PAGE

Manual recount results are not final or official until certified by the counties. The results posted on this site are unofficial as some counties have not presented results to the county canvassing board for final certification. The Secretary of State is projecting that all counties will have certified results by December 23, 2004. After all counties have certified results, the Secretary of State will file an amended abstract of the manual recount returns that will be the final count of the Governor's race.

**MANUAL RECOUNT RESULTS**
39 of 39 counties reported.

**» View Manual Recount Results by County**
**» Manual Recount Voter Turnout/County Reporting Status**

**GOVERNOR**

| | Ballot Name | Party | Votes | Percentage | Gain/Loss |
|---|---|---|---|---|---|
| | Christine Gregoire | Democratic | 1,373,361 | 48.8730% | **+919** |
| | Dino Rossi | Republican | 1,373,232 | 48.8685% | **+748** |
| | Ruth Bennett | Libertarian | 63,465 | 2.2585% | **+50** |

3 Candidate(s)

Results last updated on: 12/23/2004 3:52:00 PM

**Additional Recount Information**

**NEWS RELEASES**
Agreement Reached on Tallying Electronic Ballots » 12-7-2004
Reed Orders Manual Recount » 12-6-2004
Reed to Issue Recount Order Monday » 12-4-2004

Reed Certifies 2004 General Election » 11-30-2004
Historic race demonstrates need for election reform » 11-24-2004

**GUIDELINES & FAQS**

Electronic Votes Agreement » 12-7-2004
Manual Recount Procedures - FAQ » 12-6-2004
Guidelines for Manual Recount in Governor Race » 12-4-2004
Why Numbers Change in a Recount - FAQ » 11-24-2004
Hand Recounts in Washington » 11-17-2004

**STATE SUPREME COURT PLEADINGS**

Democratic Party's Complaint »
Republican Party's Response »
Secretary of State's Response »
County Responses »
State Supreme Court Order » 12-8-2004



Washington Secretary of State
520 Union Avenue SE, PO BOX 40220, OLYMPIA WA 98504-0220
(360) 902-4180

# EXHIBIT D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

| | |
|---|---|
| TIMOTHY BORDERS, et al., Petitioners, vs. KING COUNTY and DEAN LOGAN, its Director of Records, Elections and Licensing Services, et al., Respondents, and WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, Intervenor-Respondent, and LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Intervenor-Respondent. | No. 05-2-00027-3 |

COPY

VERBATIM REPORT OF PROCEEDINGS
Court's Oral Decision

BE IT REMEMBERED that on the 4th day of FEBRUARY, 2005, the above-entitled and numbered cause came on for hearing before the HONORABLE JOHN E. BRIDGES at the Chelan County Auditorium, Wenatchee, Washington.

APPEARANCES

FOR THE PETITIONERS: Mr. Harry Korrell
Mr. Robert Maguire
Mr. Dale Foreman
Ms. Diane Tebelius

| | |
|---|---|
| FOR THE DEMOCRATIC CENTRAL COMMITTEE: | Ms. Jenny Durkan<br>Mr. Kevin Hamilton<br>Mr. Russell Speidel |
| FOR SECRETARY OF STATE: | Mr. Jeffrey Even<br>Mr. Tom Ahearne<br>Mr. John Pearson |
| FOR LIBERTARIAN PARTY: | Mr. Richard Shepard |
| FOR ASOTIN COUNTY: (Telephonically) | Mr. Ben Nichols |
| FOR BENTON COUNTY: | Ms. Rea Culwell |
| FOR CHELAN COUNTY: | Mr. Gary Riesen |
| FOR CLARK COUNTY: (Telephonically) | Mr. Curt Wyrick |
| FOR COLUMBIA COUNTY: (Telephonically) | Ms. Colleen Fenn |
| FOR COWLITZ COUNTY: (Telephonically) | Mr. Ron Marshall |
| FOR FERRY COUNTY: | Mr. James von Sauer |
| FOR GRANT COUNTY: | Mr. Stephen Hallstrom |
| FOR ISLAND COUNTY: (Telephonically) | Mr. Greg Banks |
| FOR JEFFERSON COUNTY: | Mr. David Alvarez |
| FOR KING COUNTY: | Mr. Thomas Kuffel<br>Ms. Janine Joly |
| FOR KITTITAS COUNTY: (Telephonically) | Mr. James Hurson |
| FOR KLICKITAT COUNTY: (Telephonically) | Mr. Tim O'Neill<br>Mr. Barnett Kalikow |
| FOR LEWIS COUNTY: (Telephonically) | Mr. Michael Golden |
| FOR LINCOLN COUNTY: (Telephonically) | Mr. Ron Shepard |

| | |
|---|---|
| FOR PIERCE COUNTY: | Mr. Daniel Hamilton |
| FOR PEND OREILLE COUNTY: (Telephonically) | Mr. Tom Metzger |
| FOR SKAGIT COUNTY: (Telephonically) | Mr. Don Anderson |
| FOR SNOHOMISH COUNTY: | Mr. Gordon Sivley |
| FOR SPOKANE COUNTY: (Telephonically) | Mr. Steve Kinn |
| FOR STEVENS COUNTY: (Telephonically) | Mr. Lloyd Nickol |
| FOR WAHKIAKUM COUNTY: (Telephonically) | Mr. Fred Johnson |
| FOR YAKIMA COUNTY: (Telephonically) | Mr. Martin Muench |

(Argument by counsel)

THE COURT: All right. I'm going to take up first what I'm going to call the intervenor's motion to dismiss for lack of subject matter jurisdiction. And, ladies and gentlemen, I think Ms. Sugg indicated that some of you in the back have a difficult time hearing. I really apologize for that, but we don't have a sound system in here and the county doesn't have enough money right now to pay for one, and if you'd like to put some money in a collection box at the back of the room today, we'd really like that. I'll do the best I can to speak up, but I have a cold that I can't get rid of, probably from lack of sleep, and I'm trying to not cough, so we'll see how this all works out and comes together.

So first I'd like to start with the intervenor's motion

to dismiss for lack of subject matter jurisdiction. And as I term the issue here, it is this. Does this Court and, for that matter, any court have subject matter jurisdiction to hear any petition contesting the outcome of an election for the governor of this state. The analysis starts with the Constitution. Article III of our state Constitution focuses on the executive department and Section 1 of Article III says this: The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature. As was first pointed out in the case of State v. Clausen in 1928, the Court observed that the governor is not merely part of the executive department but is in fact the supreme executive and possesses the supreme executive power in the State of Washington.

The issue here as to whether the courts of this state have subject matter jurisdiction to hear and determine an election contest involving the governor arises because of the language of one sentence in Article III, Section 4. I'm not going to read all of Section 4 to you. Counsel are well aware of what it says but, for instance, that article provides that if there is an election for governor and as a result of that election both candidates are tied, then the legislature will

decide which candidate will be the governor of the state.

The very next sentence then says this: Contested elections for such officers shall be decided by the legislature in such manner as shall be determined by law. And, ladies and gentlemen, this language in this particular section of Article III has not changed in the last 116 years since our Constitution was adopted in 1889. The language at issue and its meaning has never been addressed by any published opinion of any court in the State of Washington. The Washington State Democratic Central Committee, the intervenors here, and others argue that the courts of Washington lack subject matter jurisdiction to hear this election contest because the above-referenced language from the Constitution vests the power to consider election contests for governor exclusively with the legislature. And in support of that proposition, the Washington State Democratic Central Committee rely upon the language of Article III, Section 4 which again states: Contested elections for such officers shall be decided by the legislature in such manner as shall be determined by law.

In further support of their argument, the intervenors advise this Court that the Court should employ various rules of constitutional interpretation. First, the Court should look to the plain language of the text and accord it its reasonable interpretation. Second, when considering the plain

meaning of a constitutional provision, the text necessarily includes the words themselves, their grammatical relationship to one another as well as their context. And third, if a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or, for that matter, permissible. And fourth, constitutional provisions should be construed so that no clause, sentence or word shall be superfluous, void or insignificant.

In addition to the rules of constitutional construction, the intervenors rely upon the following: That in 1941, an election contest was filed against the election of Governor Langlie in this state and that that contest was filed in the Washington State legislature, that the legislature held a joint session as a judicial body to hear and determine election contests and that on a roll call vote of both houses, the legislature rejected a motion to refer the contest to a special joint committee for investigation.

The intervenors also point out that in 1949, another election contest, this time involving the commissioner of public lands, a state executive officer, was filed and that was also filed with the legislature and again the legislature did not grant the petition. The intervenors point out that some courts in other states have ruled that similar language in their state's Constitution requires election contests involving statewide executive officers to be held and handled

by the legislature and not by the courts.

And finally, the intervenors advance the grammatical argument that this sentence consists of two parts; the first part dictates the forum, that is, contested elections for such officers shall be decided by the legislature, with the second clause, in such manner as determined by law, referring to the standard that the legislature should employ in handling the contest. Finally -- and this Court does not intend that this summary be exhaustive as to all the legal arguments intervenors have advanced. The Washington State Democratic Central Committee argue that the legislature may not and has not delegated its duty to decide general election contests for statewide executive officers to the courts.

In response to all of these arguments, the petitioners in this case assert the following: That the same sentence that we've just discussed from Article III, Section 4 authorized the legislature to confer jurisdiction over election contests on and in the courts of this state, and petitioners' reading of this particular sentence is that the clause, in such manner as shall be determined by law, allows the legislature to delegate its power with respect to election contests for executive branch officers to the judicial branch.

Petitioners argue that the intervenor's interpretation of Article III, Section 4 runs counter to two common rules of statutory construction. First, it ignores the plain language

of the provision, that is, the Court will not add to or subtract from the clear language of the statute even if the Court believes that the legislature intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational. And, second, that the intervenor's interpretation would render part of the sentence superfluous, violating another rule of construction that the Court is required, when possible, to give effect to every word, clause and sentence of a statute or constitutional article. In essence, petitioners here are saying that although the legislature cannot delegate its power to make a law, the legislature can make a law to delegate its power.

Petitioners then point out that the legislature has exercised its constitutional authority by enacting legislation which confers jurisdiction over election contests with the courts and that RCW 29A.68.020 specifically provides that all election contests must proceed under 29A.68.010, and that statute, now recodified as 011, confers jurisdiction of election contests with any justice of the Supreme Court, judge of the Court of Appeals or judge of the Superior Court in the proper county.

The Secretary of State of our state advances the proposition that neither the text nor the history of Article III, Section 4 prohibits the legislature from allowing court

jurisdiction to hear statewide election contests. And further, that the Secretary of State asserts that in 1977, in recognition that jurisdiction for partisan election contests should not be in the partisan legislature, the legislature decided to extend the state's election contest statute to provide that all such election contests would be dealt with by the Court.

After reviewing Article III, Section 4, the various contest election statutes, the rules of construction and certainly, I think, all of the cases cited but focusing upon the following, State ex rel. Troy, T-r-o-y v. Yelle decided in 1947, Foulkes v. Hays decided in 1975, Yelle v. Bishop decided in 1959 and State ex rel. O'Connell v. Dubuque decided in 1966, this Court concludes that Article III, Section 4 conferred upon the legislature the authority to delegate the hearing of election contests and that in 1977 and thereafter, the legislature enacted an election contest statute conferring jurisdiction to hear all election contests upon those persons named in RCW 29A.68.011 which include again justices of the Supreme Court, judges of the Court of Appeals and judges of the Superior Court in the proper county.

Therefore, intervenor's motion to dismiss for lack of subject matter jurisdiction shall be dismissed. In doing so, this Court is mindful of the admonition of this state's Supreme Court. First, in Dumas v. Gagner, a case that was

decided earlier, the Court said this. It's a 1999 case. Election contests are governed by several general principles. Chief among them is the principle long followed by this Court that the judiciary should exercise restraint in interfering with the elective process which is reserved to the people in the state Constitution. Unless an election is clearly invalid, when the people have spoken, their verdict should not be disturbed by the courts.

In O'Connell v. Dubuque, our Court said this. We apprehend grave danger to our democratic institutions if it be the inexorable rule that, without regard to concepts of fair play and due process of law, the House and Senate of either the State Legislature or the Congress have exclusive jurisdiction to disqualify and unseat members thereof and that the courts are completely powerless in the premises. Conceding the separation of powers to be one of the keystones of freedom, we note, among other dangers, that should the courts be deemed utterly without jurisdiction, one political party can, if ruthlessly bent upon destruction of its opposition, disqualify and unseat all of its opposing members. And so, in summary, again the Court denies the intervenor's motion to dismiss for lack of subject matter jurisdiction.

The second motion consists of the intervenor's motion to dismiss for improper venue or, I think, in the alternative, to transfer venue to the Washington State Supreme Court or the

Thurston County Superior Court. The Court's going to deny this motion, also. 29A.68.011 requires that election contests must be brought in the appropriate court. And in this statewide election contest, it's argued by intervenors that Chelan County is not the appropriate court and, therefore, the appropriate venue. The argument is that the Washington State Supreme Court is the only appropriate court. 29A.68.011 provides, in part, that any judge of the Superior Court in the proper county may take appropriate action. This statute does not define the appropriate county.

It's important to note that the specific issue here is venue and not jurisdiction. And after our Supreme Court's ruling in Shoop, S-h-o-o-p v. Kittitas County, it's clear that the remedy of dismissal that the intervenors seek is not available but, rather, only the remedy of transfer if Chelan County does not have proper venue. RCW 4.12.025 instructs that in any action in which there is more than one defendant, venue is proper where any of the defendants reside at the time of the commencement of the action. Although the counties take the position that the venue statute with respect to public officials should apply, our courts have held that venue statutes should be read together such that a suit against multiple counties or county officials can be brought where venue is proper as to any one of those persons or entities. Chelan County is such a county because both the county as well

as its auditor have been named as defendants in this case.

If this Court's conclusion is correct that the courts of this state have subject matter jurisdiction of a statewide election contest, then pursuant to the language of 29A.68.011, this judge has concurrent jurisdiction with any other of the 176 judges of the Superior Courts of the State of Washington or 22 judges of the Courts of Appeals or the nine justices of the Supreme Court. There is no evidence in the record before this Court that would allow this Court to conclude that a transfer of this case to any other judge either of the Superior Court or of the Court of Appeals would satisfy the traditional notions of convenience of witnesses or the ends of justice.

And this Court also concludes that there is no authority, either pursuant to the statute or civil rules, that authorizes this Superior Court to transfer this case to the Supreme Court. And absent such directive in this regard -- preferably if there be a directive, it come directly from the Supreme Court -- this Court will not accept the invitation to transfer this case to the Supreme Court. And so again, in summary, the Court denies the intervenor's motion to dismiss as well as the counties' motions to dismiss for improper venue. Counsel, which matter would you like to address next?

(Argument by counsel)

THE COURT: Counsel, I'm ready to rule on this issue

unless someone feels they really have to say something. Okay. There are a series of issues before the Court and as soon as I rule, because it's almost 12:30, we'll take a noon recess. And I understand the issues are as follows generally: That the affidavits are not sufficient, that the Rossi Campaign is not a proper party and the issue of -- I think counsel have referred to it as timeliness, and I'm going to take up those issues not in any particular order, and I think I'll start with the Rossi Campaign as being a proper or a not proper party, and I think it's pretty clear they're not a proper party, but at this point in this case, they are as proper as the Washington State Democratic Central Committee or the Libertarian Party so I don't think it makes much difference whether they're in or they're out and I'm going to leave them in at this point. I'm mindful of the statute and that's why I say I don't think they are necessarily a proper party because 29A.68.011 defines these folks, as does 020.

With respect to timeliness, I'm going to deny the counties' motions for timeliness. I understand how and why the counties make these motions, the motion, of course, being that this action was not brought within ten days of the filing of the certificate of election. I have to make the threshold determination of what is meant by the certificate of election, whether it's the certificates issued by the county election officers or officials or it's that certificate contemplated by

Article III, Section 4 or perhaps it's even the certificate issued by the Secretary of State. And in this case I'm going to find that it should be the latest of those filings, that being, I think, in this case it was January 10th when the President of the Senate and the Speaker of the House signed the certificate of election for the governor. And in any event, the petitioners, of course, filed this action, I think, before that date, if I remember my dates correctly.

The next issues are two-fold and I don't -- and for you folks on the phone, I don't mean to give this short shrift. I'm going to actually because I'm going to address it a lot more thoroughly when the intervenors argue their motion to dismiss causes here because I think the two arguments overlap somewhat and I'm prepared to address it more thoroughly when we talk about the intervenor's motion to dismiss causes.

But here, as Benton County has pointed out, as Ferry County has pointed out, clearly there are some counties that are parties to this action that there have been no allegations really made to support an action against them and they will be dismissed out of this case. But I think more after looking at the causes and after looking at the petition and looking at the motions that have been filed to extricate themselves from this action by the counties, the Court's going to dismiss every county from this case. I don't see where the counties -- and this is not a criticism of the cluster of

prosecutors actually that we have here. I don't -- I can't see where their involvement -- the counties' participation is necessarily helpful to the Court and probably in the administration of justice or the efficient administration of justice, they're not necessarily helpful and are more burdensome.

To the extent that petitioners would argue the counties need to be in because of discovery, I don't read the election contest statute as requiring the counties in. I don't read the Pemberton case as suggesting the counties should be in and I think discovery can proceed whether the counties are in or they're out. In other words, I don't see any prejudice to petitioners in dismissing the counties from this action. Now, as I think Ferry County has pointed out, there may be folks who would like to stay in this action and that's certainly welcome, I'm sure, by everybody and they can do that, but they need to indicate that affirmatively, that they intend to stay in, because I think the Supreme Court is going to want to know who's in and who's out at some point in time.

So with respect to the counties' argument and, in summary, that the affidavits are not sufficient, I'm going to rule that the affidavits are sufficient for purposes of this particular motion and I'm going to explain why more fully -- and I'm sorry I do it this way -- but when the intervenors argue their motion to dismiss certain causes because I've

broken this down in some detail actually in that regard.

MS. DURKAN: Your Honor, when you said you were dismissing all the counties, would that include the county auditors as well?

THE COURT: Yes. I think -- and I'm not as smart as counsel in this case and certainly petitioners' counsel. I had the impression that one of the arguments made was that if the Court were to grant the relief, if the evidence was sufficient, the Court would be ordering a new election. Now, of course, that's an issue that we're going to decide this afternoon apparently, but I don't think it's necessary that the counties be in even if that was a remedy the Court could afford so -- because that's going to happen pursuant to state law, in any event.

MR. NICHOLS: Your Honor.

THE COURT: Yes. Who are we talking to?

MR. NICHOLS: Dan Nichols, Asotin County.

THE COURT: Mr. Nichols.

MR. NICHOLS: Your Honor, I don't think I've ever been so happy to hear that my comments were not needed or necessarily helpful. In light of that and by way of thanking you, I'd like to be asked -- I'd like to ask permission to go ahead and get on with my duties here and leave you folks to weightier matters there in Chelan County and on the phone.

THE COURT: Could you hang on just a second. I mean,

I'm only going to go about one more minute and we're going to be in recess.

MR. NICHOLS: Yes, sir.

THE COURT: I just don't want to hear any music, sir. Ms. Culwell.

MS. CULWELL: For clarification and for the record, you denied timeliness -- the motions on timeliness. Does that ruling apply to the affidavits submitted after the ten days?

THE COURT: No.

MS. CULWELL: Thank you, Your Honor.

THE COURT: With respect to any timeliness argument -- I don't think I actually need to rule on this. I don't think it's necessary, but I think the affidavits should be stricken for purposes of the counties' motion that were filed after the ten-day period as set by the legislature which I think, according to the certificate I have here, was January the 10th.

MS. CULWELL: Thank you, Your Honor.

THE COURT: You bet. Folks, is it okay if we take up at 1:30 again and try to finish this? Okay. For you ladies and gentlemen on the phone, the Court's going to be in recess. We'll take up at 1:30 this afternoon. Thank you very much. We're going to hang up.

(Noon recess taken)

(Argument by counsel)

THE COURT: All right. The Court will address this particular motion now and I have found this motion exceedingly difficult. And part of the difficulty, admittedly, is the amount of time that we all have had to deal with this subject. Dealing with the law is one thing, but in this case we're also dealing with some allegations that are set out either in the petition or, more specifically, set out in petitioners' affidavits in support of their election petition. And I would certainly like to have had more time to digest some of that, but I haven't had it and I don't have it. You folks don't have it because you need to move on to the next step here, which I think is the Supreme Court, and so I'm going to make a ruling. And to the extent I can, I'll address Mr. Hamilton's invitation to talk about some of these issues that are indeed important. And as a part of this decision, I will hearken back to the arguments this morning made by the counties as relates to insufficiency of the affidavits because that is a theme that carries through here, that is, the intervenor's motion to dismiss the causes.

Petitioners in this case filed their election petition on January 7th of this year and they filed at least, I think, 22 affidavits from electors pursuant to the statute, and the petition and the affidavits allege and allege generally, I think, that, first, election officials, including precinct election boards, failed to comply with state election law

requirements and that, for example, election officials allowed provisional ballots to be cast directly into the tabulating machines without first or, for that matter, ever determining that the voters casting the ballots were properly registered and had not previously voted.

Second, that election officials counted thousands of votes in excess of the number of persons who were credited as voting so that it can never be determined whether the ballots were cast by registered voters or, indeed, were each cast separately by a person who had not already voted. Third, that election officials accepted and counted ballots cast in the name of deceased persons. Fourth, that election officials accepted and counted ballots from persons who, under the Constitution, may not vote because of felony convictions. Five, that election officials accepted and counted absentee ballots signed by persons other than the registered voters to whom the ballots had been issued. Six, that election officials accepted and counted ballots by persons who also voted in other jurisdictions in the general election.

Seven, that the manner in which the election was conducted violated the rights of some of the voters of the State of Washington under the equal protection clause in that, for example, some counties, but not others, permitted the correction of election worker errors detected after the initial certification of county results, that some counties,

but not others, allowed third parties to solicit and present revised election documents in an effort to rehabilitate previously wrongfully rejected absentee ballots and that uniform standards were not applied between counties or between election officials in a single county regarding how and whether to count overvotes, that is, ballots filled out in a way as to suggest that the voter had voted for more than one candidate for governor. Also, apparent undervotes and apparent write-in attempts.

In support of their motion to dismiss, the intervenors in this case set forth a number of arguments which the Court now will attempt to address individually. First, the Washington State Democratic Central Committee assert that in order to prevail on this election contest, the petitioners must prove that the 2004 election for the office of governor was clearly invalid. In response to that argument, the Court will indicate this, that the Court believes that this argument is premature because the petitioners have not yet been put to their proof. Further, as observed by the Court in the Foulkes v. Hays case, a 1975 case, our Court discusses preponderance of the evidence in the case of negligence, and clear, cogent and convincing evidence in the case of fraud allegations in an election contest. Today I'm not determining what the burden of proof is. I just wanted to note that at least that discussion has been made.

Next, the intervenors assert that election contests must proceed under RCW 29A.68.020, not under 29A.68.011, and that election contests are limited to the specific causes enumerated in 020. The Court believes that the Foulkes case addressed those issues and our Court, again speaking through Justice Utter, clearly determined that even though a cause could not be maintained under the predecessor statute to 29A.68.020, it could be maintained under the predecessor statute to 29A.68.011.

The intervenors allege that limitations on illegal votes as grounds for an election contest exist under 29A.68.020 and in that regard, that any objection to the qualifications of a voter must have been made prior to or on the day of the election and that illegal votes must be attributable to Governor Gregoire in order for petitioners' allegations to have any merit here. 29A.68.020 provides, in part, as we have heard this afternoon, that illegal votes include, but are not limited to, first, more than one vote cast by a single voter and, secondly, a vote cast by a person disqualified under Article VI, Section 3 of our state Constitution. And subsection (c) provides that illegal votes do not include votes cast by improperly registered voters who were not properly challenged under 29A.08.810 and 820, statutes counsel have addressed this afternoon.

The Court concludes that to the extent that petitioners

are attacking votes on grounds of voter eligibility or qualifications to vote, the petitioners must first establish that each voter was challenged prior to or on the day of the November 2nd, 2004 general election. Based on the record before the Court, however, it is very difficult, if not impossible, at this stage to know the answer to that particular question. The Court, however, believes that the only reasonable interpretation of section (5)(a) and (5)(b) of 29A.68.020 is that such a challenge as provided by 29A.08.810 and 29A.08.820 does not pertain to, nor exclude from consideration in an election contest those references in subsection (5)(a)(i) and (ii), that is, more than one vote cast by a single voter and/or votes cast by persons disqualified under Article VI, Section 3.

In other words, such classification of illegal votes remain a valid cause for a contested election, subject, however, to 29A.68.100 and 29A.68.110. 29A.68.100 requires that no testimony may be received as to any illegal votes unless the party contesting the election delivers to the opposite party, at least three days before trial, a written list of the number of illegal votes and by whom given that the contesting party intends to prove at trial. No testimony may be received as to any illegal votes except as to such as are specified in the list. And secondly, with respect to 29A.68.110, no election may be set aside on account of illegal

votes unless it appears that an amount of illegal votes has been given to the person whose right is being contested, that, if taken from that person, would reduce the number of the person's legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes that may be shown to have been given to the other person.

This same requirement was recognized early in our state's history when in 1912 our Supreme Court in Hill v. Howell held that where there was no evidence to show for whom the elector voted and because both candidates were innocent of wrongdoing, the vote must be treated between the parties as a legitimate vote. Now, today the intervenors ask the Court to dismiss certain of these causes including allegations of illegal votes.

Although it may be problematical for petitioners to ultimately prevail based on a theory or cause of illegal votes, 29A.68.090 provides that initially, at least, at this stage of the proceedings, when the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that illegal votes were cast, that, if given to the person whose election is contested in the specified precinct or precincts, will, if taken from that person, reduce the number of that person's legal votes below the number of legal votes given to some other person for the same office. The

Court concludes that with respect to the causes asserted in this election petition by petitioners that relate to illegal votes, it would be premature at this point to grant the intervenor's motion to dismiss.

The next basis for intervenor's motion to dismiss relates to petitioners' allegations of misconduct. 29A.68.020 provides that one of the causes for an election contest is misconduct. More specifically, misconduct on the part of any member of any precinct election board. A precinct election board is comprised of the inspector, judge of election and other precinct election officers appointed by the county auditor to oversee the election proceedings at a given precinct or polling place. The misconduct reference in 29A.68.020 subsection (1) must be by one of these election officials.

And RCW 29A.68.070 instructs that no irregularity or improper conduct in the proceedings of any election board or any member of the board amounts to such malconduct as to annul or set aside any election unless the irregularity or improper conduct was such as to procure the person whose right to the office may be contested to be declared duly elected although the person did not receive the highest number of legal votes. After reading a number of Washington State Supreme Court cases dating from the early part of this century until now, it's clear that more election contests have been rejected than have

been successful. The reason, of course, is that there are some well-recognized presumptions, if not policy reasons, why elections should not be overturned. For instance, do we as voters and as constituents of candidates want to engage in what one judge referred to as seasons of discontent commencing the moment after the polls close on election day.

Our Supreme Court has observed that election officers are presumed to have complied with the duties required of them in an honest and careful manner. That was the Quigley case. And also in Quigley the Court noted that the returns of any election official are entitled to the presumption of regularity. Even our legislature has indicated in 29A.08.810 that registration of a person as a voter is presumptive evidence of his or her right to vote at any primary, general or special election. And in McCormick v. Okanogan County in 1978, the Supreme Court observed that informality or irregularity in an election that does not affect the result is not sufficient to invalidate the election.

Nevertheless, having noted those presumptions and those directives from our statutes, the Court believes that at this juncture in this case the Court should deny intervenor's motion to dismiss the alleged cause of misconduct. The Court concludes that pursuant to 29A.68.050, the facts alleged in the affidavits and verified petition, which if proven, are sufficient to meet a prima facie showing to support an

election contest under 29A.68.020 based on causes of misconduct and illegal votes. If the Court finds that, and I do, then this case should go forward at least at this point.

Next, the intervenors argue that many of the causes enumerated in the petition are insufficient to sustain an election contest and, more specifically, the intervenors claim there are at least five specific causes that petitioners assert which the Court should now dismiss, and I'm going to deal with those in the reverse order to how they were argued in the written materials. First, the intervenors move the Court to dismiss the petitioners' equal protection violations. I'm going to do that and I will dismiss the equal protection violations. This Court perceives that an equal protection violation claim should not survive a motion to dismiss when Washington State law provides a means by which a losing candidate for office may avail himself of this state's election contest laws. And further, that an equal protection argument should not, in view of this state's comprehensive contested election law, serve as a separate and distinct cause to overturn an election.

Next, the intervenors argue that the petitioners can only claim illegal votes of deceased persons to the extent that such registrations were challenged on or before election day. As indicated previously, this Court rejects that interpretation of 29A.68.020 subsections -- section (5) and

subsection (5)(a) and (b). In sum, the Court reads subsection (5)(b) to refer to illegal votes other than more than one vote cast by a single voter and votes cast by persons disqualified under Article VI, Section 3 of our Constitution. The intervenor's motion to dismiss this cause, other than I've indicated with respect to equal protection, then is denied.

Finally, petitioners allege causes that cannot be attributable to or against a candidate -- I'm sorry. Petitioners here allege causes that cannot be attributed to or against a candidate and discrepancies that do not allege illegal votes or misconduct and wrongdoing that may not be attributable to precinct election officers, all matters that are generally referenced in 29A.68.020 and 29A.68.011. In response, intervenors argue that all of these allegations are insufficient to sustain an election contest. In reliance upon this argument, intervenors point to 29A.68.020 which sets forth the causes for an election contest.

Certainly, petitioners' causes do not fall within 29A.68.020, but they do, at least, on a prima facie basis, fall within 29A.68.011, a statute entitled Prevention and Correction of Election Frauds and Errors. The Court concludes that this statute, by its terms, establishes separate causes for election contests which include wrongful acts in section (4), neglect of duty on the part of election officers in section (5) and errors or omissions in the issuance of a

certificate of election in section (6).

Besides the clear language of this statute, the Court concludes that the Foulkes v. Hays case is squarely on point factually and legally with the arguments advanced by petitioner and adopted by this Court, that petitioners are not limited just to those causes outlined in 29A.68.020. In summary then, intervenor's motion to dismiss will be denied. And, Mr. Hamilton, hopefully for the benefit of you folks, the Court has set this out so that you can have your plate full when you reach the Supreme Court.

MR. HAMILTON: Thank you, Your Honor.

THE COURT: You're welcome. Counsel, I think there's one more motion.

MS. DURKAN: There is, Your Honor, on remedy. Does the Court want to do it now or take a two-minute break?

THE COURT: Do you need a two-minute break?

MS. DURKAN: I wouldn't mind one if the court reporter wouldn't mind one, Your Honor.

THE COURT: Why don't we take a two-minute break.

MS. DURKAN: Thank you.

THE COURT: For folks on the phone, we're going to take two minutes.

(Brief recess taken)

THE COURT: Counsel, if you'll permit me, I'd like to elaborate with one more sentence on my decision with respect

to these causes, and I think I tried to be as plain as I could with respect to what I felt the statutory standard was relating to illegal votes. With respect to misconduct, whether that misconduct falls in 020 or 011, I think the standard is 29A.68.070, and so I want to say that so you folks have some sense of what I think the ultimate standard of proof is and what the petitioners have to show.

(Argument by counsel)

THE COURT: All right. The issue arises because in their prayer for relief contained in their election contest petition at page 10, petitioners ask the Court to direct that a new election be conducted as soon as practicable. And in response to that, intervenors filed a motion asking this Court to strike that specific requested relief. And I think the argument -- and I can't state it as eloquently as Ms. Durkan, but I believe the intervenor's argument is something like this, that assuming the judiciary -- sorry, that the judiciary -- I'm feeling as old as our Constitution here. That the judiciary has jurisdiction to decide an election contest for the office of governor, and assuming that the Court is the appropriate Court to hear the contest, does the Court have the authority to grant petitioners' request for a special election for governor.

And I know Mr. Korrell argues that this is premature, something I've talked about earlier, but my thought in that

regard is I don't think it is premature because the proofs here are not going to change what remedies may be available to the Court based on the petitioners' request and so I'm going to address the issue. Ms. Durkan argues that neither the Constitution, nor the election contest statute, nor the Court's equity jurisdiction provides for the extraordinary remedy of the Court ordering, if petitioners are successful, a special election for governor.

I would note first that the Foulkes case, which is indeed a case that I relied on heavily today, I'm sure to the consternation of the intervenors, has now been cited again to me by the petitioners, but at this time I'm going to distinguish the Foulkes case from what I have to decide here because in the Foulkes case, our Supreme Court was faced with the prospect of addressing the election of a county commissioner. And here, this Court is faced with a state executive officer and there are certain constitutional provisions that attach to a state executive officer.

First of all, our Washington State Constitution contains mandatory requirements for the manner in which the governor will be elected and that's Article I, Section 29. That particular section instructs that the provisions of the Constitution are mandatory, unless by express words they are declared to be otherwise. And Article III, Section 1 of our Constitution provides that the executive department -- that's

the governor here -- shall be severally chosen at the same time and place of voting as for members of the legislature. The Constitution requires that the election for governor be on the first Tuesday after the first Monday in November, unless otherwise changed by law.

And Article III, Section 10 outlines the procedure for succession to governor if the governor is removed and the requirement that the election for a new governor be at a general election. And RCW 29A.04.321 subsection (1) sets the dates and the times for general elections and provides that the office of governor is specific -- and I note that the office of governor is specifically omitted from the statewide general elections during odd-numbered years.

The Court concludes that the petitioners' request for -- to order, if they're successful, a statewide special election is not permitted by Washington's election contest statute, 29A.68.050, which happens to be up on the easel and, more particularly, not permitted by the Washington State Constitution. The Court notes that back in 1902 when we had a vacancy in the governor's office, our Supreme Court looked to the Constitution, not the Court's inherent powers to resolve how that vacancy was to be dealt with as far as elections were concerned. And so in response to the intervenor's motion, I'm going to grant the motion and the Court's going to strike that portion of the petition which requests what I call special

relief, that is, the Court order a new election. The Court doesn't have that authority either under the statute, the Constitution and the Court thinks it should not exercise it on grounds of equity.

(End of Court's Oral Decision)

STATE OF WASHINGTON )

: ss

County of Chelan )

I, LuAnne Nelson, a Certified Shorthand Reporter, and official reporter for Chelan County Superior Court, do hereby certify:

That the foregoing Verbatim Report of Proceedings was reported at the time and place therein stated and thereafter transcribed under my direction and that such transcription is a true, complete and correct record of the proceedings.

I further certify that I am not interested in the outcome of said action, nor connected with, nor related to any of the parties in said action or their respective counsel.

LuAnne Nelson
Official Court Reporter
CSR No. 299-06 NE-LS-OL-M464C7

THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

[PROPOSED] ORDER GRANTING WSDCC'S MOTION IN LIMINE TO EXCLUDE PETITIONERS' PROPOSED SPECULATIVE ATTRIBUTION OF ILLEGAL VOTES



**Perkins Coie** LLP
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THIS MATTER comes before the Court on Washington State Democratic Central Committee's ("WSDCC's") Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes (the "Motion"). The Court having reviewed the Motion, all briefing filed in support of or opposition thereto, and any reply, and all declarations filed in support of or in opposition to the Motion, and being fully advised in the premises, now, therefore, ORDERS that:

(1) Washington law requires that, in an election contest that contends under RCW 29A.68.110 that illegal votes were cast in sufficient number to change the result of the election, an election contestant must:

(a) prove that identified illegal votes were cast and;

(b) prove for which candidate each illegal vote was cast.

(2) Petitioners may not present evidence regarding the percentage of legal votes cast for a particular candidate in a precinct, county, or statewide, for the purposes of attempting to prove whether a particular candidate received illegal votes in that same precinct, county, or statewide in the same percentage they received legal votes cast. No votes shall be deducted from any candidate's total based on such evidence.

ENTERED this ____ day of _____ 2005.

_____
The Honorable John E. Bridges



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Presented by:

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April 13, 2005

*Via Electronic Delivery*

The Honorable John E. Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

**Re:** *Borders v. King County, et al.*
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed with this letter are copies of out-of-state cases and statutes and relevant treatise authority, referred to by Washington State Democratic Central Committee's Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes, filed today.

Yours truly,

William C. Rava

cc: All parties and counsel of record

WCR:ccs

Enclosures

[15934-0006/SL051020.275]

ALASKA STATUTES
Title 15. Elections.
Chapter 20. Special Procedures for Elections.
Article 3. Election Contests.

**➡Sec. 15.20.540 Grounds for election contest.**

A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election.

Current through all 2004 Sessions, Annotations through Opinions Decided
as of September 17, 2004.

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ALASKA STATUTES
Title 15. Elections.
Chapter 20. Special Procedures for Elections.
Article 3. Election Contests.

**➡Sec. 15.20.550 Jurisdiction and time for contest.**

The action may be brought in the superior court within 10 days after the completion of the state review.

Current through all 2004 Sessions, Annotations through Opinions Decided
as of September 17, 2004.

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ALASKA STATUTES
Title 15. Elections.

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A.R.S. § 16-672

Chapter 20. Special Procedures for Elections.
Article 3. Election Contests.

**➡Sec. 15.20.560 Judgment of court.**

The judge shall pronounce judgment on which candidate was elected or nominated and whether the question or proposition was accepted or rejected. The director shall issue a new election certificate to correctly reflect the judgment of the court. If the court decides that the election resulted in a tie vote, the director shall immediately proceed to determine the election by lot as is provided by law. If the court decides that no candidate was duly elected or nominated, the judgment shall be that the contested election be set aside. The provisions of this section and AS 15.20.540 and 15.20.550 are not intended to limit or interfere with the power of the legislature to judge the election and qualifications of its members.

Current through all 2004 Sessions, Annotations through Opinions Decided
as of September 17, 2004.

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ARIZONA REVISED STATUTES ANNOTATED
TITLE 16. ELECTIONS AND ELECTORS
CHAPTER 4. CONDUCT OF ELECTIONS
ARTICLE 13. CONTEST OF ELECTIONS

**➡§ 16-672. Contest of state election; grounds; venue**

**A.** Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office at a primary election, or the declared result of an initiated or referred measure, or a proposal to amend the constitution of Arizona, or other question or proposal submitted to vote of the people, upon any of the following grounds:

1. For misconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvass for a state election.

2. That the person whose right to the office is contested was not at the time of the election eligible to [FN1] the office.

3. That the person whose right is contested, or any person acting for him, has given to an elector, inspector, judge or clerk of election, a bribe or reward, or has offered such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise.

4. On account of illegal votes.

5. That by reason of erroneous count of votes the person declared elected or the initiative or referred measure, or proposal to amend the constitution, or other question or proposal submitted, which has been declared carried, did not in fact receive the highest number of votes for the office or a sufficient number of votes to carry the measure,

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amendment, question or proposal.

**B.** The contest may be brought in the superior court of the county in which the person contesting resides or in the superior court of Maricopa county.

**C.** In a contest of the election of a person declared elected to a state office or of an initiated or referred measure, constitutional amendment, or other question or proposal, which has been declared carried, the attorney general may intervene, and upon demand, the place of trial of the contest shall be changed to Maricopa county, if commenced in another county.

[FN1] So in original.

<<ARTICLE 13. CONTEST OF ELECTIONS>>

<For disposition of the subject matter or derivation of sections repealed, added, or transferred and renumbered by Laws 1979, Ch. 209, § § 2 to 5, effective January 1, 1980, see Disposition and Derivation Tables preceding Chapter 1.>

Current through the 2nd Regular and 2nd Special Sessions of the
Forty-Sixth Legislature (2004), and also includes election results from
the November 2, 2004 general election.

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Formerly cited as IL ST CH 46 ¶ 23-1.1a

*WEST'S* SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 10. ELECTIONS
ACT 5. ELECTION CODE
ARTICLE 23. CONTESTING ELECTIONS

**➡5/23-1.1a. Election contest--Statewide--Jurisdiction**

§ 23-1.1a. Election contest--Statewide--Jurisdiction. The Supreme Court shall have jurisdiction over contests of the results of any election, including a primary, for an elected officer provided for in Article V of the Constitution, and shall retain jurisdiction throughout the course of such election contests.

Current through P.A. 93-1096 of the 2004 Reg. Sess.

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PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES ANNOTATED
PURDON'S PENNSYLVANIA STATUTES ANNOTATED
TITLE 25. ELECTIONS & ELECTORAL DISTRICTS
CHAPTER 14. ELECTION CODE

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25 P.S. § 3326

ARTICLE XVII. RECOUNTS AND CONTESTS
(B) CLASSES OF NOMINATION AND ELECTION CONTESTS

**➡§ 3291. Classes of nomination and election contests**

The several classes of nominations at primaries and elections of public officers which may be contested in this Commonwealth are hereby distinguished and designated as follows, to wit:

Class I. Nominations and elections of the Governor and Lieutenant Governor of the Commonwealth.

Class II. Nominations and elections of electors of President and Vice-President of the United States and all officers of this Commonwealth, including Judges of the Courts (except Governor and Lieutenant Governor), who now are or hereafter shall be required to be nominated or elected by the electors of the State at large, and nominations of United States Senators.

Class III. Nominations and elections of judges of the several courts.

Class IV. Nominations and elections of Senators and Representatives in the General Assembly, and nominations of Representatives in Congress.

Class V. All other officers, whether nominated or elected by the qualified voters of counties, cities, boroughs, townships, wards, school districts, poor districts or any other division of the State.

Current through Act 2004-239 (End)

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**➡§ 3326. Proceeding before committee; unqualified voters; testimony; immunity**

When it is proven to the satisfaction of said committee that any person, not a legally qualified voter, voted at any such contested election, it shall be lawful for said committee to compel said voter to disclose, under oath, for which of the respective candidates he voted; but when the committee examines the witness on oath as to the person or persons for whom he voted, and said witness on such examination discloses the names of the persons for whom he voted at such election, he shall not afterwards be prosecuted for having illegally voted at such election.

CREDIT(S)

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1937, June 3, P.L. 1333, art. XVII, § 1726.

CONSTITUTIONAL PROVISIONS

1994 Main Volume

Const. Art. 7, § 8, provides: "In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceedings except for perjury in giving such testimony."

LIBRARY REFERENCES

1994 Main Volume

Witnesses 297(1).
Westlaw Topic No. 410.
C.J.S. Witnesses § 431.

25 P.S. § 3326, PA ST 25 P.S. § 3326

Current through Act 2004-239 (End)

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WYOMING STATUTES 1977
TITLE 22. ELECTIONS.
CHAPTER 17. CONTESTS.

**→§ 22-17-101 Right to contest elections; exception; grounds.**

(a) A qualified elector may contest the right of a person declared elected to an office in the elector's county, municipality, district or precinct, other than the office of state legislator, United States president and vice-president and presidential elector, on the following grounds:

(i) Misconduct or material negligence of an election official which affected the result of the election;

(ii) The person whose election is contested is not eligible to hold the office;

(iii) The person whose election is contested offered to give a bribe to a voter or election official to procure his election;

(iv) Illegal votes were counted or legal votes were not counted;

(v) The person whose election is contested violated the provisions of W. S.

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22-26-101 through 22-26-121.

Current through the 2004 special session (57th Legislature)

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**American Law Reports**
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**Annotation**

# ADMISSIBILITY OF PAROL EVIDENCE OF ELECTION OFFICIALS TO IMPEACH ELECTION RETURNS

C. C. Marvel

TABLE OF CONTENTS

Article Outline

Research References

- Total Client-Service Library References

Table of Jurisdictions Represented

Article

ARTICLE OUTLINE

§ 1. Generally

TABLE OF JURISDICTIONS REPRESENTED

ARIZONA

Oakes v Finlay (1898) 5 Ariz 390, 53 P 173--§ 1

COLORADO

Gray v Huntley (1925) 77 Colo 478, 238 P 53--§ 1

FLORIDA

Burke v Beasley (1954) (Fla) 75 So2d 7, 46 ALR2d 1381--§ 1

INDIANA

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46 A.L.R.2d 1385
**(Publication page references are not available for this document.)**

Weakley v Wolf (1897) 148 Ind 208, 47 NE 466--§ 1

KENTUCKY

Broaddus v Mason (1894) 95 Ky 421, 25 SW 1060--§ 1

Browning v Lovitt (1906) 139 Ky 480, 94 SW 661--§ 1

Hodges v Murray (1931) 240 Ky 127, 41 SW2d 923--§ 1

Land v Land (1931) 244 Ky 126, 50 SW2d 518--§ 1

Widick v Ralston (1946) 303 Ky 373, 197 SW2d 261, 198 SW2d 56--§ 1

MINNESOTA

Stemper v Higgins (1888) 38 Minn 222, 37 NW 95--§ 1

MISSISSIPPI

Word v Sykes (1884) 61 Miss 649--§ 1

NEW YORK

People ex rel. Stemmler v McGuire (1874, NY) 2 Hun 269--§ 1

OHIO

Dittrick v Kelly (1917) 20 Ohio NP NS 86, 27 Ohio Dec NP 500--§ 1

Smith v Rauh (1910) 14 Ohio CC NS 33, 32 Ohio CC 515--§ 1

State ex rel. Bambach v Markley (1907) 9 Ohio CC NS 561, 30 Ohio CC 113--§ 1

State ex rel. Conrad v Patterson, 84 Ohio St 89, 95 NE 780--§ 1

State ex rel. Figley v Conser (1902) 5 Ohio CC NS 119, 24 Ohio CC 270--§ 1

Taylor v Wallace (1876) 31 Ohio St 151--§ 1

ARTICLE

§ 1. Generally

The nature of election contests, and the rules of procedure and evidence relating thereto, are influenced to a great extent by statutes providing for the administration of elections, recounts, and contests. The statutes tend, from jurisdiction to jurisdiction, to be more often unique than standard. The cases involving election contests have for the most part been, of necessity, long and technical, and their results have frequently been determined upon a consideration of distinctive factors developed from many types of evidence, most of which might be characterized, in a broad sense, as extrinsic to the official returns.

The various rules of evidence which have been applied in election contests are, therefore, by no means consistent or easily reconciled. It has been said that the returns are the best evidence of the election results, except for the ballots themselves, providing their integrity has been preserved; [FN1] a concomitant proposition is that the returns cannot be impeached by parol evidence generally. Thus, apparently, in some instances the returns have been considered

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conclusive, at least apart from properly preserved ballots. However, the conclusiveness has varied with the particular circumstances and the statutory provisions applicable to particular circumstances; a safer rule, therefore, is the one that election returns and certificates of election generally constitute presumptive proof of the result of an election, which will prevail unless rebutted by proper evidence. [FN2] One is then brought back to the original question, namely, what is proper evidence. It would seem that firm rules in connection with the present subject cannot be drawn from the cases summarized herein, all of which fall within the strictly defined scope stated below.

The annotation is limited to the question of the admissibility of parol testimony of election officials to impeach election returns, and is not concerned with the question of the admissibility of their testimony merely to explain, corroborate, or support returns. Also, the annotation is confined to cases involving the admissibility of testimony to impeach the substance of the return, and not to cases involving impeachment of merely formal aspects of the return, such as the date. [FN3] It includes only cases involving the testimony of election officials, and not those involving the admissibility of their declarations. [FN4] Further, the testimony offered is assumed to have been material to the contest being litigated. [FN5]

One additional specific caveat: this annotation does not purport to cover the right of election officials to officially withdraw or amend their returns, but merely their right to testify in a contest in impeachment of their returns.

Only cases containing some contention or discussion concerning the admissibility of the evidence are included. Not considered are those cases in which it merely appears that such evidence was admitted, with no indication that any issue was raised concerning its admission.

Despite all the above warnings and qualifications, there is a considerable amount of judicial opinion to the effect that election returns are not impeachable by the parol testimony of election officials.

Although it was contended that ballots cast had not been correctly counted, and it was clear from the evidence that the integrity of the ballots themselves had not been preserved, the court in Oakes v Finlay (1898) 5 Ariz 390, 53 P 173, held that the court below had erred in receiving parol testimony of the election officials as to the contents of rejected ballots. Stating that it was not called upon to determine the correctness of the reasoning of the lower court, as based upon the testimony, the reviewing court emphasized that what was resisted was the right of the court below to make any finding or arrive at any conclusion in regard to the ballots on any other evidence than the ballots themselves. The court said that the return constituted the highest evidence of the election, with the one single exception of the recount in court of the identical ballots that were cast, and that the return could not be overturned or set aside upon any other evidence than upon such a recount.

In an election contest in which the ballots themselves were held inadmissible to impeach the returns where the integrity of the ballots had not been established, the court held, also, in Burke v Beasley (1954) (Fla) 75 So2d 7, 46 ALR2d 1381, that the trial court had properly refused to admit the testimony of election managers for the purpose of impeaching the official return, under the rule that the parol testimony of election officers cannot be used to impeach their own official returns.

It was held in Land v Land (1931) 244 Ky 126, 50 SW2d 518, that the result of an election cannot be shown by parol evidence of election officers or other witnesses to the count, even if the court refuses to count the ballots and thereby obtain the best evidence of the error, and even though the verbal testimony was supported by what purported to be an original tally sheet.

In Browning v Lovitt (1906) 139 Ky 480, 94 SW 661, it appeared that the certificate of returns from a particular precinct signed by all the election officers for the precinct gave a different vote than a certificate signed by the sheriff, and it appeared also that the ballots from that precinct had been tampered with, and therefore might not be recounted. Nevertheless, testimony of two of the election officers as to the incorrectness of the certificate signed by them was held to be inadmissible; noting that their testimony given some months after the election was from memory only, the court stated that "an officer of election will not be permitted to contradict in this manner pending a contest a solemn writing signed by him at the close of an election." The court stated also that the action of the trial court in accepting the certificate of the election officers was entirely proper, since the certificate was the very best evidence obtainable of the result, where the ballots had been stolen. The court distinguished the case of Broaddus v Mason (1894) 95 Ky 421, 25

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SW 1060, in which the parol testimony of election officers was held admissible to explain and corroborate the tally paper which was in contravention of their return, on the ground that the evidence was presented not to show that the votes had been miscounted, but merely that the election officers had made a mistake in adding up the votes.

See also Smith v Rauh (1910) 14 Ohio CC NS 33, 32 Ohio CC 515, and Dittrick v Kelly (1917) 20 Ohio NP NS 86, 27 Ohio Dec NP 500, affd Dittrick v Andrews, 7 Ohio App 363, both infra.

However, in some circumstances, at least, the courts have held admissible parol testimony of election officials which was apparently in impeachment of official returns.

Recognizing that as a general rule judges and clerks of elections cannot impeach their own certificates by oral evidence, even though oral evidence is generally admissible to go behind the returns to judge of their validity, the court in Smith v Rauh (1910) 14 Ohio CC NS 33, 32 Ohio CC 515, nevertheless held that the testimony of election officers was admissible to show that, on a local option issue, the vote which had been certified to be for the "drys" was in fact the vote cast by the "wets," and vice versa, where tally sheets and certificates, all certified by the same officers, were at variance, and the evidence was required to resolve the conflict. Upon appeal in 84 Ohio St 469, 95 NE 1154, the court affirmed judgment below without opinion, citing as authority State ex rel. Conrad v Patterson, 84 Ohio St 89, 95 NE 780, in which the court had indicated that oral testimony would be admissible generally to show how disputed ballots which had been destroyed had been voted.

In Stemper v Higgins (1888) 38 Minn 222, 37 NW 95, it was held not error to receive parol evidence of the judges of a town election as to the number of votes actually cast, counted, and publicly declared for the several candidates, where one of the grounds of the contest was that in making the return, votes cast and counted for one contestant had by mistake been assigned to another candidate. The court stated that the return was not conclusive, and that, where the ballots themselves had not been so protected from possible corruption that they could be deemed legally preferable to the parol evidence, the parol evidence became admissible.

It was held in People ex rel. Stemmler v McGuire (1874, NY) 2 Hun 269, affd without op 60 NY 640, that the testimony of poll clerks respecting the vote cast was admissible to impeach the return of the canvassers, although it was contended that the canvassers' certificate should not be overthrown simply by the oral evidence of other witnesses. The court took the position that to hold otherwise would be to encourage fraudulent elections, and that no different measure of evidence should be required to establish fraud or official misconduct in cases concerning proceedings under the election laws than in cases involving other rights and interests.

In upholding the admissibility of testimony of various election officials, in an election contest, respecting the manner in which various ballots had been marked and counted, the court in Dittrick v Kelly (1917) 20 Ohio NP NS 86, 27 Ohio Dec NP 500, affd Dittrick v Andrews, 7 Ohio App 363, stated that judges and clerks of elections are not permitted to take the stand and swear that their returns were false and untrue, but that they may properly testify as to the manner in which certain ballots were counted.

Attention is called to Widick v Ralston (1946) 303 Ky 373, 197 SW2d 261, 198 SW2d 56, in which the court, in holding that certain votes should be invalidated because the voters exposed their ballots after voting, thus violating their requisite secrecy, held also that the testimony of an election officer was competent to show how exposed ballots were voted, the court not discussing the question of impeachment of returns.

Similarly, testimony of election officials has been held admissible where the ballots had been destroyed. Testimony of election officials that they had by mistake of law rejected certain ballots, all of which subsequently had been destroyed, was held admissible in State ex rel. Figley v Conser (1902) 5 Ohio CC NS 119, 24 Ohio CC 270. Although it was contended that parol evidence is not competent to prove the contents of rejected and destroyed ballots, the court stated that it had always been held that where the ballots are destroyed, or where it is impossible to produce them in court, the next best evidence is competent, following the general rule that where the best evidence is unattainable, the next best may be resorted to.

However, in a case where ballots had been legally destroyed according to detailed statutory direction, parol testimony of officials impeaching returns was held inadmissible, on the ground that the returns must have been

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intended by the statute to be conclusive after the destruction of the ballots. Thus, where the election law provided that ballots bearing distinguishing marks or mutilations should be void, but that on protest of any member of the election board, any such ballot and all disputed ballots should be preserved, it was held in Weakley v Wolf (1897) 148 Ind 208, 47 NE 466, that parol testimony of election officers that certain ballots having distinguishing marks had been wrongfully counted, but had subsequently been destroyed because not protested, was held inadmissible. The court approved a statement of the trial judge that it was intended by the above statute that the record made by the election officers in counting the ballots should be conclusive, except where protests are made and exceptions properly taken. The court stated that the tally sheets and certificates of the election officers were made a conclusive record as to how the unprotested ballots were cast and counted, and that if it had been the intention of the legislature that any evidence should ever be given as to those ballots which had been counted without protest from any member of the election board, it would never have been provided that such ballots, showing on their face and without the possibility of a doubt, how they had been voted, and what marks, if any, were upon them, should be destroyed. Under any other construction of the statute, the court would be compelled to determine, as best it could, from the uncertain memory of one or more members or clerks of the election board, weeks or months afterward, how such ballots had been voted and whether or not the markings were such as to make the ballots or any of them illegal.

Attention is called to State ex rel. Bambach v Markley (1907) 9 Ohio CC NS 561, 30 Ohio CC 113, affd without op 76 Ohio St 636, 81 NE 1190, in which oral evidence to identify disputed ballots which had been destroyed by the election judges, and which were not required by statute to be destroyed, and oral evidence indicating for whom said ballots had been cast, was held to be admissible; it did not appear by whom the testimony had been made. The court stated that the legislature, by providing that all the ballots which had been counted and read should be destroyed, intended, by such destruction of the best evidence, that the decision of the election judges should be final, but that, as to all ballots that were not required to be destroyed, oral evidence was competent to show how they came to be destroyed, whom they were voted for, and how they were marked.

Research References

Total Client-Service Library References

The following references may be of related or collateral interest to a user of this annotation.

ALR Digest Evidence § 840.

[FN1]. See the summaries of cases, infra.

[FN2]. See 18 Am Jur, Elections § 302.

[FN3]. See, for example, Hodges v Murray (1931) 240 Ky 127, 41 SW2d 923, and Taylor v Wallace (1876) 31 Ohio St 151.

[FN4]. See, for example, Word v Sykes (1884) 61 Miss 649.

[FN5]. See, for example, as a kind of case excluded from the present discussion, Gray v Huntley (1925) 77 Colo 478, 238 P 53, in which testimony of an election official as to miscounts in the election of candidates other than those involved in the contest being litigated was rejected as immaterial.

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# CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE

AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

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Editor-in-Chief

and

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## Volume 29

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the trial of contested elections shall be conducted, the legislature is given broad power with respect to the trial of election contests and the manner of procedure.[18]

A constitutional provision authorizing the legislature to provide for the mode of contesting elections in all cases not otherwise specifically provided for in the constitution itself confers on the legislature adequate authority to provide for all election contests and to determine where and by what means election contests shall be conducted, and under such a constitutional provision the legislature is not limited to requiring that such contests be had before the courts established by the constitution, and it is generally held that, unless the constitution forbids, the legislature may refer such contests to any court or tribunal of its selection.[19]

Provisions for election contests may be repealed by the enactment of other provisions in irreconcilable conflict with them[20] or by the omission in a later act of provisions of the earlier act.[21]

## § 246. Remedy at Common Law

**At common law there is no right to contest an election; the only remedy is quo warranto.**

**Library References**

Elections ⇐269.

The right to contest an election is not a common-law right.[22] Elections belong to the political branch of the government, and, in absence of special constitutional or statutory provisions, are beyond the control of the judicial power.[23] In the absence of any statutory proceeding the only remedy in the nature of an election contest known to the common law is quo warranto, or in modern practice an information in the nature of quo warranto.[24]

The use of mandamus in election cases is discussed in Mandamus § 142. Actions for a declaratory judgment in connection with elections are considered in Declaratory Judgments § 79.

## § 247. Statutory Remedies

a. In general
b. Exclusiveness of remedy

### a. In General

**The right to contest an election exists only under constitutional and statutory provisions, and the procedure prescribed by statute must be strictly followed. Election contest statutes are to be construed to effect the intention of the legislature.**

**Library References**

Elections ⇐269 et seq.

In the various jurisdictions provision has been made by statute for the contest of elections or of particular elections.[25] The right to contest an elec-

18. Ohio.—Foraker v. Township of Perry Rural School Dist. Board of Education, 199 N.E. 74, 130 Ohio St. 243.

19. Ark.—Stafford v. Cook, 252 S.W. 597, 159 Ark. 438.
Tribunal having jurisdiction to hear election contest see infra § 252.

20. Mont.—Wilkinson v. La Combe, 197 P. 836, 59 Mont. 518.

21. La.—Chisholm v. Hinson, 5 La. App. 334.

22. U.S.—**Corpus Juris Secundum cited in** Johnson v. Stevenson, C.A. Tex., 170 F.2d 108, 110, certiorari denied 69 S.Ct. 491, 336 U.S. 904, 93 L.Ed. 1069.
Ala.—Cosby v. Moore, 65 So.2d 178, 259 Ala. 41.
Ariz.—Griffin v. Buzard, 342 P.2d 201, 86 Ariz. 106—Grounds v. Lawe, 193 P.2d 447, 67 Ariz. 176.
Cal.—Castle Rural County Fire Protection Dist. v. Superior Court in and For San Joaquin County, 234 P.2d 726, 105 C.A.2d 816.
Ill.—Fiegenbaum v. McFarlane, 77 N.E.2d 816, 399 Ill. 367—Flake v. Pretzel, 46 N.E.2d 375, 381 Ill. 498—Wood v. Hartman, 45 N.E.2d 864, 381 Ill. 474.
Ind.—State ex rel. Watson v. Pigg, 46 N.E.2d 232, 221 Ind. 23—Gordon v. Corning, 92 N.E. 59, 174 Ind. 337.
Ky.—Napier v. Neplis, 318 S.W.2d 875—Craft v. Davidson, 224 S.W. 1032, 189 Ky. 378.
Mo.—Nichols v. Reorganized School Dist. No. 1 of Laclede County, 254 S.W.2d 9—Wann v. Reorganized School Dist. No. 6 of St. Francois County, 293 S.W.3d 408.
Mont.—State ex rel. Palagi v. Regan, 126 P.2d 818, 113 Mont. 343.
N.H.—**Corpus Juris Secundum cited in** Stickney v. Town of Salem, 78 A.2d 921, 922, 96 N.H. 500.
N.M.—Montoya v. McManus, 362 P.2d 771, 68 N.M. 381.
W.Va.—**Corpus Juris Secundum cited in** State ex rel. Myers v. Garner, 133 S.E.2d 82—**Corpus Juris Secundum cited in** State ex rel. Daugherty v. County Court of Lincoln County, 31 S.E.2d 321, 323, 127 W. Va. 35.
20 C.J. p 222 note 30.

23. N.M.—**Corpus Juris Secundum quoted in** Reese v. Dempsey, 152 P.2d 157, 164, 48 N.M. 417.
N.D.—**Corpus Juris quoted in** State v. Sherman, 245 N.W. 877, 879, 63 N.D. 9.
20 C.J. p 209 note 63.
Jurisdiction of courts to hear election contests see infra § 252.
Matters relating to elections as political questions generally see Constitutional Law § 148.

24. U.S.—Johnson v. Stevenson, C.A. Tex., 170 F.2d 108, certiorari denied, 69 S.Ct. 491, 336 U.S. 904, 93 L.Ed. 1069.
Or.—Tazwell v. Davis, 130 P. 400, 64 Or. 325.
20 C.J. p 209 note 62.

25. Del.—State ex rel. Mitchell v. Wolcott, 83 A.2d 762, 7 Terry 368.
Ky.—Hatcher v. Ardery, 242 S.W.2d 105—**Corpus Juris cited in** Craft v. Davidson, 224 S.W. 1032, 1033, 189 Ky. 378.
La.—Downs v. Pharis, 124 So.2d 553, 240 La. 580—State ex rel. Vullo v. Plaquemines Parish Police Jury, 115 So.2d 368, 238 La. 328.
Minn.—Bank v. Egan, 60 N.W. 257, 240 Minn. 192.
N.M.—Reese v. Dempsey, 152 P.2d 157, 48 N.M. 417.
Pa.—In re Election Returns, Third Precinct, Second Ward, Borough of Ambridge, Com.Pl., 18 Beaver 8—Appeal from Board of Elections, Com.Pl., 38 Luz.Leg.Reg. 324—Appeal of Waltman, Com.Pl., 59 York Leg.Rec. 161.

tion is not a natural right,[25.5] but it exists only under constitutional or statutory provisions,[26] and one seeking relief under such provisions must bring himself strictly within their terms.[27] A particu-

Tenn.—Peeler v. State ex rel. Beasley, 231 S.W.2d 321, 190 Tenn. 615—State ex rel. Robinson v. Hutcheson, 171 S.W.2d 282, 180 Tenn. 46, 168 A.L.R. 850.

Tex.—Maddox v. Commissioners Court of Palo Pinto County, Civ.App., 222 S.W.2d 475.

W.Va.—Evans v. Charles, 56 S.E.2d 850, 133 W.Va. 463.

20 C.J. p 210 note 31.

**Contest after recount**

(1) Under statute governing contests of elections, if procedure for obtaining a recount of ballots before certificate of election has been issued is followed, a general contest may also be instituted as a separate proceeding.

Ky.—Wright v. Crase, 119 S.W.2d 868, 274 Ky. 628.

(2) The fact that contestant of election to office of city commissioner asked for statutory recount did not estop him to maintain statutory contest for fraud for receipt of illegal votes, but he could avail himself of both remedies.

N.J.—Richardson v. Radics, 35 A.2d 425, 21 N.J.Misc. 466, reversed on other grounds 37 A.2d 293, 131 N.J. Law 406.

**Contest in case of tie vote**

(1) The legislative intent manifested by the contested election statute is sufficiently broad to authorize an election contest where the candidates have tied, and the statutory provision concerning proceedings in case of tie in an election, and requiring such election to be held void and another election ordered, does not have the effect of making the tally of votes returned uncontestable where votes appear from such return to be equal, if, in fact, by a true count of legal votes cast, the votes were unequal, and one of the candidates was actually elected.

Tex.—Beeler v. Loock, Civ.App., 135 S.W.2d 644, error dismissed.

(2) Persons who may contest election in case of tie vote see infra § 263.

**Correction of count**

Statutory election contest proceeding affords sufficient remedy by which circuit court can investigate and determine not only legality of votes cast, but can correct any inaccuracies in count of ballots by having ballots brought into court and examining contents of ballot boxes if properly preserved.

Fla.—State ex rel. Peacock v. Latham, 169 So. 597, 125 Fla. 69.

**Nature and form of contest**

Election contest is in form a creature of statute and a statutory contest of election to state office is in substance, although not in form, quo warranto proceeding, although proceedings may be instituted before actual entry in office.

S.D.—Warren v. Brown, 234 N.W. 38, 57 S.D. 528.

Definition and nature of election contest see supra § 1(10).

25.5 La.—Caswell v. Hoft, App., 119 So.2d 864.

20 C.J. p 222 note 30.

Right at common law see supra § 246.

26. Ala.—Cosby v. Moore, 65 So.2d 178, 259 Ala. 41.

Ariz.—Griffin v. Buzard, 342 P.2d 201, 86 Ariz. 166—Harless v. Lockwood, 332 P.2d 887, 85 Ariz. 97, 68 A.L.R. 2d 1314—Brown v. Superior Court In and For Santa Cruz County, 303 P.2d 990, 81 Ariz. 236—Grounds v. Lawe, 193 P.2d 447, 67 Ariz. 176—Sorenson v. Superior Court in and for Maricopa County, 254 P. 280, 31 Ariz. 421.

Ark.—Casey v. Burdine, 217 S.W.2d 618, 214 Ark. 680.

Cal.—Alden v. Superior Court In and For San Luis Obispo County, App., 28 Cal.Rptr. 387—Castle Rural County Fire Protection Dist. v. Superior Court In and For San Joaquin County, 234 P.2d 726, 105 C.A.2d 816—Howe v. Board of Sup'rs of San Diego County, 6 P.2d 38, 118 C.A. 306.

Ill.—Whitney v. Frazier, 171 N.E.2d 644, 21 Ill.2d 292—Doelling v. Board of Ed. of Community High School Dist. No. 88, Washington County, 160 N.E.2d 801, 17 Ill.2d 145—Fiegenbaum v. McFarlane, 77 N.E. 2d 816, 399 Ill. 367—Wagler v. Stoecker, 66 N.E.2d 408, 393 Ill. 560—Patterson v. Crowe, 53 N.E. 2d 415, 385 Ill. 514—Wood v. Hartman, 45 N.E.2d 864, 331 Ill. 474—People ex rel. McLaren v. DeBoice, 37 N.E.2d 337, 377 Ill. 634—Kohout v. Rench, 172 N.E. 809, 340 Ill. 470.

People of City of Olney v. City of Olney, 53 N.E.2d 728, 322 Ill.App. 43.

Ind.—State ex rel. Howard v. Lake Circuit Court, 121 N.E.2d 647, 233 Ind. 459—State ex rel. Watson v. Pigg, 46 N.E.2d 232, 221 Ind. 23.

Ky.—Napier v. Noplis, 318 S.W.2d 875—Lyon v. Holbrook, 316 S.W.2d 862—Brock v. Saylor, 189 S.W.2d 688, 300 Ky. 471—Davis v. Stahl, 154 S.W.2d 736, 287 Ky. 629—North East Coal Co. v. Johnson County Fiscal Court, 143 S.W.2d 1063, 284 Ky. 121—Kinner v. Zachem, 117 S. W.2d 943, 273 Ky. 758—Campbell v. Mason, 106 S.W.2d 100, 269 Ky. 128—Gallagher v. Campbell, 102 S.W.2d 340, 267 Ky. 370—Gross v. Ball, 81 S.W.2d 409, 258 Ky. 730—Colvin v. Mills, 284 S.W. 115, 214 Ky. 812—Dodge v. Johnson, 276 S. W. 884, 210 Ky. 843.

La.—Downs v. Pharis, 124 So.2d 553, 240 La. 580—Porter v. Conway, 159 So. 725, 181 La. 487—Reid v. Brunot, 96 So. 43, 153 La. 490.

Zibilich v. Orleans Parish Democratic Executive Committee, App., 129 So.2d 860.

Minn.—Christenson v. Allen, 119 N. W.2d 35, 264 Minn. 395.

Mo.—Wann v. Reorganized School Dist. No. 6 of St. Francois County, 293 S.W.2d 408—State ex rel. Penrose v. Killoren, 188 S.W.2d 1, 354 Mo. 22—State ex rel. Jackson County v. Waltner, 100 S.W.2d 272, 340 Mo. 127.

Felker v. City of Sikeston, App., 334 S.W.2d 754—Davenport v. Teeters, App., 272 S.W.2d 506.

N.J.—Burkett v. Francesconi, 23 A. 2d 780, 127 N.J.Law 541.

N.M.—State ex rel. Denton v. Vinyard, 230 P.2d 238, 55 N.M. 205—Montoya v. Gurule, 36 P.2d 1118, 39 N.M. 42.

Ohio.—State ex rel. Shriver v. Hayes, 76 N.E.2d 869, 148 Ohio St. 681.

Pa.—Laderer v. Reidenbach, Com.Pl., 46 Lack.Jur. 21.

Va.—Cundiff v. Jeter, 2 S.E.2d 436, 172 Va. 470.

W.Va.—State ex rel. Myers v. Garner, 133 S.E.2d 82—Corpus Juris Secundum cited in State ex rel. Staley v. Wayne County Court, 73 S.E.2d 827, 831, 137 W.Va. 431—State ex rel. Daugherty v. Lincoln County Court, 31 S.E.2d 321, 127 W.Va. 35.

Persons entitled to contest election see infra §§ 261–266.

27. Ill.—Whitley v. Frazier, 171 N.E. 2d 644, 21 Ill.2d 292.

Ind.—State ex rel. Howard v. Lake Circuit Court, 121 N.E.2d 647, 233 Ind. 459—Gossard v. Vawter, 21 N.E.2d 416, 215 Ind. 581—Slinkard v. Hunter, 199 N.E. 560, 209 Ind. 475.

Neb.—Landgren v. Hamilton, 276 N. W. 659, 133 Neb. 668.

N.J.—Burkett v. Francesconi, 23 A. 2d 780, 127 N.J.Law 541.

N.M.—Montoya v. McManus, 362 P.2d 771, 68 N.M. 381.

Tex.—De Shaze v. Webb, Civ.App., 109 S.W.2d 264, certified questions answered 113 S.W.2d 519, 131 Tex. 108.

W.Va.—State ex rel. Staley v. Wayne County Court, 73 S.E.2d 827, 137 W.Va. 431.

20 C.J. p 211 note 33 [a].

**Contest by candidate**

Code provisions respecting election contests by any elector for specified causes were inapplicable to contest by sole candidate for supervisor if

lar election may be contested only under the statute applicable to the election.[27.5]

The procedure in election contests, which varies in the different jurisdictions, is purely statutory,[28] and the statute must be strictly followed.[29] The statute must be followed and complied with by the

recall had been successful, for ouster of incumbent supervisor and recount of recall vote, and an action by him containing essential elements of contest under statute, was a statutory election contest and was required to be dismissed.

Cal.—Howe v. Board of Sup'rs of San Diego County, 6 P.2d 28, 118 C.A. 306.

27.5 Ill.—Bell v. South Cook County Mosquito Abatement Dist., 121 N.E. 2d 472, 7 Ill.2d 163; Hoenig v. Northeast Park District, 125 N.E. 2d 540, 10 Ill. 254.

Minn.—Phillips v. Ericson, 30 N.W.2d 514, 219 Minn. 492.

**Applicability of statutes**

(1) Statutory provisions relating to contests of election for office of judge of probate were applicable to contests of city elections.

Ala.—Pope v. Howle, 149 So. 222, 227 Ala. 564.

(2) Office of county commissioner of a commissioner district of Coffee County, constituting a subdivision of the county, was a county office, within statute which could be contested.

Ala.—Ammons v. Moore, 104 So. 452, 213 Ala. 292.

(3) Union high school district was a "political subdivision" of a county, within election contest statute.

Ariz.—Sorenson v. Superior Court in and for Maricopa County, 251 P. 250, 31 Ariz. 421.

(4) Contests of election of any person declared duly elected to any county office except office of county judge were governed by particular statute.

Colo.—Gray v. Hensley, 138 P. 68, 27 Colo. 474.

(5) Contest over office of county judge came under Supreme Court Rule.

Colo.—Hoge v. Smith, 232 P. 67, 77 Colo. 476.

**Applicability of general election contest statutes**

(1) General statutes relating to election contests applied to the office of county superintendent of schools.

Mo.—Armantrout v. Bybee, 193 S.W. 2d 857, 242 Mo. 667.

(2) The statute authorizing election contests was limited in scope by the statute defining an election as any election except those held in any school district and hence a contest of a school district election was not authorized.

Minn.—Johnson v. Du Bois, 294 N.W. 839, 208 Minn. 567.

(3) General provisions of law as to election contests applicable to county offices applied to contests in cities of fourth class.

Mo.—Ormby v. Powell, App., 12 S.W. 2d 102.

(4) Election at which members of board of trustees of land grant were chosen was not contestable in absence of provision in land grant statute for contest, since general contest and recount provisions of code were applicable only to general elections for state district, and county offices.

N.M.—Montoya v. Garcia, 33 P.2d 1118, 39 N.M. 42.

(5) General election contest law was inapplicable to town elections, towns being excluded from the provisions defining terms.

Minn.—Dannenberg v. Zimmerman, 288 N.W. 695, 184 Minn. 310.

28 Ala.—Groom v. Taylor, 118 So. 33, 220 Ala. 247; Bowen v. Holcombe, 87 So. 37, 204 Ala. 649.

Del.—Lammot v. Wald, 107 A.2d 895, 9 Terry 532.

Ill.—Harding v. Albert, 75 N.E.2d 52, 399 Ill. 41; MacGuidwin v. South Park Comr's, 154 N.E. 209, 328 Ill. 56; Clarke v. Butterbrough, 129 N.E. 303, 296 Ill. 572.

Ind.—Simkard v. Hunter, 199 N.E. 860, 208 Ind. 478.

La.—Treadaway v. Plaquemines Parish Democratic Committee, App., 193 So. 669.

Mo.—Phelps v. Peak, 184 S.W.2d 84, 349 Mo. 440; State ex rel. Brown v. Stewart, 231 S.W. 799, 291 Mo. 1; State ex rel. Phillips v. Barton, 254 S.W. 25, 300 Mo. 76; State ex rel. Hartly v. Gideon, 40 S.W.2d 745, 328 Mo. 490, 161 N.J.—Cleo v. Moore, 136 A. 130, 119 N.J.Law 215.

In re Donahey, 12 A.2d 418, 21 N.J.Misc. 169.

Wash.—State ex rel. Harris v. Peak, 278 P.2d 310, 45 Wash.2d 161.

Trial of election contest see infra § 300.

**Counter contest**

Election contests are purely statutory, and as such the letter of the law is the limit of their power, and a counter election proceeding was unauthorized other than as prescribed by statute, giving the party holding the certificate of election the right to challenge votes for contestant.

Mo.—State ex rel. Phillips v. Barton, 254 S.W. 25, 300 Mo. 76.

**Informal proceedings**

Election contest proceedings are informal and intended to be summarily and speedily disposed of.

S.D.—Graf v. Burnside, 234 N.W. 523, 57 S.D. 573; Duna v. Gamble, 193 N.W. 821, 47 S.D. 303, rehearing denied 198 N.W. 467, 47 S.D. 573.

**Summary proceedings**

(1) Election contests must be summary.

Colo.—Gunson v. Baldauf, 28 P. 516, 18 Colo. 424.

Ky.—Stafford v. Bailey, 138 S.W.2d 993, 282 Ky. 625.

(2) Election contest as summary proceeding, see supra § 1(10).

**Where election void**

If it appears on the face of the proceedings that an election was void, a collateral attack could be made on it in any proceeding.

Va.—Cundiff v. Jeter, 2 S.E.2d 435, 173 Va. 479.

29 Ala.—Garrett v. Cunningham, 160 So. 835, 231 Ala. 420.

Ga.—Wood v. Peebles, 122 S.E. 618, 162 Ga. 162.

Ill.—Dowling v. Board of Ed. of Community High School Dist. No. 81, Washington County, 169 N.E.2d 301, 17 Ill.2d 145—Piegenhagen v. Mc-Fadzean, 77 N.E.2d 814, 393 Ill. 367—Patterson v. Crowe, 58 N.E.2d 415, 385 Ill. 514—Fake v. Pfeifer, 36 N.E.2d 376, 374 Ill. 482—Graves v. Needham, 20 N.E.2d 221, 370 Ill. 25—Harding v. Albert, 75 N.E.2d 52, 399 Ill. 41—McCuddy v. Board of Education of City of Bloomington, 124 N.E. 881, 288 Ill. 183—Girard v. Toel, 120 N.E. 868, 284 Ill. 482—Neiland v. Sonka, 113 N.E. 94, 341 Ill. 446—Smith v. Township High School Dist. No. 113, 107 N.E. 76, 265 Ill. 446.

People ex rel. Chez v. City of Olney, 53 N.E.2d 726, 322 Ill.App. 42.

Ky.—Adams v. Magisterial Dist. No. 6, Perry County, 71 S.W.2d 23, 254 Ky. 121—Buford v. Clark, 268 S.W. 677, 200 Ky. 828.

Neb.—Wilcox v. Matson, 194 N.W. 776, 110 Neb. 439.

Nev.—Crumpler v. Miller, 147 P. 817, 40 Nev. 81.

N.J.—Petition of Clee, 136 A. 476, 119 N.J.Law 211—Clee v. Moore, 136 A. 536, 119 N.J.Law 215.

Kreuzer v. Roscarell, 148 A. 506, 6 N.J.Misc. 302.

N.M.—Madrid v. McManus, 662 P. 2d 671, 98 N.M. 451.

Ohio—McCall v. Board of Ed., Eastern Local School Dist., 187 N.E.2d 351, 169 Ohio St. 58—Corpus Juris Secundum cited in Williams v. O'Neill, 82 N.E.2d 858, 860, 142 Ohio St. 467.

Burnett v. Wooster Com. Pl., 84 N.E.2d 261.

Pa.—Tedyer v. Reidenbach, Com.Pl., 46 Lack.Jur. 71.

parties and the court.[29.5] However, mere technicalities should never thwart the inherent and basic purpose of the proceeding.[29.10] Where no specific procedure is prescribed by the election contest statute, any suitable mode of proceeding may be adopted by the court under a general statute which permits this course.[29.15] Where no procedure has been prescribed by the legislature for getting local election contests before the courts, a reasonable method is to follow the procedure provided for contesting state elections.[29.20]

Under some statutes the usual rules governing the procedure in civil actions apply to election contests,[29.25] at least as to procedural matters not provided for in the election contest statute,[29.30] although the procedure in election contests may be excepted from the code or rules of civil procedure in so far as the election contest statutes are inconsistent with the code or rules.[29.35] Under other statutes the ordinary rules of civil actions do not apply to election contests.[29.40] In some jurisdictions the statutory law relating to election contests constitutes a code or law unto itself and the civil code of procedure is of necessity inapplicable, especially as to the procedure to be followed.[29.45] Under some statutes an election contest is conducted under the rules of chancery practice,[29.50] and is, to all intents and purposes, a chancery proceeding,[29.55] but under other statutes an election contest is not governed by the rules of chancery practice.[29.60]

A statute providing for election contests should be liberally construed,[30] so as to make it workable

S.D.—Bronson v. Rapid City, 259 N. W. 674, 63 S.D. 408.

Tex.—Carter v. Tomlinson, 227 S.W. 2d 795, 149 Tex. 7.
Horine v. Kellam, Civ.App., 123 S.W.2d 439—Treaccar v. City of Galveston, Civ.App., 28 S.W.2d 276, error dismissed—Thurston v. Thomas, Civ.App., 7 S.W.2d 105—McCall v. Lewis, Civ.App., 263 S. W. 325—Turner v. Allen, Civ.App., 254 S.W. 630.

W.Va.—Evans v. Charles, 56 S.E.2d 880, 133 W.Va. 463.

**Statute mandatory**

Ky.—Ward v. Story, 258 S.W.2d 515.

**Choice of procedure**

Minn.—Hunt v. Rolloff, 28 N.W.2d 771, 224 Minn. 323.

**Immaterial departures**

A proceeding, in which petitioner sought to contest an election and to enjoin the board of election commissioners from issuing a certificate of election to a certian person, was an election contest, within statute prescribing the mode, method, and practice for contesting general elections, although the initial pleading was styled a "petition in equity" and although the parties were designated as "plaintiff" and "defendant" instead of "contestant" and "contestee."

Ky.—Hewlett v. Carter, 239 S.W. 789, 194 Ky. 454.

**Recomputation of votes** cast at election was not substitute for contest in which legality of votes actually cast could be determined.

Pa.—Kline v. Eagen, 170 A. 263, 314 Pa. 23.

29.5 Ill.—Flake v. Pretzel, 46 N.E.2d 375, 381 Ill. 498—People ex rel. McLaren v. DeBoice, 37 N.E.2d 337, 377 Ill. 634.

29.10 Pa.—In re Election of School Directors in Birmingham Tp., Chester County, 143 A.2d 13, 393 Pa. 396.
Petition to Contest the Nomination of DeNunzio, Com.Pl., 31 Northumb.Leg.J. 146.

29.15 Wash.—State ex rel. Kurtz v. Pratt, 273 P.2d 516, 45 Wash.2d 151—State ex rel. Pemberton v. Superior Court, 83 P.2d 845, 196 Wash. 465—State ex rel. McAvoy v. Gilliam, 111 P. 401, 60 Wash. 420.

29.20 Alaska.—Turkington v. City of Kachemak, 380 P.2d 593.

29.25 La.—Torres v. Serpas, App., 21 So.2d 175.

Minn.—Phillips v. Ericson, 30 N.W. 2d 513, 248 Minn. 452—Bank v. Egan, 60 N.W.2d 257, 240 Minn. 192.

Definition and nature of election contest see supra, § 1(10).

Trial of election contests see infra § 300.

**Principles of procedure in election contests must be in harmony** with the provisions of the civil code relating to proceedings under special statutes.

Neb.—Swan v. Bowker, 281 N.W. 891, 135 Neb. 405.

**Proceedings similar to those in action at law**

N.J.—In re Donahay, 82 A.2d 499, 21 N.J.Misc. 159.

29.30 Miss.—Evans v. Hood, 15 So. 2d 37, 195 Miss. 743—Harris v. Stewart, 193 So. 389, 187 Miss. 469.

29.35 Ky.—Britton v. Garland, 335 S.W.2d 329.

Minn.—Phillips v. Ericson, 30 N.W. 2d 513, 248 Minn. 452.

Neb.—Swan v. Bowker, 281 N.W. 891, 135 Neb. 405.

N.M.—Trujillo v. Trujillo, 197 P.2d 421, 52 N.M. 258.

29.40 Tex.—Carter v. Tomlinson, 227 S.W.2d 795, 149 Tex. 7.
Yoakum County Gas Co. v. Dudley, Civ.App., 231 S.W.2d 397—Wilburn v. Galloway, Civ.App., 179 S.W.2d 540.

29.45 Mo.—Armantrout v. Bohon, 162 S.W.2d 867, 349 Mo. 667.
State ex rel. Hartly v. Gideon, 40 S.W.2d 745, 225 Mo.App. 459.

29.50 Ill.—Whitley v. Frazier, 171 N.E.2d 644, 21 Ill.2d 292—Joyce v. Blankship, 77 N.E.2d 325, 399 Ill. 136—Flake v. Pretzel, 46 N.E.2d 375, 381 Ill. 498—Wood v. Hartman, 45 N.E.2d 864, 381 Ill. 474—McKinley v. McIntyre, 196 N.E. 506, 360 Ill. 382—Hulse v. Nash, 163 N.E. 792, 332 Ill. 500—Weeden v. Gher, 147 N.E. 388, 316 Ill. 534—Neal v. Odle, 140 N.E. 31, 308 Ill. 469—Olson v. Scully, 129 N.E. 841, 296 Ill. 418—Clarke v. Bettenhausen, 129 N.E. 803, 296 Ill. 373.

20 C.J. p 210 note 81[f], p 225 note 79[c].

Election contest as not constituting action at law or suit in equity see supra § 1(10).

**Effect of amendment to statute**

The amendment to the statute pertaining to election contests providing that the case shall be tried in like manner as other civil cases did not change the applicability of rules of chancery practice to election contests.

Ill.—Wood v. Hartman, 45 N.E.2d 864, 381 Ill. 474.

29.55 Ill.—Wood v. Hartman, 45 N. E.2d 864, 381 Ill. 474.

20 C.J. p 210 note 81[f].

29.60 Ariz.—Grounds v. Lawe, 193 P.2d 447, 67 Ariz. 176.

30. Ark.—Gunter v. Fletcher, 233 S. W.2d 243, 217 Ark. 800—Horne v. Fish, 127 S.W.2d 623, 198 Ark. 79.

Cal.—People ex rel. McGroarty v. City of Los Angeles, 50 P.2d 161, 9 C.A.2d 421.

Ky.—Bullitt v. City of Louisville, 281 S.W. 1031, 213 Ky. 756.

Okl.—Otjen v. Kerr, 136 P.2d 411, 191 Okl. 623—Wadsworth v. Neher, 280 P. 383, 138 Okl. 4.

Pa.—In re Dunmore Borough's Elec-

and all its parts effectual,[31] ascertaining and giving effect to the intention of the legislature,[32] although it has been held that such statutes should be strictly construed or observed as to those provisions for inaugurating the contest and which are necessary to jurisdiction.[33] Election contest statutes must be construed with a view to protect the elective franchise.[33.5] Public policy calls for a determination of election contests on their merits, as discussed infra § 300, and for a construction of the election statutes which will not defeat that end, unless their language imperatively commands it.[33.10]

An election contest being purely statutory, the courts are limited in their investigation to such subjects as are specified in the statutes.[34] The remedy is not to be extended to include cases not within the language of the statute;[35] and the right of contest is not to be inferred from doubtful provisions.[36]

Where the statutes so provide, an election whereby any special question is submitted to the voters may be contested.[37] On the other hand, if the statute makes no provision therefor, statutory contest is not the proper remedy to contest an election on a proposition.[38]

*Interest of public in election contests.* A contested election case is a proceeding in which the public is interested, since it is for the public good.[39] An election contest is not merely a proceeding for the adjudication and settlement of the private rights of rival claimants to an office; whatever the form the proceeding may be, it is in its essence a proceeding in which the public is vitally and primarily concerned.[39.5] It is the public interest, not the parties' claims, which is the paramount legislative concern.[39.10] The right of contest is not conferred on the assumption that the personal rights of contending individuals to the office is of particular moment.[39.15] In an election contest, a court should

tion, 149 A. 733, 299 Pa. 517—In re Pazdrak's Contested Election, 137 A. 109, 288 Pa. 585, followed in In re Burns' Contested Election, 137 A. 111, 288 Pa. 592.
Tex.—De Shazo v. Webb, 113 S.W.2d 519, 131 Tex. 103.
Beeler v. Loock, Civ.App., 135 S.W.2d 644, error dismissed.
20 C.J. p 212 note 86.

**Statute authorizing appeal from secretary of state or county clerk** to courts by person adversely affected by act of secretary of state or county clerk under any election law is remedial and should be liberally construed.
Or.—Columbia River Salmon & Tuna Packers Ass'n v. Appling, 375 P.2d 71, 232 Or. 230.

31. Ky.—Austin v. Anderson, 132 S.W.2d 56, 279 Ky. 742.

**Change in location of some of provisions** of section of statute relating to election petitions for corrupt practices in revision of statutes, as compared with initial enactment, disclosed no intent to change their meaning.
Mass.—Ross v. Crane, 195 N.E. 884, 291 Mass. 28.

32. Ill.—Harding v. Albert, 25 N.E. 2d 32, 373 Ill. 94—Smiley v. Lenane, 1 N.E.2d 213, 363 Ill. 66.

**Presumption of intention**
In construing the statute governing election contests, the presumption of an intention that both parties shall have a fair and full hearing, provided they proceed diligently within various periods prescribed, must be entertained.
Ky.—Austin v. Anderson, 132 S.W.2d 56, 279 Ky. 742.

33. Ala.—**Corpus Juris Secundum cited in** Walker v. Junior, 24 So. 2d 431, 433, 247 Ala. 342, 165 A. L.R. 1257—Groom v. Taylor, 178 So. 33, 235 Ala. 247.
Ark.—Casey v. Burdine, 217 S.W.2d 613, 214 Ark. 680.
Colo.—Graham v. Swift, 228 P.2d 969, 123 Colo. 309.
Ky.—Brock v. Saylor, 189 S.W.2d 688, 300 Ky. 471.
Minn.—Hancock v. Lewis, 122 N.W. 2d 592.
Mo.—Davenport v. Teeters, App., 273 S.W.2d 506.
Ohio.—Jenkins v. Hughes, 105 N.E.2d 53, 157 Ohio St. 186.
Okl.—**Corpus Juris Secundum cited in** Yocham v. County Election Bd. of Creek County, 180 P.2d 831, 833, 198 Okl. 588.
Tex.—Maddox v. Commissioners Court of Palo Pinto County, Civ. App., 222 S.W.2d 475.
20 C.J. p 212 note 87.

33.5 Pa.—Appeal of Lord, 41 A.2d 661, 351 Pa. 469—In re Cole's Election, 72 A. 610, 223 Pa. 271—Election Cases, 65 Pa. 20.

33.10 Cal.—O'Dowd v. Superior Court of California In and For City and County of San Francisco, 111 P. 751, 158 C. 537.
Benson v. Superior Court In and For Napa County, App., 39 Cal. Rptr. 760.

34. See infra § 249.

35. See infra § 249.

36. N.M.—Montoya v. Gurule, 38 P. 2d 1113, 39 N.M. 42.

37. S.D.—Bronson v. Rapid City, 259 N.W. 674, 63 S.D. 498.
20 C.J. p 210 note 72[a].
Contest of local option election see Intoxicating Liquors § 87.

**Proposition submitted to vote of "people"**
In statute providing that any proposition submitted to vote of the people may be contested, word "people" means persons qualified to vote at election being held.
Idaho.—Henley v. Elmore County, 242 P.2d 855, 72 Idaho 374.

38. Ala.—Savage v. Wolfe, 69 Ala. 569.
W.Va.—State ex rel. Myers v. Garner, 133 S.E.2d 82.
20 C.J. p 210 note 72.

**In Pennsylvania,** prior to the enactment of the election code, the statutory provisions for election contest referred exclusively to the election of public officers, and the election code did not manifest a legislative intent to enlarge the powers of courts in election contests or alter the existing laws by authorizing election contests in cases other than the nomination and election of public officers.
Pa.—In re Granting Malt Beverage Licenses in Greene Tp., Franklin County, 1 A.2d 670, 331 Pa. 536.

39. Ala.—McCallagher v. Bosarge, 136 So.2d 181, 273 Ala. 123—Cosby v. Moore, 65 So.2d 178, 259 Ala. 41—Ex parte Hartwell, 188 So. 891, 238 Ala. 62.

39.5 Idaho.—Henley v. Elmore County, 242 P.2d 855, 72 Idaho 374.
Kan.—Johnson v. Russell, 166 P.2d 563, 161 Kan. 293.

39.10 Cal.—Garrison v. Rourke, 196 P.2d 884, 32 C.2d 430.

39.15 Cal.—O'Dowd v. Superior Court of California In and For City and County of San Francisco, 111 P. 751, 158 C. 537.

never approve or consent to any conduct or action of the parties unless it can say with assurance that its approval and consent are in the public interest.[39.20]

*Validity of statutes.* Statutes providing for election contests have been sustained as against various objections.[39.25] A statute confirming an election,[40] curing irregularities therein,[41] taking away the right to contest it,[42] or limiting the time within which a contest may be filed[43] is not invalid as depriving any person of vested rights.

*Purpose of statutes.* The purpose of election contest statutes is to invite inquiry into the conduct of popular elections so as to secure that fair expression of the popular will without which the integrity of the political system cannot be maintained.[43.5] They are designed to prevent the will of the electors being thwarted either by fraud committed during the election or by mistakes honestly made but by reason of which injustice is done the contestant.[43.10]

### b. Exclusiveness of Remedy

**While there are many decisions holding that the statutory remedy for contesting elections is exclusive, there is substantial authority for the view that it is cumulative with the common-law remedy of quo warranto and such other common-law or statutory remedies as are not incompatible with the special statute.**

There is some apparent conflict among the cases as to whether, when the statute prescribes a specific mode for contesting elections, that mode is exclusive of, or cumulative with, the common-law remedy by quo warranto, although this apparent lack of judicial harmony can generally be explained by the difference in the statutes under which the decisions were rendered. There are many cases in which it is said that the statutory remedy is exclusive,[44] and the common-law remedy by quo warranto will not be entertained except in special cases where it appears that public interests require that the writ shall issue.[45]

In some jurisdictions the statutes provide the only and exclusive remedy for contesting elections other than one of a person to an office,[46] while in the case

Benson v. Superior Court In and For Napa County, App., 29 Cal. Rptr. 760.

39.20 Kan.—Johnson v. Russell, 166 P.2d 568, 161 Kan. 203.

39.25 Mo.—State ex rel. Phillips v. Barton, 254 S.W. 35, 300 Mo. 76.
Tex.—De Shazo v. Webb, Civ.App., 109 S.W.2d 264, certified questions answered 113 S.W.2d 519, 131 Tex. 108.

**Investigation by attorney general or district and county attorneys**
(1) Statute held valid.
Tex.—Ex parte Jimenez, 317 S.W.2d 189, 159 Tex. 183.
(2) Penal provision held invalid.
Tex.—Ex parte Meyer, Cr.App., 357 S.W.2d 754.

40. Ala.—Lovejoy v. Beeson, 25 So. 599, 121 Ala. 605.

41. N.H.—Eastman v. McCarten, 45 A. 1081, 70 N.H. 23.

42. Ala.—Scheuing v. State, 59 So. 160, 177 Ala. 162.
Kan.—Gilleland v. Schuyler, 9 Kan. 569.

43. Tex.—Coats v. Blanding, 125 S. W. 627, 59 Tex.Civ.App. 334.
Time for commencing election contest see infra §§ 258–260.

43.5 Cal.—O'Dowd v. Superior Court of California In and For City and County of San Francisco, 111 P. 751, 158 C. 537—Minor v. Kidder, 43 Cal. 236.
Benson v. Superior Court In and For Napa County, App., 29 Cal. Rptr. 760.
Purpose of election contest see infra § 249.

**Other statements of purpose**
(1) Purpose is to aid democratic processes our system of government is based on, by providing ready remedy whereby compliance with election laws can be assured.
Ark.—Gunter v. Fletcher, 233 S.W. 2d 242, 217 Ark. 809.
(2) General election statute authorizing contest of general election was designed to relieve from mistakes and fraud which are known with such reasonable certainty as to justify assertion thereof as fact, as distinguished from vehicle to be employed in search of mistakes or fraud.
Okl.—Otjen v. Kerr, 136 P.2d 411, 191 Okl. 628.

43.10 Ill.—Smiley v. Lenane, 1 N.E. 2d 213, 363 Ill. 66.

44. Ariz.—McCall v. City of Tombstone, 135 P. 942, 21 Ariz. 161.
Ark.—Shimek v. Janesko, 66 S.W.2d 626, 188 Ark. 418.
Ky.—Watts v. Glover, 39 S.W.2d 1004, 239 Ky. 562—Coleman v. Goff, 39 S.W.2d 1003, 239 Ky. 479.
N.M.—State ex rel. Abercrombie v. District Court of Fourth Judicial Dist. within and for Guadalupe County, 24 P.2d 265, 37 N.M. 467.
Ohio.—Mehling v. Moorehead, 14 N. E.2d 15, 133 Ohio St. 395—Foraker v. Township of Perry Rural School Dist. Board of Education, 199 N.E. 74, 130 Ohio St. 243.
State v. Herdman, 17 Ohio App. 269.
Baker v. Slusser, 19 Ohio N.P., N.S., 523, reversed on other grounds 9 Ohio App. 117, 27 Ohio Cir.Ct.,N.S., 197, 28 Ohio Cir.Dec. 409, affirmed 118 N.E. 1085, 96 Ohio St. 606.
20 C.J. p 213 note 95.
Illegality of election as ground for quo warranto see Quo Warranto § 11.

**Not maintainable as quo warranto**
Petition contesting municipal election could not be maintained as quo warranto proceeding, where defendants were not at time inducted into office, nor performing duties thereof.
Ga.—Jones v. McElreath, 146 S.E. 734, 167 Ga. 333.

**Combining quo warranto and mandamus**
The statutory proceeding for contesting election is designed to combine ouster from office of quo warranto with introduction into office of mandamus.
Me.—Lesieur v. Lausier, 96 A.2d 585, 148 Me. 500.

45. Minn.—State v. Moriarity, 84 N. W. 495, 82 Minn. 68.
20 C.J. p 213 note 98.

46. Tex.—Crawford v. Maples, Civ. App., 114 S.W.2d 595—Gates v. Hays, Civ.App., 95 S.W.2d 1020.
20 C.J. p 213 note 1[b].
However, in a case of an election on a proposition, it was held that no action for sole purpose of procuring adjudication of invalidity of election can be maintained unless it be statutory election contest or quo warranto proceeding, although whether the latter is available in the absence of a showing that the former is not was not decided.

# A TREATISE

ON

# THE LAW OF ELECTIONS

TO

# PUBLIC OFFICES,

EXHIBITING THE RULES AND PRINCIPLES APPLICABLE TO CONTESTS BEFORE JUDICIAL TRIBUNALS AND PARLIAMENTARY BODIES,

INCLUDING

PROCEEDINGS BY QUO WARRANTO, INFORMATION, INJUNCTION, MANDAMUS, AND INDICTMENT, BASED ON THE AMERICAN, ENGLISH, SCOTCH, IRISH, AND CANADIAN AUTHORITIES.

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BY

HALBERT E. PAINE,

OF THE WASHINGTON BAR.

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1890.

cinct return, declined, by a decided vote, to exclude the return, and proceeded to purge the poll.[1]

§ 513. Where illegal votes have been cast the true rule is to purge the poll, by first proving for whom they were cast, and thus ascertain the real vote; but, if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties.[2] But in a contest for a seat in the forty-fifth congress, the committee of elections said: "In purging the polls of illegal votes, the general rule is that, unless it is shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidates having the highest number. Of course, in the application of this rule, such illegal votes would be deducted, proportionately, from both candidates, according to the entire vote returned for each."[3]

[1] Finley *v.* Walls, Smith, 367.

[2] Curtin *v.* Yocum, 1 Ells. 416.

[3] Finley *v.* Walls, Smith, 367. See also McDaniel's case, 3 Penn. L. J. 310; Shepherd *v.* Gibbons, 2 Brewst. 128; Duffey's case, 4 id. 531.

The party who demands the exclusion of votes, actually cast and canvassed for his opponent, on the ground of their illegality, must show, not only that illegal votes were cast, but also that they were canvassed for his competitor. If they were canvassed for the party making the demand, they are not to be subtracted from the vote of his opponent, upon mere proof of their illegality. That would be double robbery.

And yet that is a possible, not to say probable, result of the rule to permit a party to make mere proof of the illegality of votes cast, and stop there, without showing for whom they were cast, or canvassed, and demand the apportionment of the fraud among the candidates. The chances are at least equal that the party making the demand, and failing to make the proper proof, will, by such an apportionment, not only secure a part of the illegal votes cast and canvassed for himself, but will also cause an equal number of illegal votes, cast and canvassed for himself, to be subtracted from the poll of his competitor.

If the proofs show that persons voted, who were not qualified voters, but do not show for whom they voted, the illegality will, as we have seen, be disregarded, when such votes are not sufficient, in number, to affect the result of the election. But when such illegal votes are sufficient, in number, to affect the result, the case may be one of great practical difficulty. Four distinct courses will be open to the court, or tribunal, charged with its determination: (1) to reject the entire poll, (2) to disregard the illegality, (3) to make a *pro rata* reduction of the vote of each candidate, and (4) to take all the illegal votes from one candidate.

The adoption of the first course, as an inflexible rule, would secure to the minority an easy method of destroying a close election. The adoption of the second would secure an equally easy method of carrying a close election. The adoption of either of the other causes would be a purely arbitrary act; and the result would be, not established by the facts, but fabricated by the court; and it would, at the same time, enable

§ 514. The enforcement, by the officers of election, of an erroneous rule respecting the qualifications of electors, which excludes the votes of certain legal voters, who offer to vote, and prevents other legal voters similarly situated from offering to vote, may be a sufficient ground for setting aside the election.[1] Where a member of the house of representatives of Massachusetts was returned, as elected by a majority of one vote, and it appeared that several persons, legally qualified, who were present and desired to vote at the election, were prohibited by the selectmen, the election was held void, although it did not appear that more than one of the rejected voters would have voted against the sitting member, if permitted to vote.[2] But the election return cannot be set aside, or the declared result of the election avoided, by proof that qualified electors were denied the right to vote, unless it be shown that the officers of election acted dishonestly, or collusively, or be proved that such votes would have been cast against the returned member.[3] And, in order to entitle a rejected vote to be counted, the voter must attend the meeting, and tender his ballot, where the election takes place; and it is not sufficient that the voter's name is not on the list of voters, and that, in consequence of that, he fails to attend the meeting; or that he tenders his vote, and is refused, at any other balloting.[4] If the rejection of legal votes do not affect the result, the election will not be set aside.[5] Under

the minority to carry the election, by a dexterous adjustment of the illegal vote to the real majority. For illustration, if one candidate should receive 220 legal votes and no illegal votes, but the other should receive 210 legal votes and 20 illegal votes, the legal majority of the first candidate would be ten votes. But the apportionment of the 20 illegal votes, between the two candidates, would secure to the second candidate a fictitious majority of not less than ten votes. Again, if the aggregate majority of a candidate, in the district, the illegal votes being excluded, amount to twenty, and the illegal votes, twenty-one in number, be all taken from him the will of the majority may be defeated.

In the total absence of proof tending to show for whom illegal votes, sufficient in number to affect the result, were cast, the duty of the court would seem to be to choose, as wisely as possible, between a disregard of the illegality and a rejection of the entire precinct vote. There ought to be no arbitrary presumption of law, either that all the illegal votes were cast by the political party in the majority, or that they were cast by different parties in proportion to their numbers. To take the illegal votes all from one candidate, or *pro rata* from several candidates, would be, not to decide, but to make a case for the parties.

[1] Scranton case, Brightly's Elect. Cas. 455.

[2] Hobbs' case, C. S. & J. 67; Baker v. Hunt, L. & R. 378.

[3] Barr's case, L. & R. 254.

[4] Howe's case, C. S. & J. 459.

[5] Mawby's case, 3 El. & Bl. 713.

statutes providing that "no officer, clerk, agent, or other person, shall communicate, at any time, to any person, any information, obtained at a polling place, as to the candidate for whom any voter, at a polling place, is about to vote, or has voted,"[1] and that "no person, who has voted, at an election, shall, in any legal proceeding, to question the election or return, be required to state for whom he has voted,"[2] the election will not be set aside, at the instance of the unsuccessful candidate, because ballots of electors, who would have voted for the returned candidate, were unlawfully rejected.[3] If some of the votes given in at an election be not taken from the envelopes or counted, the validity of the election will not be thereby affected if it be shown, or admitted, that the member elected received a majority of all the votes.[4]

§ 515. The state constitution contained the following provision: "In all elections, every white male citizen, above the age of twenty-one years, having resided in the state one year next preceding any election, shall be entitled to vote at such election; and every white male inhabitant, of the age aforesaid, who may be a resident of the state, at the time of the adoption of this constitution, shall have the right of voting as aforesaid; but no such citizen or inhabitant shall be entitled to vote except in the district, or county, in which he shall actually reside, at the time of such election."[5] It was held that, although statutes requiring thirty days' or six months' residence, as an additional qualification, might be unconstitutional and void, the mere fact that certain persons, who were entitled to vote under the constitution, were deprived of their right, at an election held under such statutes, did not render the election void.[6] The fact that the petitioner received, in one of the towns of the district, more votes than were canvassed for him, would not, under the law of New York, be a sufficient ground for the exclusion of the vote of the town.[7]

§ 516. It has been held, in some of the states, that legal votes, duly offered, at the polls, but not actually deposited in the ballot-box, cannot be counted. In New York the result of the election must

[1] Stat. Can. 37 Vict. c. 9, s. 72, sub-s. 3.
[2] Id. s. 77.
[3] North Victoria Election, 37 U. C. Q. B. 234.
[4] Henry's case, C. S. & J. 664.
[5] Const. Ill. 1848, art. 6, s. 1.
[6] Supervisors v. Davis, 63 Ill. 405.
[7] Van Rensselaer v. Van Allen, C. & H. 74.

Court of Common Pleas of Pennsylvania, Dauphin County.
Harner Appeal
**No. 444.**

September term, 1947.
December 8, 1947.

**1 *56 Appeal from county board of elections.

West Headnotes

**Elections** 239
144k239 Most Cited Cases
Where it appears that more votes have been reported by a precinct than there are registered voters therein, and there is no way of determining for whom the excess votes were cast, the election board need not reject the entire vote of the precinct, but may reduce the votes cast for all candidates proportionately to aggregate the number of votes which might legally have been cast.

**Elections** 259
144k259 Most Cited Cases
An election return board may not consider the validity of individual votes: It should not, therefore, attempt to compare the signatures on voters' certificates with those on the registration books to determine whether there has been forgery or other fraud, but should leave such action, if called for, to the registration commission.

**Elections** 260
144k260 Most Cited Cases
Where even if all the votes reported by a precinct for one candidate were counted and all reported for his opponent were rejected, the opponent would still win the election, the candidate is not a person "aggrieved" by the count in the precinct within the meaning of section 1407(a) of the Pennsylvania Election Code of June 3, 1937, P.L. 1333, 25 P.S. § 3157(a), and has no standing to appeal from a recount.
Henry E. Harner, p.p., for appellant.

WOODSIDE, J.

This comes before us on appeal of Henry E. Harner, a candidate for district attorney, from the decision of the county board of elections regarding the computation of the votes of *57 the fifth precinct, seventh ward, Harrisburg, cast at the election held November 4, 1947. [FN1]

FN1. The only matter before us is the appeal of Harner. Even were we to determine that his position is sound we could change only the vote as to the district attorney and for none of the other offices: McIntyre's Appeal, 343 Pa. 87, 91 (1941); Phillips' Appeal, 262 Pa. 396, 399 (1918).

At this election two of the county commissioners were candidates for reelection and therefore the judges of the court of common pleas acted as "a return board" as is provided by section 1403(b) of the Pennsylvania Election Code of June 3, 1937, P. L. 1333, 25 PS § 3153, hereinafter referred to as the Election Code.

When the clerks computing the vote examined the duplicate return sheet of the fifth precinct, seventh ward, Harrisburg, and made the comparison with the number of electors certified as registered in that district, it appeared that the total vote returned for the candidates for district attorney, and for other offices not here involved, exceeded the number of registered electors in said district. [FN2] As is provided in section 1404(b) of the Election Code (25 PS § 3154) this excess was deemed a discrepancy and palpable error, and an investigation was made by the return board which included the examination of the members of the district election board.

FN2. The number of electors in this district certified by the board was 953. Upon investigation the correct number was found to be 962.

**2 This investigation revealed that the number of electors' cards contained in the registration book was 962. The street list contained 971 names but it was explained by a clerk in the registration office that certain changes and corrections were made subsequent to the preparation of the street lists. The number 953 was certified to the return board. This number was obtained from a record which is made by adding or subtracting daily to the total as electors are registered or *58 removed from a particular district. This figure was not checked against the book for a considerable length of time. The cards in the registration book being the best evidence before the return board of the number of electors in the district and the clerks in the registration commission office having stated that the correct number of registered electors was 962, that

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was the number accepted by the board as correct. This was the exact number of votes cast in the district for the office of district attorney.

Two machines were used in the election district. The certificate on the duplicate return sheet indicates that on machine number 22607 the protective counter showed 008882 at the opening of the polls and 009390 at the close of the polls, and that the public counter showed 508. That on machine number 22610 the protective counter at the opening of the polls showed 009459 and at the close of polls 009845, and that the number on the public counter was 386. This would make a total of 894 votes cast.

After due notice to interested parties as required by law, these machines were publicly opened, examined and tested. The public counter on machine number 22607 showed 558 and the protective counter showed 009440, and on machine number 22610 the public counter showed 436 and the protective counter showed 009895. This indicated a total of 994 votes cast. Thus each machine showed 50 more votes than the certificates on the duplicate return sheet indicated.

The test of the voting machines revealed no defects. The machines and the duplicate return sheet both showed that Carl B. Shelley, Republican candidate for district attorney, had received 339 votes on one machine and 389 votes on the other, or a total of 728, and that Henry E. Harner, Democrat, had received 85 on one machine and 149 on the other, or a total of 234. This made a total of 962 votes for both candidates.

***59** The list of voters as shown on the form returned to the return board contained 950 names. The list of voters obtained from the minority inspector of election also showed 950 names. The signed voters' certificates returned for this district were obtained from the registration bureau and counted by the clerks of the return board who certified that there were 877 of them. The return board concluded that inasmuch as no legal vote could be cast without a signed voter's certificate that there were, from the facts before it, 877 legal votes, and that since the machines showed that 994 votes were cast, 117 of them were therefore illegal. The board deducted 117 votes from the referendum, the amendment and the candidates for each office in such proportion as the votes on the machine were apportioned between the particular candidates or questions. This resulted in the reduction of the total number of votes in the district of Carl B. Shelley from 728 to 639, and the total number of votes of Henry E. Harner from 234 to 206, and reduced the majority which Shelley received in the district from 494 to 433.

****3** The situation might be more clearly understood by the following table:

| Registration | | | Return Showed | Votes Subtracted | Corrected Figure | Total Co. Vote |
|---|---|---|---|---|---|---|
| Rep. | 787 | Shelley ..... | 728 | 89 | 639 | 36,347 |
| Dem. | 171 | Harner ..... | 234 | 28 | 206 | 29,462 |
| Non-P. | 4 | Majority ..... | 494 | 61 | 433 | 6,885 |
| Total.. | 962 | Total ..... | 962 | 117 | 845 | 65,829 |

It will be noted from the above that Shelley's majority was 6,885 and that even if all of Harner's vote and none of Shelley's vote in the fifth precinct of the seventh ward were counted it would not affect the result.

Section 1407(a) of the Election Code (25 PS § 3157), provides that "any person aggrieved by any order or decision of any county board regarding the computation ***60** or canvassing of the returns of any ... election, or regarding any recount or recanvass thereof under sections 1701, 1702 and 1703 of this act, may appeal ... to the court of common pleas."

Is Harner "aggrieved" by the count of the fifth precinct, seventh ward?

"The term 'person aggrieved' does not include one who may be aggrieved in his feelings because he believes that the action ... is unjust, but means one whose legal rights are infringed and who by the decree complained of will suffer injury; and the right of appeal is conferred upon only those persons who are aggrieved in this legal sense by the order, judgment, or decree from which the appeal is taken. One who is not thus aggrieved is not affected or injured, and hence,

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has no standing to complain": 9 Standard Pa. Practice, 91, § 107, and cases there cited.

In Morgan v. Terrill, 45 Pa. Superior Ct. 639 (1911), two opposing candidates for the office of assessor each received 169 votes according to the return of the district election board. Through a misunderstanding of the law the election board had failed to count two votes for one of the assessors and an overseer appointed by the court so reported to it. The court, then serving in the capacity of a return board although not then so termed, thereupon counted the two votes which resulted in the election of one of the candidates for assessor. The other candidate appealed and the Superior Court speaking through President Judge Rice said (p. 642):

****4** "... It will be appropriate to consider whether the appellant was aggrieved by the order. The vote for him was not changed thereby. He was not deprived of the right to cause a contest to be instituted if he had so desired. If the order should be annulled the vote would stand a tie, and his right to the office, under the return, or legal standing to obtain it, would be no higher than that of any other person possessing the ***61** necessary qualifications. In short, so far as the record shows, he had no right or special interest that was prejudicially affected by the order."

In 1936 while in the process of computing election returns a petition was presented to this court to open the ballot box of the first precinct of Middle Paxton Township in this county. Upon opening the box and recanvassing the vote the question was raised as to whether 40 ballots containing an "X" in the Democratic Party square and also an "X" in the Old Age Pension Party square could be counted for the Democratic candidates for those offices for which the Old Age Pension Party had no candidates. This court held they could not be counted: In re Counting of Votes, First Precinct, etc., 43 Dauph. 180 (1936). The result of the election would not have been changed regardless of the manner in which these 40 ballots were counted.

An appeal was taken to the Supreme Court which in an unreported opinion filed November 24, 1936, set forth as follows:

"Per Curiam: Upon careful review of the record we are of opinion that the conclusion of the court below is correct, but as the question is moot we can only dismiss the appeal at appellant's cost."

We have examined a number of cases both in the lower courts and in the appellate courts and have found none, nor has any been called to our attention by counsel, in which it appears that the determination of the question being considered would not change the result of the election.

It therefore is evident that appellant in the case now before us is not aggrieved and that the question before us is moot. Nevertheless, because of the public interest involved in this case we feel we should discuss briefly the points raised in the appeal and to record the authority for the acts of the judges while serving as the board.

***62** The contentions of appellant as we understand them are first, that the board had no authority to apportion the votes, and being faced with the choice of either accepting all or rejecting all, all should have been rejected, and secondly, that the judges acting as the return board should have compared the names on the voter's certificates with the names in the registration book to determine whether or not there were any forgeries or whether there was other evidence of illegal votes.

We shall consider the contentions in their order.

In the memorandum filed by the return board in this matter it was said: "The courts have said on numerous occasions that the voters of an entire district should not be disfranchised by disregarding the vote of the district except when such action cannot be avoided."

****5** We cite the following authority for this: Healey's Appeal, 319 Pa. 510, 512 (1935); Focht's Appeal, 275 Pa. 449,451 (1923); West Mahanoy Township's Contested Election, 258 Pa. 176,179 (1917); Coyne et al. v. Return Board, 83 Pitts. L. J. 533,535 (1935); Nomination for Office of Constable, 41 Lack. Jur. 163, 167 (1939).

It was further pointed out in the memorandum that there was nothing before the board from which it could determine for whom the 117 illegal votes were cast; that neither the Republicans nor the Democratic members of the district election board offered any explanation that would assist the return board on this point; that the testimony of the members of the district election board was that a number of voters whose

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cards were not in the registration book appeared and voted upon presentation of cards indicating registration, some as Republicans and some as Democrats; that the testimony indicated there were both Republican and Democratic watchers present in the district during the election.

***63** At argument appellant said that he felt none of the illegal votes were cast for him and that the "history" of the election district during the past ten years should have led the return board to a different conclusion in recanvassing the votes, but he frankly admitted that there was nothing in the record on which to base his conclusion, and that neither the return board nor the court could make a finding not supported by the record. Of course, of this there can be no doubt.

In the board's memorandum it was pointed out that the legislature has provided for the computing or counting of the votes even where error or fraud is discovered by the county boards. Section 1404(d)(3) of the Election Code (25 PS § 3154) provides: "If any error or fraud is discovered, the county board shall compute and certify the votes justly regardless of any fraudulent or erroneous returns presented to it." "Error or fraud" having been discovered here, the provision applies.

Furthermore, appellant's contention that the return board was limited by law to either accept or reject the entire vote not only disregards the clear provision of the code above quoted, but also ignores the case of Herminie Election District Returns, 326 Pa. 321 (1937) which holds contra to such contention.

Appellant was not able to refer us to any case, nor could we find any, holding that the return board was compelled by law to either accept or reject all the votes returned from the election district under circumstances similar to this case.

In In re Dunmore Borough Election, 42 Pa. D. & C. 215 (1941), the court did exclude the entire vote of a district, but there in addition to excess of votes over signed certificates, the election officers did not sign the election returns, failed to subscribe to their oaths and added names to the voters' list, and certified that a correct return could not be made. The court of Lackawanna County there held that "there was no real election ***64** conducted in the (district)", and the vote should be excluded.

****6** The second contention of appellant results from a misconception of the functions of the return board. [FN3]

> FN3. Under section 301 of the Election Code (25 PS § 2641), the county commissioners are ex officio the county board of elections, and have duties involving a number of things prior to as well as subsequent to an election, as for example the selection and equipping of polling places, the preparation of ballots, the receipt and determination of the sufficiency of nomination petitions, certificates and papers, the receipt and computation of election returns, and the issuance of certificates of election. From the foregoing it can be seen that the duties imposed by law upon the county board of elections are far more extensive than the duties of "a return board." The county commissioners (in this class county) are also ex officio the registration commission under section 3 of the Registration Act of April 29, 1937, P. L. 487 (25 PS § 951-3). Under section 1403(b) of the Election Code (25 PS § 3153), when two or more of the county commissioners are running for office the judges of the court of common pleas serve in place of the commissioners but only as "a return board".

For it to compare the signatures on the voter's certificates even in a district where fraud was discovered would be the consideration of the validity of an individual vote, and in In re Warrior Run Borough Election, 54 Pa. D. & C. 183, 184 (1945), it was said the return board "cannot consider the validity of the individual votes."

In Twenty-Eighth Congressional District Nomination, 268 Pa. 313, 319 (1920), the court said:

"Any attempt to determine the qualifications of voters, or to exclude a poll because of defects in the election machinery, goes beyond this purpose ... These and all other matters, not relating to the computation of the votes actually cast, are to be decided by contests."

In Coyne et al. v. Return Board, 83 Pitts. L. J. 533, 535 (1935), the court said:

"Considering the signing of the voter's certificate either as a qualifying act or an act having to do with

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the conduct of election, it is not the province of the ***65** return board to deal with this matter. If any are aggrieved, the redress which the law provides is an election contest."

See also In re Dunmore Borough Election, 42 Pa. D. & C. 215, 216 (1941); Focht's Appeal, 275 Pa. 449, 451 (1923); Plains Twp. Election Returns, 280 Pa. 520 (1924).

Appellant knows that the signatures on the voter's certificates are being compared with the signatures on the cards in the registration book by the Registration Commission upon whom is placed the duty to do it by section 38 of the Registration Act of May 25, 1937, P. L. 814, 25 PS § 807-138. He also knows that he himself shall have the right to compare them. If the commission discovers any evidence of fraud it is its duty under section 38, supra, to refer it to the district attorney.

****7** When the palpable error was discovered by the return board it called before it all the members of the district election board and through counsel examined publicly each of them. Appellant in this case was also permitted to question them. The machines were

Supreme Court of Alaska.

Victor FISCHER, Petitioner/Cross-Respondent,

v.

Sandra STOUT, Director of the Alaska Division of Elections, and Stephen A. McAlpine, Lieutenant Governor of Alaska, Respondents,

Rick Uehling, Respondent/Cross-Petitioner.

**No. S-1953.**

Aug. 7, 1987.

Candidate, who lost election, filed election recount appeal. The Supreme Court, Burke, J., held that: (1) the Supreme Court was required to review any and all questioned ballots cast in the election at issue, regardless of whether ballots were specifically challenged in proceeding before the Director of Elections; (2) punch card ballots marked entirely with pen were valid; (3) listing air force base as residence was sufficient to fix voter's residence to specific locale within election district; and (4) votes should have been counted for voters, who listed on their submitted ballots their current names and the names under which they were previously registered.

publicly opened, examined and tested. The election papers, including those in the hands of the minority inspector, were all publicly examined. The correct number of registrations was carefully checked. Stenographic notes were taken of all proceedings including all that transpired during the opening and testing of the machine. All the facts were reported to the district attorney. But the comparison of signatures by the return board would have been improper: Coyne et al. v. Return Board, supra.

Before any decisions were made all the cases and provisions of the statutory law called to our attention by appellant in the argument of this case, as well as many others, were carefully considered by the judges of this court while acting as the return board.

***66** And now, to wit, December 8, 1947, for the reasons that appellant does not allege or show that he is aggrieved and because the case is moot, the appeal is dismissed.

END OF DOCUMENT

So ordered.

West Headnotes

**[1] Elections 305(3)**
144k305(3) Most Cited Cases
The Supreme Court was required, in election recount appeal, to review any and all questioned ballots cast in election at issue, regardless of whether ballots were specifically challenged in proceeding before the Director of Elections. AS 15.20.510.

**[2] Elections 194(1)**
144k194(1) Most Cited Cases
Punch card ballot upon which voter signed his or her name was not "exhibited," within meaning of statutes prohibiting exhibition and identification of ballots; therefore, ballot did not have to be declared spoiled and did not have to be destroyed. AS 15.15.280-15.15.300.

**[3] Elections 186(4)**
144k186(4) Most Cited Cases
Punch card ballots which were marked entirely with pen, rather than punched, could be counted, even

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though punch card machine had been available at time of election; ballots provided clear evidence of the voters' intent. AS 15.20.730.

**[4] Elections 72**
144k72 Most Cited Cases
Residence, for purposes of constitutional provision and statute requiring voters to be residents of election district in which they vote, need only be some specific locale within district at which habitation can be specifically fixed; therefore, hotel, shelter for the homeless, or even park bench will be sufficient. Const. Art. 5, § 1; AS 15.05.010(4), 15.05.020(2).

**[5] Elections 72**
144k72 Most Cited Cases
Listing air force base as residence was sufficient to fix voters' residence to specific locale within election district, for purposes of constitutional provision and statute requiring voters to be residents of the election district in which they vote. Const. Art. 5, § 1; AS 15.05.010(4), 15.05.020(2).

**[6] Elections 108**
144k108 Most Cited Cases
Absentee voters, who registered to vote using post office box as their address and who later requested that their registration be updated to reflect air force base as their address, provided sufficient information to fix their residence to specific locale within election district, within meaning of constitutional provision and statute requiring voters to be residents of election district in which they vote. Const. Art. 5, § 1; AS 15.05.010(4), 15.05.020(2).

**[7] Elections 106**
144k106 Most Cited Cases
Absentee voters, who registered to vote using private mail service as their address without providing any additional information as to their residence, failed to provide sufficient information to fix their residence to specific locale within election district, for purposes of constitutional provision and statute requiring voters to be residents of election district in which they vote. Const. Art. 5, § 1; AS 15.05.010(4), 15.05.020(2).

**[8] Elections 116**
144k116 Most Cited Cases
Ballot of absentee voter, who allegedly registered using nonexistent address, could be counted in election; no evidence was produced indicating that voter did not reside at her listed address at time of registering, and voter did not provide affidavit required to rebut presumption of residency. Const. Art. 5, § 1; AS 15.05.010(4), 15.05.020(2, 10).

**[9] Elections 216.1**
144k216.1 Most Cited Cases
Ballots of absentee voters who resided overseas could be counted in state election; voters listed presumptively valid Alaska residence within appropriate election district and were otherwise qualified. AS 15.05.010, 15.05.010(4), 15.05.020(2); Const.Art. 5, § 1.

**[10] Elections 216.1**
144k216.1 Most Cited Cases
Declarations on special envelopes used by absentee voters to return their absentee ballots could rebut presumption of voter residence; envelopes contained voter oath including space for voter to fill in his or her permanent Alaskan residence, and the voter oath was form prepared by the Director of Elections. AS 15.05.020(10), 15.20.030.

**[11] Elections 216.1**
144k216.1 Most Cited Cases
Ballots of absentee voters could be counted, even though attesting officers failed to adequately indicate the source of their attestation authority; it had to be presumed that person who attested absentee ballot as authorized official did so in full cognizance of the text and oath on the absentee ballot form, and no evidence was presented rebutting the presumption of authorization. AS 15.20.081, 15.20.081(d).

**[12] Elections 116**
144k116 Most Cited Cases
Vote should have been counted even though voter's registration had been lost; error with regard to voter's registration was solely on the part of the election officials.

**[13] Elections 116**
144k116 Most Cited Cases
Vote should have been counted, even though voter checked box cancelling his registration when he was attempting to correct error in address given on his voter registration card; it could not be said that voter's intent to cancel his franchise was unambiguous.

**[14] Elections 177**
144k177 Most Cited Cases

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Vote should have been counted even though attesting officer had initialed, rather than signed, the attestation section; any mark intended as signature will function as such, and there was no administrative pronouncement specifying form that attesting officer's signature must take.

**[15] Elections 118**
144k118 Most Cited Cases
Vote should not have been counted for voter who never registered in election district; although there was some evidence indicating that voter had changed his residence to the election district, the evidence was inconclusive, unconvincing, and not of the sort required by statute to rebut presumption of residence. AS 15.05.020(10).

**[16] Elections 119**
144k119 Most Cited Cases
Vote should not have been counted for voter who filed appropriate papers to have her official voter residence changed to residence outside the election district, even though the change was never processed. Const. Art. 5, § 1; AS 15.05.010(4), 15.05.020(2).

**[17] Elections 119**
144k119 Most Cited Cases
Vote should not have been counted for voter who changed his address to residence outside the election district. AS 15.05.020(10).

**[18] Elections 216.1**
144k216.1 Most Cited Cases
Vote should not have been counted for voter who "witnessed" his own absentee ballot. AS 15.20.081(d).

**[19] Elections 106**
144k106 Most Cited Cases
Voter was not required to have her registration by absentee ballot application witnessed; voter clearly stated on the absentee ballot application that she wished merely to update her current registration, and there was no evidence that voter was not officially registered at the time she filed her absentee ballot application. AS 15.07.070(b).

**[20] Elections 97**
144k97 Most Cited Cases
Vote should not have been counted for voter who was originally registered outside the election district, who later moved to locale within the election district, but who failed to update his official voter residence address. AS 15.05.010.

**[21] Elections 216.1**
144k216.1 Most Cited Cases
Vote should not have been counted for voter who originally registered by submitting absentee ballot application that was not witnessed or attested. AS 15.07.070(b).

**[22] Elections 227(8)**
144k227(8) Most Cited Cases
Voters, who listed on their submitted ballots their current names and the names under which they were previously registered, voted under their previous names, and thus, their votes should have been counted; voter votes "under the previous name" whenever voter is positively identified as the registered individual and lists on the ballot his or her previous name. AS 15.07.090(a).

**[23] Elections 260**
144k260 Most Cited Cases
The Director of Elections exceeded her authority by using proportionate reduction formula to actually change official vote totals of each candidate after determining that 17 ballots had been erroneously counted; the proportionate reduction formula is to be used only as analytical tool to aid in the determination of whether contaminated ballot actually would effect result of the election and should not be used to actually reduce candidate's official total.

***219** Don Clocksin, Wagstaff, Pope, Rogers & Clocksin, Anchorage, Joseph H. McKinnon, Anchorage, for petitioner/cross-respondent Fischer.

Susan D. Cox, Asst. Atty. Gen., Anchorage, Ronald W. Lorensen, Acting Atty. Gen., Juneau, for respondents Stout and McAlpine.

James T. Robinson, David A. Devine, Robinson, Devine & Holliday, Anchorage, for respondent/cross-petitioner Uehling.

OPINION

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

BURKE, Justice.

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This is an election recount appeal filed pursuant to AS 15.20.510. [FN1] The principle issue is whether certain votes or classes of votes were properly counted or rejected in the November 1986 election for the state senate in Senate District H.

FN1. AS 15.20.510 provides:
A candidate or any person who requested a recount who has reason to believe an error has been made in the recount (1) involving any question or proposition or the validity of any ballot may appeal to the superior court in accordance with applicable court rules governing appeals in civil matters, and (2) involving candidates for the legislature or Congress or the office of governor and lieutenant governor may appeal to the supreme court in accordance with rules as may be promulgated by the court. Appeal shall be filed within five days of the completion of the recount. Upon order of the court, the director shall furnish the record of the recount taken including all ballots, registers, and other election material and papers pertaining to the election contest. The appeal shall be heard by the court sitting without a jury. The inquiry in the appeal shall extend to the questions whether or not the director has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate or division on the question or proposition the vote should be attributed. The court shall enter judgment either setting aside, modifying, or affirming the action of the director on recount.

The election results were certified on November 24, 1986. Republican candidate Rick Uehling was declared the winner with 6,730 votes. The incumbent, Victor Fischer, who received 6,715 votes, requested a recount. Following the recount, Uehling was again declared the winner with 6,738.5 votes to Fischer's 6,721.5. [FN2] Fischer then filed the instant appeal [FN3] and Uehling cross-***220** appealed on certain issues. On January 16, 1987, we issued an order vacating the certificate of election declaring Uehling the prevailing candidate and remanded the matter to the Director of Elections (Director) for a partial further recount. [FN4] We indicated at that time that an opinion would follow.

FN2. The fractional vote given to each candidate is the result of a proportionate reduction in their vote totals. This adjustment was apparently made to compensate for a counting error. The adjustment is discussed in Part III(b), *infra*. *See also,* note 14 *infra*.

FN3. Fischer also challenged the election in an action filed in superior court pursuant to AS 15.20.540. That action was ordered stayed pending our resolution of this appeal.

FN4. We take judicial notice that after the order issued, partial recount was conducted and Uehling again certified as the prevailing candidate.

## I. SCOPE OF REVIEW

[1] On December 4, 1986, following Fischer's request for a recount, a meeting was held between the Director, Fischer, and Uehling wherein it was explained to the candidates that they would have until December 6, 1986 to make specific challenges to specific ballots or any challenges would be deemed waived. Both candidates appeared to understand these instructions and neither objected to the deadline. Both candidates did submit written comments and ballot challenges by December 6 but, despite the fact that the deadline had passed, Fischer later challenged at least thirty-six additional ballots.

The Director urges us to limit our review in this recount appeal to those individual ballots specifically challenged by December 6, 1986 under the specific error alleged at the time of the challenge. In effect, the Director argues that our review authority under AS 15.20.510 is limited to a review of those ballots upon which the Director has actually made a specific determination. Alternatively, she asserts that Fischer has either waived any challenges not raised by December 6 or that lack of notice should prevent Fischer from asserting new challenges not listed in his original complaint.

While he neither admits nor denies that he has raised new challenges, Fischer argues that candidates are entitled to submit materials for consideration up until final certification of the recount. Any establishment of a deadline, Fischer asserts, is arbitrary and unsupported by statute or regulation. Fischer's argument is persuasive.

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We are unaware of any specific legislative or administrative pronouncement providing the Director authority to set deadlines for submission of specific ballot challenges. Consequently, the December 6 deadline will not be given effect. While imposition of the Director's deadline may well have been wise and expeditious, streamlining the recount and providing faster certification, we will not imply from the legislative and administrative silence an intent to provide the Director with the authority to arbitrarily limit the scope of a recount. [FN5]

> FN5. We express no opinion as to the Director's authority to establish recount guidelines through the normal process for promulgating administrative regulations.

Our obligation under AS 15.20.510 is to determine whether a "vote was cast in compliance with the requirements of Alaska's election law." *Willis v. Thomas*, 600 P.2d 1079, 1082 (Alaska 1979). [FN6] That obligation may not be discharged by a limited review of the Director's specific determinations, but must extend to a review of all ballots questioned on any basis. Accordingly, we hold that our obligation under AS 15.20.510 is to review any and all questioned ballots cast in the election at issue, regardless of whether they were or were not specifically challenged below.

> FN6. Although *Willis* was decided under a different version of AS 15.20.510, the *only* difference between the statute then and now is that the "director" has been substituted for the "lieutenant governor" as the person whose decision is reviewed.

II. BALLOT CHALLENGES: FISCHER

a. *Punch-Card Ballots*

Fischer complains of the Director's decision to count or reject certain punch-card ballots based upon the methods used to mark those ballots. There are eight such ballots, five called for Uehling and three called as blank. In each of these challenges we must examine the ballot to determine whether the voter's intent can be adequately identified. *Willis*, 600 P.2d at 1084-85; *Hammond v. Hickel*, 588 P.2d 256, 274 (Alaska 1978). We conclude that the Director's call in each case was correct.

***221** [2] Fischer also challenges one ballot, called for Uehling, upon which the voter signed his or her name. Fischer argues that this ballot should have been declared a "spoiled ballot" and destroyed pursuant to AS 15.15.280--.300 (declaring "spoiled" ballots which have been "exhibited"). We are unable to agree that this ballot was "exhibited" within the meaning of AS 15.15.280--.300. Accordingly, we affirm the Director's determination.

[3] Finally, Fischer challenges two ballots, called for Uehling, which were marked entirely with a pen rather than punched. Fischer claims these votes should not have been counted because there was a punch-card machine available. Neither AS 15.15.360 (rules for counting hand-marked ballots) nor AS 15.20.730 (rules for counting punch-card ballots) require voters to use a punch-card machine if one is available, but only specify the manner of counting properly punched and hand-marked ballots. Moreover, in *Hammond*, we held that punch-card ballots marked entirely by pen or pencil instead of punched were valid because they provided clear evidence of the voters' intent. 588 P.2d at 274. *Accord, Willis*, 600 P.2d at 1084. The voters' intent on these challenged ballots is clear. Accordingly, we affirm the Director's decision.

b. *Absentee Ballots: Voter Residence in Question*

[4] Voters in state and local elections must be residents of the election district in which they vote. Alaska Const. art. V, § 1; AS 15.05.010(4). A person's residence is that fixed place of habitation to which the individual intends to return if absent. AS 15.05.020(2). It need not be a house or apartment. It need not have mail service. A residence need only be some specific locale within the district at which habitation can be specifically fixed. Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient. *See Pitts v. Black*, 608 F.Supp. 696 (S.D.N.Y.1984); *Collier v. Menzel*, 176 Cal.App.3d 24, 221 Cal.Rptr. 110 (1985).

[5] Fischer contests the ballots of five voters who listed as their residence address only "Elmendorf Air Force Base." Elmendorf Air Force Base is a bounded area wholly within Senate District H. Thus, merely listing "Elmendorf Air Force Base" is sufficient to fix a voter's residence to a specific locale within District H. These votes were properly counted.

Fischer also challenges those absentee voters who registered to vote using a post office box or private mail service as the voter's residence. A post office

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box or private mail service address is clearly not a voter's fixed place of habitation and is therefore insufficient to fix a voter's residence within a voting district. [FN7] Thus, any voter providing such an address as his or her residence would be ineligible to vote unless he or she provided additional information regarding that voter's residence.

FN7. We take judicial notice that human beings are of insufficiently diminutive stature to dwell comfortably within such a space.

[6] Both Cyrette Sanford and Lash G. Sanford registered with a post office box address. However, both also requested, on their absentee ballot application, that their registration be updated to reflect a new residence address: Elmendorf Air Force Base. This address update provided sufficient information to ascertain their residence within District H. These votes were properly counted.

[7] Seven voters registered using the address of a private mail service without providing any additional information as to their residence. Thus, those voters provided insufficient information to ascertain their residence within District H and should not have had their ballots counted. The ballots of the following voters were improperly counted: Andrea S. Ellis, Robert L. Jones; Treva E. Jones; John D. McCannell; Phyllis E. Neher and Thomas S. Stein.

[8] Finally, Fischer contests the ballot of a single voter, Jennifer Gomilar, who is alleged to have registered using a non-existent*222 address. One may not, of course, reside in a nonexistent locale. In this instance, however, no evidence was produced indicating that Jennifer Gomilar did not reside at her listed address at the time of registering, nor did Ms. Gomilar provide the affidavit required to rebut the presumption of residency provided by AS 15.05.020(10). This ballot was properly counted.

c. *Overseas Voters*

[9] The Director counted some fourteen absentee ballots from voters living outside the United States. Persons residing outside the United States may register to vote in Alaska pursuant to AS 15.05.011 [FN8] if they were domiciled in Alaska before leaving the United States and meet various other requirements as specified. Fischer asserts that a voter registered pursuant to AS 15.05.011 may vote only in federal, not state, elections and thus these ballots should not have been counted.

FN8. AS 15.05.011 provides:

*Qualifications of overseas voters.* (a) A person residing outside the United States may register and vote absentee by qualifying under this section.

(b) Before registering a person under this section, the director shall determine that the person

(1) was domiciled in the state immediately before leaving the United States;

(2) meets the qualifications established in AS 15.05.010(1) and (2); (3) has not established a domicile in another state, territory, or possession of the United States since leaving this state;

(4) is not registered to vote and has not voted in another state, territory, or possession of the United States since leaving this state;

(5) has a valid passport, card of identity and registration, or other identification issued under the authority of the United States Secretary of State, and identification complying with the requirements of this title.

(c) Lack of a place of abode in the state or lack of intent to return to this state does not disqualify a person who qualifies under (b) of this section.

(d) A person registered under this section may vote in a federal election in this state.

Fischer is quite correct in asserting that a voter who actually registered pursuant to AS 15.05.011 may not vote in a state race. *See* AS 15.05.011(d). However, a person living outside the United States is not required to register pursuant to AS 15.05.011, but may vote by absentee ballot in Alaska if that person is otherwise qualified pursuant to AS 15.05.010. Here, every questioned voter listed a presumptively valid Alaska residence within District H and was otherwise qualified. Because no evidence was produced rebutting the presumption of residence, these ballots were properly counted.

d. *Persons Allegedly Residing Outside District H*

[10] Fischer also challenges thirteen ballots on the ground that each voter had executed an affidavit setting out a new voting residence outside District H and therefore the presumption of AS 15.05.020(10) [FN9] had been rebutted. The affidavits to which Fischer refers are declarations that appeared on the

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envelope in which each of these voters returned his or her absentee ballot.

> FN9. AS 15.05.020(10) provides:
> The address of a voter as it appears on his official voter registration card is presumptive evidence of the person's voting residence. If the person has changed his voting residence, this presumption is negated only by the voter executing an affidavit on a form prepared by the director setting out his new voting residence.

Absentee ballots must be returned in a special envelope which contains an oath that the voter is a qualified voter in all respects. AS 15.20.030. The voter oath includes a space for the absentee voter to fill in his or her "permanent Alaskan residence." Fischer claims that since the absentee voter oath was a "form prepared by the director" and since the challenged voters each indicated under oath a residence outside District H, these ballots should not have been counted.

Fischer's argument has merit. Because these affidavits come within the literal definition of the statute by which the presumption of voter residence may be rebutted, they cannot be disregarded as were the forms prepared by the federal government at issue in *Willis*. 600 P.2d at 1085. Thus, the following ballots should not have been ***223** counted because the voters reside outside District H: Anita Gilmore; Carol S. Kirkland; Walter C. Kirkland; Elizabeth B. Larsen; M. Inez Lee; Lucia S. Mandapat; Leonard D. Neher; LaMar Noth; Robert Six; Vicki L. Six; and Betty Sue Williams.

The ballots of Laura J. Sims, Neal C. Sims and Susan Schreib, though challenged on identical grounds, were properly counted. As to these ballots there was insufficient evidence on the ballot or ballot envelope to indicate that the voters intended to register a new permanent Alaska residence.

e. *Absentee Ballot Attestation Defects*

[11] Fischer contends that thirty absentee ballots were improperly counted on the ground that the attesting officer failed to adequately indicate the source of that officer's attestation authority. Alternatively, he asserts that if these thirty ballots were properly counted, the Director's disqualification of another ballot on the identical ground was improper.

Absentee ballot voting by mail is governed by AS 15.20.081. AS 15.20.081(d) provides that an absentee ballot will be valid only if the ballot envelope is signed by the voter in the presence of an attesting officer. The officer must in turn sign and date the attestation section of the envelope immediately thereafter. AS 15.20.081(d) and 6 AAC 25.110(a) specify the classes of persons authorized to serve as an attesting officer. [FN10] If no appropriate officer is available, the voter may sign the voter's certificate in the presence of two persons over the age of eighteen years and have those two witnesses sign the attestation form. AS 15.20.081(d); 6 AAC 25.110(b).

> FN10. These persons are: (1) justice; (2) judge; (3) magistrate; (4) clerk of court; (5) notary public; (6) United States Postmaster or authorized postal clerk; (7) any commissioned officer of the armed services, including the National Guard and United States Coast Guard; (8) election judge on election day; (9) absentee voting official; (10) division of election employee; (11) any other person qualified to administer oaths.

Fischer maintains that a ballot must be found void and thus uncountable unless the authority of the attesting officer is clear from the face of the ballot envelope and because the Director has provided space in the attestation section wherein this information may be provided. We disagree. Fischer indicates no authority, and we are aware of none, which requires the production of such information. Therefore, the officer's failure to provide the source of that officer's authority will not of itself invalidate the ballot.

It must be presumed that persons who attest an absentee ballot as an authorized official do so in full cognizance of the text and oath on the absentee ballot form. This presumption may be rebutted by an affirmative showing that the attesting officer lacks appropriate authority. Because Fischer has produced no evidence rebutting the presumption of authorization, all ballots challenged on this basis were properly counted. Conversely, it naturally follows that the Director's disqualification of Vincent McClelland's ballot for the failure of the attesting officer to adequately identify the source of the officer's authority was improper. Mr. McClelland's ballot should have been counted.

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f. *Individual Ballot Challenges*

[12] 1. *Maritza M. Munoz.* Ms. Munoz asserts that she was properly registered in August 1986 at the Cowper for Governor Campaign Headquarters. Her statements are corroborated by Cathy Allen, a certified voter registrar, who assisted Ms. Munoz in completing the voter application. Apparently Ms. Munoz's forms were lost somewhere along the line and Ms. Munoz was forced to vote a questioned ballot. The election officials found this evidence insufficient to establish that Ms. Munoz was a qualified elector and refused to count her ballot.

In *Willis* we upheld the decision of a master to count the votes of two voters whose names did not appear on the voters list because the registrars failed to send their registration applications to the Division of Elections. 600 P.2d at 1087. As in *Willis,* the error with regard to Ms. Munoz's application was "solely on the part of ***224** the election officials." *Id.* Her vote should have been counted.

[13] 2. *Daryl Wallace.* When attempting to correct an error in the address given on his voter registration card, Mr. Wallace checked the box cancelling his registration. Fischer argues that the voter registration card is confusing and that Mr. Wallace's ballot should have been counted. We agree. A voter's franchise will not be withdrawn unless the voter's intent to have it withdrawn is clearly and unambiguously expressed. In this case we can not say that Mr. Wallace's intent was unambiguous. His vote should have been counted.

[14] 3. *Howard Baker.* The Director refused to count the ballot of Mr. Baker on the ground that the attesting officer had initialed the attestation section rather than signed. It is black letter law that any mark intended as a signature will function as such. [FN11] Moreover, we are unaware of any legislative or administrative pronouncement specifying the form that the attesting officer's signature must take. Mr. Baker's ballot should have been counted.

FN11. *See* Section III(a) *infra.*

[15] 4. *Glen Greeley.* The voter registration records indicate that Mr. Greeley has never been registered in District H. Though there is some evidence indicating that Mr. Greeley had changed his residence to District H, the evidence is inconclusive and unconvincing. Additionally, the evidence is not the sort required by AS 15.05.020(10) to rebut the presumption of residence. His vote should not have been counted.

[16] 5. *Christian F. Kreps.* Ms. Kreps filed appropriate papers on October 15, 1985 to have her official voter residence changed to a residence outside District H but this change was not processed. Regardless, the records conclusively show that Ms. Kreps is not a resident of District H. Her ballot should not have been counted.

[17] 6. *Michael E. Banasik.* Mr. Banasik changed his address to a residence outside the district in 1982. He has not changed it since. Mr. Banasik's ballot should not have been counted. AS 15.05.020(10).

[18] 7. *Gary W. King.* Captain King "witnessed" his own absentee ballot. Such a "witnessing" contravenes AS 15.20.081(d). His ballot should not have been counted.

[19] 8. *Margie D. Wagner-Jogerst.* Fischer asserts that Ms. Wagner-Jogerst originally registered by absentee ballot application without proper witnessing contrary to AS 15.07.070(b). Contrary to Fischer's assertion, however, Ms. Wagner-Jogerst clearly stated on the absentee ballot application that she wished merely to update her *current* registration and thus no witnessing was required. Fischer has offered no proof that Ms. Wagner-Jogerst was not officially registered at the time she filed her absentee ballot application. Her vote was correctly counted.

9. *Wilford A. Day.* Mr. Day "witnessed" his own ballot. His vote was improperly counted (see # 7 above).

[20] 10. *Mason McLean.* Mr. McLean was originally registered outside District H. Though he later moved to a locale within District H, he has never updated his official voter residence address and so may not vote within the district. AS 15.05.020(10). His vote was improperly counted.

[21] 11. *Ira E. Hill.* Mr. Hill originally registered by submitting an absentee ballot application. Because his application was not witnessed or attested, the registration contravened AS 15.07.070(b) and was therefore invalid. Mr. Hill's vote should not have been counted.

III. JOINT CHALLENGES

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A. *Name Changes*

[22] Six women attempted to vote by signing a name different from that under which they were registered. Though it is not contested that each woman was properly identified as a person registered to vote, each was told that she must vote a questioned ***225** ballot. Five of these women listed on their submitted ballots their current names, the names under which they were previously registered and none were told that signing a ballot with a name different from that under which they were registered would invalidate their ballots. Nevertheless, all six ballots were rejected pursuant to unpublished policy. Both Fischer and Uehling contest the treatment of these ballots as contrary to law.

AS 15.07.090(a) provides that:

> A voter whose name is changed by marriage or court order may vote under the previous name, but if the voter desires to use the new name, he or she shall notify the director not later than 30 days preceding an election so that the registration may be amended to reflect the change.

Though we have discussed the requirements of AS 15.07.090(a) in other contexts, *see Willis,* 600 P.2d at 1086; *Hammond,* 588 P.2d at 271, we have not before had occasion to consider the specific question here raised: whether a voter who has changed his or her name since originally registering and who signs a ballot with a name different from his or her registered name has voted under his or her previous name pursuant to AS 15.07.090(a). Legislative history provides little guidance in interpreting the facially ambiguous phrase, "may vote under the previous name." Accordingly, we will seek a construction of the phrase which avoids the wholesale disfranchisement of qualified electors. *See Carr v. Thomas,* 586 P.2d 622, 626 (Alaska 1978). [FN12]

> FN12. In *Carr* we observed:
> Courts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and "[where] any reasonable construction of the statute can be found which will avoid such a result, the courts should and will favor it."
> 586 P.2d at 626 (quoting *Reese v. Dempsey,* 48 N.M. 485, 153 P.2d 127, 132 (1944) (footnote omitted)).

The Director argues that to vote "under the previous name," a voter must sign his or her registered name on the ballot and that signing with any other name or mark will invalidate that ballot. We cannot agree.

As a broad proposition, requiring a signature is nothing more than a means of affirming the identity of the signator and of authenticating the document on which the signature is affixed. The signature may be affixed in any manner and may consist of any character, symbol, figure, or name so long as such mark is intended by the signator as a substitute for the individual's given name. *See generally* 80 C.J.S. *Signatures* § § 1(c), 2(a) (1953) and cases cited therein. AS 15.07.090(a) does not refer to signatures at all, let alone specify a particular form of signature. We thus see no justification for inferring a legislative intent to require the voter to sign using only his or her previous name. Rather, we think it evident that a voter votes "under the previous name" whenever the voter is positively identified as the registered individual and lists on the ballot his or her previous name. Analogy is useful here. There is no question that a voter registered under the name of Jane Doe would be allowed to vote by signing the ballot with an "X" so long as the voter was positively identified as Jane Doe, listed the name "Jane Doe" on the ballot, and intended the "X" as a substitute for her signature. We see no reason for invalidating the ballot because Jane Doe choose to sign "Jane Smith" instead. Thus, because five of these women here were properly identified as registered voters in District H and listed their previous name on their ballots, the following ballots should have been counted: Debra M. Sherwood (Rudloff); Alice Rodes (Bullington); Carrie Kee (Showers); Felicia Z. Gatewood (Williams); and Fannie J. Martin (Crowe). [FN13]

> FN13. In our January 16, 1987 order we erroneously indicated that Penny A. Wild's ballot should have been counted. Penny A. Wild did not list her previous name, leaving blank the space following the line calling for a listing of a previous name. Thus, under our construction of AS 15.07.090(a), her ballot should not have been counted and the director's decision is upheld.

b. *Pro Rata Vote Reduction*

[23] After determining that seventeen ballots had been erroneously counted, the ***226** Director applied the "*Hammond* formula" [FN14] to proportionately

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reduce each candidate's actual vote total. Six votes were deducted from the District 12 absentee ballot count and eleven from District 13. The result was a pro-rata deduction of 6.5 votes from Fischer's total and 10.5 votes from Uehling's total.

> FN14. *See Hammond,* 588 P.2d at 260 & n. 6 ("contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast").

Uehling argues that the Director exceeded her authority by using a proportionate reduction formula to actually change the official vote totals of each candidate. He contends that the Director's analysis should have ended when she correctly determined that the errors in the vote count were not sufficient to change the results of the election. We agree.

In *Hammond,* we discussed the proportionate reduction rule as the only method to properly determine the effect of any bias that affected individual votes in a random fashion. 588 P.2d at 260. We did not intend, however, that the technique was to be used to actually reduce the candidate's official total. As Uehling correctly points out, the technique was to be used only as an analytical tool to aid in the determination of whether the contaminated ballot actually would effect the result of the election.

Accordingly, in the recount proceeding which was conducted, each candidate's final vote total was reduced on a pro-rata basis for the limited purpose of determining whether the count errors noted above were errors of sufficient magnitude to change the result of the election in Senate District H. If the result was not changed, the Director was authorized to certify candidate Uehling as the prevailing candidate. If the result would have been changed, the Director was to report that fact to the court. [FN15]

> FN15. Because the errors set forth herein did not effect the result of the election, we need not, at this time, determine the procedure to be employed if the election result is put in doubt by application of the proportionate reduction rule.

We reject Fischer's assertion that the Director used the wrong "unit" on which to base her analysis. Fischer argues that the smaller the unit to which the votes can be traced, the more accurate the reduction will be. Here, Fischer contends, the votes can be traced to six smaller, and thus more accurate, units and he urges us to adopt his method and apply it to any and all votes we now declare invalid.

Whatever the theoretical merits of Fischer's argument, the record does not support a tracing to Fischer's "smaller units." In addition, established precinct or district levels are reasonably accurate, easy, and readily available units on which to base such determinations. Reference to those units will avoid considerable administrative difficulty, speed the recount and certification process, and will thus better serve the public interest.

IV. CONCLUSION

Because of the disposition above, we need not consider Uehling's other assignments of error. For the reasons stated, pursuant to our authority under AS 15.20.510, we entered the order of January 16, 1987.

741 P.2d 217

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Supreme Court of Illinois.

FLOWERS

v.

KELLAR.

**No. 17179.**

June 16, 1926.
Rehearing Denied Oct. 8, 1926.

Suit by Richard Flowers against Thomas J. Kellar, contesting an election for the office of Village President. Judgment for defendant, and plaintiff appeals.

Affirmed.

West Headnotes

**[1] Elections 68**
144k68 Most Cited Cases
Votes of unnaturalized persons should not be received or counted in village election.

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**[2] Elections 295(1)**
144k295(1) Most Cited Cases
Evidence held to show that three men casting votes at village election were minors.

**[11] Appeal and Error 719(5)**
30k719(5) Most Cited Cases
Appellant cannot complain of rule denying motion to reopen cause, on which he has not assigned error.

**Elections 72**
144k72 Most Cited Cases
One who had address and kept trunk in nearby city, where mother and children lived, held not qualified to vote at village election, though her name was on register, and she kept suitcase there.

**Elections 227(5)**
144k227(5) Most Cited Cases
Presence of candidate without proper credentials within prohibited area about polling place, though highly improper, held not to invalidate election, in absence of showing of attempt to influence or interfere with voters.

**Elections 291**
144k291 Most Cited Cases
Votes of unregistered, but unchallenged, persons, received and deposited in ballot box by judges of election, will not be rejected, in absence of showing that they were illegal. S.H.A. ch. 46, § 4-26 note.

**Elections 291**
144k291 Most Cited Cases
When votes of unregistered persons were received and deposited in ballot box by judges of election, presumption arose that those votes were legal votes.

**Elections 295(1)**
144k295(1) Most Cited Cases
Evidence held to show voter who testified he was 24 years old and lived in village was qualified to vote at village election.

**Elections 295(1)**
144k295(1) Most Cited Cases
Testimony that voter came to village February 18th, held to show she was not qualified to vote at village election April 21st.

**Elections 299(4)**
144k299(4) Most Cited Cases
In election contest, where evidence does not disclose recipient of illegal votes, such votes will be eliminated by dividing them between candidates in proportions that number cast for each bears to total cast in precinct.

**Elections 300**
144k300 Most Cited Cases
Court held not to abuse discretion in denial of motion to reopen suit contesting village election for introduction of additional testimony.

****351 *265** Appeal from Circuit Court, Cook County; Hugo M. Friend, judge.

****352 *266** Frank W. Derby, of Chicago, for appellant.

Felsenthal, Struckmann & Berger, of Chicago, for appellee.

DE YOUNG, J.

At the annual election in the village of Robbins, in Cook county, on April 21, 1925, Richard Flowers and Thomas J. Keller were opposing candidates for the office of village president. Kellar was declared elected, and Flowers filed a petition in the circuit court to contest the election. The petition charged that a register of voters prepared for the township in which the village of Robbins is situated was used, and that a large number of persons qualified to vote at a township election, but not at the village election, were permitted to vote; that persons otherwise disqualified voted at the election; that fraudulent affidavits concerning the qualifications of voters were made; that the fraudulent voting was done at the instigation and with the connivance of Kellar and his supporters; that Kellar attempted to influence voters in his behalf within a few feet of the polling place; and that a plurality of the qualified electors voted for the petitioner. Kellar, by his answer, denied the charges of fraud and misconduct at the election. Evidence was heard, and by the court's judgment Kellar was declared elected. Flowers prosecutes this appeal.

The returns of the election made by the judges and the clerks showed that Kellar received 219 votes, Flowers 209 votes, and that six ballots were blank or defective. The board of trustees of the village canvassed the election returns, found the same result, and declared Kellar elected. There was no recount of

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the ballots on the hearing.

Appellant complains that ballots were cast at the election by three aliens, three minors, five nonresidents, and by seven unregistered persons without requiring affidavits of ***267** their qualification. The evidence with reference to these complaints will be reviewed in the order stated.

[1] Thomas and Gertrude Anderson and their daughter, Minnie Anderson, voted at the election. Appellee's counsel admitted that the parents had not been naturalized, and that the daughter was not qualified to vote at the election. These three votes should not have been received or counted.

[2] Albert Starks, Clark Harper, and John Brown, Jr., voted. The names of Starks and Harper appeared on the register. Starks testified that he was born in 1903. An employee of an insurance company testified that Harper made an application for insurance about January, 1925, and stated at the time that he was in his twentieth year. A sister said that he became of age on March 2, 1925. The names of Starks and Harper appeared upon a school register in 1913, and it showed their ages as 5 and 8 years, respectively. A witness testified that Brown admitted he was only 17 years old when the election occurred. By a preponderance of the evidence these three young men were minors and could not vote.

[3][4][5] The name of Angeline Lewis appeared on the register. She admitted that her permanent place of abode was in Chicago, although she voted in Robbins. Joseph Foy's right to vote was questioned because a person who made a canvass both before and after the election failed to find that Foy resided in the village. Foy testified that he was 24 years of age and lived in the village. Rosa Howard, according to the testimony of a neighbor, came to Robbins from Arkansas on February 18, 1925. Mrs. Howard testified that she had lived in Robbins since March 7, 1924, but admitted that she had been absent from the village for some time. Although Henry McDuffy's name appeared on the register and he voted, it was shown that he resided in Chicago at the time of the election. The name of Eugenia Horton was also upon the register. She had an address in Chicago where her mother and children lived. She kept ***268** her trunk at her mother's home and her suitcase in Robbins. The woman with whom Mrs. Horton said she lived in Robbins testified that Mrs. Horton left there in December, 1924. Four of these persons, Angeline Lewis, Rosa Howard, Henry McDuffy, and Eugenia Horton, were nonresidents, and only the fifth, Joseph Foy, was qualified to vote at the election.

[6] W. M. Humphrey, Mary Humphrey, Johanna Briggs, Mae Dillard, Eveline Carter, Edward Robinson, and Nannie Smith voted, although their names did not appear on the register. No affidavits that these persons were inhabitants of the village and entitled to vote at the election were found. There was testimony that the house which W. M. and Mary Humphrey once occupied was uninhabitable when the election occurred. On the contrary, two witnesses testified that they were acquainted with them, and that they resided in Robbins on election day. While the register failed to show the name of Johanna Briggs, it did have the name of Johanna Bridges. Eveline Carter had been divorced from her husband, and resumed her maiden name, Thomas, which appeared on the register. Edward Robinson testified that at one time he was in the county institution at Oak Forest, but resided in Robbins at the time of the election, and that he voted. No testimony was offered concerning Mae Dillard or Nannie Smith. It does not appear that at the election the seven unregistered persons were challenged or that objection was made to their voting.

[7] The election in question was held under the General Election Law and not under the City Election Act. The provision of section 7 of the 'act for the registry of electors, and to prevent fraudulent voting,' approved and in ****353** force February 15, 1865 (Cahill's Stat. 1925, p. 1081), that no vote shall be received if the name of the person offering to vote be not on the register, unless such person shall furnish to the judges of the election his affidavit that he is an inhabitant of the district and entitled to vote, and prove by ***269** the oath of a householder and registered voter of the district that he knows such person to be an inhabitant of the district, has been held to be directory. Clark v. Robinson, 88 Ill. 498; Kuykendall v. Harker, 89 Ill. 126; Dale v. Irwin, 78 Ill. 170. When the votes of the seven unregistered persons were received and deposited in the ballot box by the judges of election, the presumption arose that those votes were legal votes, and this presumption continues until the contrary is shown. Clark v. Robinson, supra; Kuykendall v. Harker, supra; Dale v. Irwin, supra. No countervailing evidence having been adduced, the seven votes cast by the persons whose names did not appear on the register cannot be rejected.

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[8] Appellant's objections concern 18 votes. From this number the ballots of Joseph Foy and the seven unregistered voters must be deducted, leaving ten illegal votes which must be rejected. Of these 10, 3 were cast by aliens, 3 by minors, and 4 by nonresidents. It appears from the evidence, that two of the nonresidents, Angeline Lewis and Henry McDuffy, voted for appellee, but the evidence fails to show for whom the other 8 illegal votes were cast. Where the evidence does not disclose the recipient of illegal votes, the general rule is that such votes will be eliminated by dividing them between the candidates in the proportions that the number cast for each bears to the total cast in the precinct. Choisser v. York, 211 Ill. 56, 71 N. E. 940; Humphrey v. Perry, 310 Ill. 373, 141 N. E. 776; People v. Cicott. 16 Mich. 283; Attorney General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Russell v. McDowell, 83 Cal. 70, 23 P. 183; Heyfron v. Mahoney, 9 Mont. 499, 24 P. 93, 18 Am. St. Rep. 757; McCrary on Elections (4th Ed.) § 495. The returns as canvassed gave appellee 219 votes. Deducting the two illegal votes which it is admitted he received reduces his votes to 217. Adding to this number the 209 votes cast for appellant makes the total vote 426. If the 8 remaining illegal votes are eliminated from this total by apportioning them between appellant and appellee in accordance ***270** with the rule approved in Choisser v. York, supra, because it cannot be determined for whom they were cast, appellant will suffer a loss of 3.92 votes and appellee a loss of 4.08 votes. Even if the fractions are resolved in appellant's favor, he will lose 3 and appellee will lose 5 votes, and the result will remain unchanged, for appellant will have 206 votes and appellee 212.

[9] Appellant further complains that appellee persisted in electioneering about the polling place, and that his conduct vitiated the election. Appellee, it appears, was within the area marked by flags outside of the polling place, and was requested to leave by appellant, then president of the village, and by another officer. Appellee refused, exhibiting a special deputy sheriff's star, but left in about half an hour, and caused no disturbance. No showing was made that he attempted to interfere with or influence voters in his behalf. The presence of an interested party, without proper credentials, within the prohibited area about a polling place, is highly improper, but it does not necessarily invalidate an election in the absence of a showing of an attempt to influence voters or to interfere with their voting. McCrary on Elections (4th Ed.) § § 580, 582a. Irregularities not proceeding from a wrongful intent, which do not change the result of an election, will not vitiate it. Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704.

[10][11] Finally, appellant insists that the circuit court erred in denying his motion to reopen the cause for the introduction of additional testimony. The motion was made after the cause had been submitted on oral and written arguments, and the court had indicated what its decision would be. There was no abuse of discretion in the denial of the motion. Moreover, appellant cannot complain of the ruling because he has not assigned error upon it. Village of North-brook v. Sterba, 318 Ill. 360, 149 N. E. 258.

The judgment of the circuit court is affirmed.

Judgment affirmed.

322 Ill. 265, 153 N.E. 351

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CHARLES GOOCH et al., Plaintiffs and Respondents,
v.
HANK HENDRIX et al., Defendants and Appellants.
**No. S028315.**

Supreme Court of California

Jun 1, 1993.

SUMMARY

In an action by several unsuccessful candidates contesting consolidated school board elections, the trial court found pervasive fraud and tampering with respect to absentee ballots and it annulled the elections (Elec. Code, § 20086). The local chapter of a political association had conducted a voter education project targeting a number of seats of several school district boards, with a strategy involving a highly selective process of both voter registration and absentee ballot applications. Project solicitors assisted voters in requesting absentee ballots, received and brought the ballots to the voters, helped voters mark their ballots,

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and mailed the ballot envelopes to the county clerk. Many of the successful candidates were themselves solicitors in the project. (Superior Court of Fresno County, No. 452088-8, Donald R. Franson, Judge. [FN*]) The Court of Appeal, Fifth Dist., No. F017764, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. It held that the widespread illegal absentee ballot voting practices that permeated the elections furnished sufficient, essentially uncontroverted circumstantial evidence that "it appeared" the illegal votes affected the outcomes of the consolidated elections, warranting setting them aside under Elec. Code, § 20024, even though it could not be determined on a vote-by-vote basis for whom the illegal votes had been cast.

FN* Retired Presiding Justice of the Court of Appeal, Fifth District, sitting under assignment by the Chairperson of the Judicial Council. (Opinion by Lucas, C. J., with Mosk, Panelli, Arabian, Baxter and George, JJ., concurring. Separate dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Elections § 22--Contests--Appeal--Standard of Review--Inclination Toward Validity.
It is a primary principle of law as applied to ***267** election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. The policy in favor of upholding elections appears in the cases in conjunction with the rule that technical errors or irregularities arising in carrying out directory provisions that do not affect the result will not void the election.

(2) Elections § 22--Contests--Appeal--Scope of Review.
The scope of review in an election contest is not different from other cases. Where the evidence is in conflict, the appellate court will defer to the trial court where events at trial and demeanor of the witnesses play an important part in the decision. The contestant has the burden of proving the defect in the election by clear and convincing evidence. The court must consider the evidence in the light most favorable to the prevailing party, giving such party the benefit of every reasonable inference, and resolving all conflicts in support of the judgment. It is bound by the trial court's determination of the facts except to the extent they are not supported by substantial evidence.

[See **Cal.Jur.3d (Rev).** Elections, § 263.]

(3) Elections § 2--Definitions and Distinctions--Illegal Votes:Words, Phrases, and Maxims--Illegal Votes.
Illegal votes are votes that have not been cast in the manner provided by law. Illegal votes include votes by persons receiving their absentee ballots in a manner that violates election laws governing absentee balloting.

[See 2 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1988) § 1240.]

(4) Elections § 11--Ballots--Absentee Ballots--Legality--Return of Ballot.
Absentee ballots that were collected from the absentee voters by a political association and returned to the county clerk by the association were illegal and could not be counted (Elec. Code, § 1013), regardless of whether the association may have been given permission by the absentee voters to return the ballots on their behalf.

(5) Elections § 11--Ballots--Absentee Ballots--Legality--Political Campaign Taint.
Sufficient evidence supported a trial court's finding, in an action contesting an election, that the entering of a political association's address, by solicitors of the association's voter education ***268** project, as the place to which requested absentee ballots were to be sent violated Elec. Code, § 1006, subd. (b)(2), which prohibits using the address of a political campaign headquarters for this purpose. That the association was engaged in a political campaign through its voter education project to defeat the incumbents in certain consolidated school board elections was shown by the evidence. In his annual report to the association's statewide convention, the local chapter president said that the project had targeted 13 seats of several of the smaller school district boards and that the central strategy in the election involved a highly selective process of both voter registration and absentee ballot applications, and predicted a "landslide" in 7 of the elections and "comfortable wins" in the others.

(6a, 6b) Elections § 21--Contests--Evidence--Apparent Effect on Outcome--Absentee Ballots.
Widespread illegal absentee ballot voting practices that permeated a consolidated school board election furnished sufficient, essentially uncontroverted

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circumstantial evidence that "it appeared" the illegal votes affected the outcomes of the consolidated elections, warranting the trial court's setting them aside under Elec. Code, § 20024, even though it could not be determined on a vote-by-vote basis for whom the illegal votes had been cast. The illegal practices included fraud and tampering by a political association; clearly established violations of the statutes prohibiting manipulation of absentee ballots by political campaigns (Elec. Code, § § 1006, 1013); the association's "loss" of 269 absentee ballots mailed to it by the county clerk; the fact that nearly all of the candidates themselves took part in the malconduct of soliciting absentee votes in violation of specific code provisions; the large percentages of illegal association absentee ballots cast and counted in each election; and the fact that all association-supported candidates won handily in each and every one of the elections.

(7) Statutes § 29--Construction--Language--Legislative Intent.
Fundamentally, the objective of statutory interpretation is to ascertain and effectuate legislative intent. In determining intent, a court looks first to the words of the statute themselves.

[See **Cal.Jur.3d,** Statutes, § § 83, 100 et seq.] ***269**

COUNSEL

Anthony P. Capozzi for Defendants and Appellants.

Perez, Makasian & Williams and Rayma Church for Plaintiffs and Respondents.

**LUCAS, C. J.**

May an election be annulled on clear and convincing evidence of illegal voting when it appears the illegal votes affected the outcome of the election, but it cannot otherwise be determined precisely for whom the illegal votes were cast?

We conclude the controlling statute, Elections Code section 20024, [FN1] authorizes the annulment of a contested election under such circumstances. Accordingly, we reverse the contrary judgment of the Court of Appeal.

FN1 All further statutory references are to this code unless otherwise indicated.

I. Facts

A. *The Election*

On November 5, 1991, consolidated elections were held in Fresno County for school board positions in one high school and four elementary school districts. Two positions were open on the Washington Union High School District Board, three positions were open on the Orange Center Elementary School District Board, two positions were open on the Pacific Union Elementary School District Board, three positions were open on the West Fresno Elementary School District Board, and two positions were open on the West Park Elementary School District Board. The four elementary schools are "feeder schools" for Washington Union High School; voters in each elementary school district received a ballot allowing them to vote for candidates for openings on their respective elementary school district boards, as well as for the Washington Union High School District Board. ***270**

On November 19, 1991, the results of the elections were certified by the Fresno County Clerk as follows (the names of the winning candidates are capitalized):

***271**

| | |
|---|---|
| | Orange Center |
| Linda Andrews (short term) | 103 |
| Tim Sanders (full term position) | 95 |
| | |
| Sam Hearnes (full term position) | 82 |
| John Graham | 65 |
| Lilo Santellano | 60 |
| Gene Balthrop | 56 |
| | Pacific Union |
| Lawrence Cato | 358 |
| Rosemary Garcia | 316 |
| Roland Lawrence | 189 |
| Delbert Cederquist | 175 |
| Tami Gandy | 80 |
| Toni Nagai | 70 |
| | West Fresno |
| Hank Hendrix | 306 |

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| | |
|---|---|
| Oscar Robinson | 292 |
| Tony Taylor | 270 |
| Charles Gooch | 114 |
| Nadine Otschkal | 81 |
| Nancy Jones | 67 |
| | West Park |
| Steve Franklin | 93 |
| | |
| Carrie Schoals | 79 |
| Ernest Morales | 69 |
| Ed Randolph | 57 |
| | Washington Union |
| Mel Sanders | 1,015 |
| Mary Bess | 902 |
| Frank Butterfield | 744 |
| Jim Coito | 744 |
| Lucky Archuleta | 237 |
| Grant Mitchell | 209 |

B. *The Absentee Voter Campaign*

In July 1991, the Fresno Chapter of the Black American Political Association of California (BAPAC) launched its Voter Education Project (VEP). The project was described by Mel Sanders, president of the Fresno Chapter of BAPAC, [FN2] in his October 1991 written report to the statewide annual BAPAC conference in Sacramento, as follows:

> FN2 Mel Sanders, himself a candidate for an open board position in the Washington Union High School District, received the highest number of votes in that election. Mary Bess, a BAPAC member, received the second highest number of votes in that contest. Hank Hendrix, an officer in the statewide BAPAC organization, and Oscar Robinson, also a BAPAC member, received the first and second highest number of votes in the contest for the West Fresno Elementary School District Board. All four are named in the election contest as defendants.

"This project has targeted 13 seats of several of the smaller school district boards that serve the southwest urban area of metropolitan Fresno. The central strategy in the election involves a highly selective process of both voter registration and absentee ballot applications. With some $10,000 in cash, equipment and materials, we are projecting a landslide in seven of the elections and comfortable wins in the others."

Frank Revis, a BAPAC member, was appointed director of VEP. Revis recruited his family members, BAPAC members and their families, and other nonmembers of BAPAC, as volunteers for the project. Some VEP workers were also paid.

The trial court made the following findings of fact, among others, regarding the manner in which VEP's voter registration and absentee ballot "strategies" were effectuated (numerical paragraph designations and references to trial exhibits have been omitted):

"A BAPAC solicitor would visit registered and unregistered voters' residences to ask the resident to sign a registration affidavit and an absentee ballot application for the coming election. The prospective voter would be told that BAPAC would mail the executed documents to the Elections Clerk and, when the ballot was received from the Clerk by BAPAC, it would hand-deliver the ballot to the voter.

"Paragraph Three of the absentee ballot application form which called for the address to which the voter wants the ballot to be mailed by the Clerk, was with a few exceptions, never filled out by the voter. In some instances the paragraph was preaddressed and signed by the voter. In most instances, the application was left blank when the voter signed the application and [was] filled in by BAPAC later. ***272**

"The BAPAC solicitor would take the executed documents to BAPAC headquarters where a BAPAC address would be written on the application form as the address to which the voter wanted the ballot mailed. BAPAC would hand carry the registration and application forms to the Clerk.

"When BAPAC received the absentee ballots from the Clerk, it would identify from its records the school district in which the voter resided; it would notify Voter Education Project workers, the candidate and/or [the] candidate's workers to pick up the ballot for

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delivery to the voter. Ballots were delivered to voters either by BAPAC members, volunteers, paid workers, or by the candidates themselves.

"If a voter was not home when delivery of the ballot was attempted, a notice was left at the door asking the voter to call a BAPAC telephone number listed on the notice so the ballot could be delivered to the voter as soon as possible.

"When a ballot was delivered, the voter was encouraged to vote in the presence of the solicitor. In some instances, the solicitor would offer to answer questions about the candidates or issues. After the voter punched the appropriate number opposite the candidate names, the voter would place the ballot in the envelope, seal, sign and date the envelope and hand it to the solicitor. The solicitor would then return the envelope containing the ballot to BAPAC headquarters where it would be mailed to the Clerk.

"Prior to the election, [VEP Director] Frank Revis and [BAPAC Fresno Chapter President] Mel Sanders met with Susan Anderson, the Fresno County Clerk, and Norma Logan, the head of the Elections Division of the Clerk's Office. One purpose of the meeting was to be sure the applications for absentee ballots being distributed by BAPAC conformed to law. Revis revealed that BAPAC had already obtained a large number of absentee ballot applications-by his own estimate, approximately 800. A number of these applications were then examined by Anderson and Logan who raised concerns that someone other than the voter was completing the portion of the application specifying the address to which the ballot was to be sent (Paragraph 3). Revis' attention was directed to Elections Code § 1006 which provides that the voter must 'personally affix []' the address in Paragraph 3. BAPAC chose to ignore this warning and to follow its own ideas about permissible absentee ballot application and mailing procedures.

"During their meeting, Anderson and Logan sought some assurance from Revis that BAPAC was not a political organization and that the ballots would not come into the possession of any candidates. Revis assured them ***273** that candidates would not have access to ballots and that BAPAC was not sponsoring candidates.

"Subsequently, 1,292 completed [absentee ballot] applications were submitted in which paragraph 3 specified one of two BAPAC addresses, 2017 Tuolumne or 9584 South Chestnut. Anderson and Logan believed these applications did not comply with Elections Code § 1006 because the address in Paragraph 3 was not personally affixed by the voter. Anderson and Logan also suspected BAPAC was a political organization which should not receive absentee ballots under Elections Code, § 1006.

"BAPAC was unable to secure the ballots at 2017 Tuolumne, where it shared space with another entity, and so Revis filed a request with the postmaster that all absentee ballots sent to 2017 Tuolumne [were] to be held for pickup by BAPAC. No hold arrangement was made with respect to 9854 S. Chestnut, though that address was a rural postal box, also incapable of holding and securing all the ballots. Eventually, all the absentee ballots sent to BAPAC addresses were delivered to 705 Mayer, the headquarters of the Voter Education Project [which was also Revis' home address].

"Absentee ballots were provided Defendants Mel Sanders, Oscar Robinson, Linda Andrews, Tim Sanders, Samuel Hearnes, Mary Bess, Lawrence Cato, Tony Taylor, Steve Franklin, and Carrie Schoals directly by the Voter Education Project for delivery to voters. Lawrence Cato gave some ballots to Defendant Rosemary Garcia for delivery to voters."

C. *The Elections Contest*

On December 19, 1991, respondents, unsuccessful candidates in the consolidated elections, filed suit to contest the election results pursuant to section 20021. [FN3] The complaint alleged: (1) appellants had given or offered bribes to electors; (2) appellants had committed offenses against the elective franchise; and (3) illegal votes were cast sufficient to change the results of the elections. ***274**

FN3 Section 20021 states:
"Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes: [¶ ] (a) That the precinct board or any member thereof was guilty of malconduct. [¶ ] (b) That the person who has been declared elected to an office was not, at the time of the election, eligible to that office. [¶ ] (c) That the defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or

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> reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Division 17 (commencing with Section 29100). [¶ ] (d) That illegal votes were cast. [¶ ] (e) That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected. [¶ ] (f) That there was an error in the vote-counting programs or summation of ballot counts."

Trial lasted five days, during which numerous witnesses testified and various documents were admitted into evidence. In addition to the findings of fact set forth above, the trial court made further findings concerning evidence of fraud and tampering, and other violations against the elective franchise, respecting ballots that were ultimately disqualified by clerk's challenge. These included, among others:

That the testimony of one elector of the West Fresno/Washington Union School Districts established she had not signed the absentee ballot application, nor the envelope for the ballot, which had been sent to one of the BAPAC addresses and returned to the clerk with signatures purporting to be hers. Another elector of those districts testified through an interpreter that a person came to his home, urged him to "sign for the schools," and further advised him it was all right for his daughter to sign the absentee ballot application for him. The clerk's record established the ballot had been processed through BAPAC's VEP.

That the testimony of an elector from the Orange Center/Washington Union School Districts established three people came to his home late one night, "told him for whom to vote," and were emphatic that he not seal his ballot. They returned when only his wife was home and, discovering he had not signed the ballot, instructed her to sign her husband's name for him. This ballot was shown to have been processed through BAPAC.

That testimony of an elector of the West Park/Washington Union School Districts established he never completed an application for an absentee ballot, but recalled someone coming to his door requesting he sign a petition for a free breakfast program. Election records showed an absentee ballot had thereafter been mailed, ostensibly on his behalf, to a BAPAC address.

That testimony of an elector of the West Fresno/Washington Union School Districts established candidate Mary Bess and Leroy Brown brought an absentee ballot to the elector's home, and that Brown completed her ballot for her. The witness denied she had either consented to this procedure, instructed Brown to vote her ballot, or been consulted by Brown concerning the choices made on her ballot. [FN4]

> FN4 Although the Court of Appeal focused on the illegal votes cast and the extent to which they impacted on the election results (§ § 20021, subd. (d), 20024), we note that various Elections Code violations were arguably established on this record.
> Section 29473 provides that: "(a) No candidate or representative of a candidate, and no proponent, opponent, or representative of a proponent or opponent, of an initiative, referendum, or recall measure, or of a charter amendment, shall solicit the vote of an absentee voter, or do any electioneering, while in the residence or in the immediate presence of the voter, and during the time he or she knows the absentee voter is voting." The statute makes knowing violations of its provisions a misdemeanor.
> Section 29505 provides that: "Any individual, group, or organization which knowingly distributes any application for an absent voter's ballot which does not conform to the requirements of [the Elections Code provisions prescribing the form for, and rules governing, such absentee ballot applications] is guilty of a misdemeanor."
> Section 29653 makes it a felony to: "furnish[] any voter wishing to vote, who cannot read, with a ballot, informing or giving that voter to understand that it contains a name written or printed thereon different from the name which is written or printed thereon, or defrauds any voter at any election by deceiving and causing him to vote for a different person for any office other than he intended or desired to vote for."
> Section 29658 provides that: "Any person who applies for, or who votes or attempts to vote, an absent voter's ballot by fraudulently

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> signing the name of a fictitious person, or of a regularly qualified voter, or of a person who is not qualified to vote, is guilty of a felony ...."
>
> Each of the aforesaid provisions of law was in full force and effect at the time of the consolidated elections herein concerned. Each constitutes an "offense against the elective franchise defined in Division 17" of the Elections Code, violations of which themselves can furnish independent statutory grounds for contesting and annulling the election, separate and apart from the effects of any illegal votes actually counted. (§ 20021, subd. (c); *see* Stebbins v. White (1987) 190 Cal.App.3d 769, 788-79 [235 Cal.Rptr. 656].)

The trial court's written findings further noted the testimony of the manager of a local copy shop. BAPAC representatives had requested his ***275** shop to reproduce a large number of what were purportedly sample ballots; he in turn informed them he could not print the document, suggesting they instead "contact the State of California." [FN5]

> FN5 The printing or duplication of simulated or sample ballots is strictly proscribed by statute, violations of which may be punishable as a misdemeanor. (§ 29414.)

The trial court concluded BAPAC was in fact "an admitted political organization," that through the auspices of the VEP it had assisted defendant-candidates in their campaigns by providing and distributing materials and furnishing access to information concerning voters, and that "[t]his assistance was not provided all candidates and would have been denied certain candidates even if requested. In this manner, BAPAC assisted in the election of defendants to non-political offices."

In addition to the certified election results reported above (*ante,* at p. 270), the following statistical facts, among others, regarding the illegal absentee ballots that were counted, and those which were disqualified by clerk's challenge, were established from official election records and other testimony and evidence adduced at trial:

The Fresno County Clerk Elections Department mailed a total of 1,292 absentee ballots to the BAPAC addresses. Of those, *269 were never returned to the elections department in any form,* and BAPAC was unable to account with any degree of reliability for the disposition of those 269 nonreturned ballots. ***276**

Of the remaining 1,023 absentee ballots that were sent to BAPAC and returned to the elections department. 93 were disqualified by clerk's challenge, 63 of those on the basis of invalid signatures. Based on the advice of county counsel and the office of the Secretary of State, the remaining 930 absentee ballots were removed from their envelopes and counted. As explained below, all 930 ballots were illegal. It is now impossible to distinguish these 930 illegal absentee ballots from the remaining valid ballots cast in the consolidated elections.

The percentages of illegal ballots cast in each of the school district contests (obtained by dividing the number of illegal-but-counted BAPAC ballots by the total number of ballots counted in each district) were as follows: Orange Center Elementary, 70/173 = 40 percent; Pacific Union Elementary, 310/632 = 49 percent; West Fresno Elementary, 369/509 = 72 percent; West Park Elementary, 76/176 = 43 percent; and Washington Union High School, 930/2224 = 42 percent.

The trial court determined there had been fraud and tampering with respect to the 93 ballots disqualified by clerk's challenge. It further found the remaining 930 absentee ballots from BAPAC were cast in violation of sections 1006 (address to which ballot is to be mailed must be "personally affixed" by voter and may not be a political campaign headquarters) and 1013 (requiring absentee voter to personally mail or return ballot to official from whom it came or precinct board at any polling place), were therefore illegal, and could not be counted. It recognized it could not determine with certainty how the illegal ballots were cast, and thus could not deduct the illegal votes from the defendants to see who received a majority of lawful votes for each office. (§ § 20024, 20087.) But the court, "after careful consideration of the competing factors," including "the wholesale violation of the mandatory requirements of the absentee voting laws in this case," concluded the evidence showed the great majority of illegal-but-counted BAPAC ballots were voted for the defendants, and had been sufficient to affect the election of many of them. It annulled the consolidated elections pursuant to section 20086 [FN6] and ordered new elections held forthwith,

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concluding "[a]nything less, under these facts, would result in a loss of public respect for and diminution of the integrity of the absentee ballot process" and would "tend to encourage even greater abuse of the process in future elections." ***277**

> FN6 Section 20086 states:
> "The court shall continue in special session to hear and determine all issues arising in contested elections. After hearing the proofs and allegations of the parties and within 10 days after the submission thereof, the court shall file its findings of fact and conclusions of law, and immediately thereafter shall pronounce judgment ... either confirming or annulling and setting aside the election. The judgment shall be entered immediately thereafter."

The Court of Appeal found substantial evidence supported the trial court's factual findings regarding the illegal ballots. It nonetheless concluded the results of the consolidated elections could not be set aside because it could not be determined for whom the illegal ballots were cast. The court focused on the command of section 20024, which states: "An election shall not be set aside on account of illegal votes, unless it appears that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person."

The Court of Appeal reasoned, "Even assuming in these circumstances it could be calculated how many votes were cast on each illegal ballot, in what district they were cast and in what proportion they were cast, any attempt to apportion pro rata must still meet the test of section 20024. [¶ ] It would be futile for this court to remand for further findings. It is clear from the findings and the record before us it would be impossible to find, by clear and convincing evidence, that the illegal votes were cast for the contestees in this case. [¶ ] Indeed, it is obvious to this court it would be impossible in any multi-issue or multi- candidate primary or general election to determine the effect of illegal voting of the type and extent at issue here. Once illegal ballots are cast and commingled with the legal ballots, they cannot be traced to reveal for whom they were cast."

The irony of this conclusion was not lost on the Court of Appeal, which concluded: "The violations of election laws pertaining to absentee balloting in this case were pervasive and significant, yet the very nature and extent of the illegal voting renders any remedy illusory. The court is constrained by the statutory limitation on the authority to annul and set aside the election based upon illegal votes."

## II. Discussion

### A. *Standard of Review*

Strict rules embodied in the Elections Code govern a court's review of a properly contested election. (1) " 'It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citations.]' " (*Wilks v. Mouton* (1986) 42 Cal.3d 400, 404 [229 Cal.Rptr. 1, 722 P.2d 187], quoting *Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430 [197 P. 74].) There is an express legislative policy requiring liberal construction of absentee ballot provisions in favor of the absentee voter. (§ 1001; *Wilks v. Mouton, supra,* 42 Cal.3d at p. 404.) ***278**

Of competing importance, however, is the principle that, "preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election." (*Fair v. Hernandez* (1981) 116 Cal.App.3d 868, 881 [172 Cal.Rptr. 379].) To this end, we have observed that, "The policy in favor of upholding elections appears in the cases in conjunction with the rule that '[t]echnical errors or irregularities arising in carrying out directory provisions *which do not affect the result* will not [void] the election.' (*Davis v. County of Los Angeles* [(1938)] 12 Cal.2d [412,] 426 [84 P.2d 1034] (italics added); *Rideout v. City of Los Angeles, supra,* 185 Cal. at p. 430; *People v. Prewett* [(1899)] 124 Cal. [7,] 10 [56 P. 619].) Both the policy and the rule manifest the fact that ' [c]ourts are reluctant to defeat the fair expression of popular will in elections. ...' (*Simpson v. City of Los Angeles* [(1953)] 40 Cal.2d [271,] 277 [253 P.2d 464]); neither has been invoked to uphold an election in the face of illegalities which affected the result-a situation in which the will of the people may be thwarted by upholding an election." (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127 [89 Cal.Rptr. 601, 474 P.2d 417].) [FN7]

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FN7 In *Rideout v. City of Los Angeles, supra,* 185 Cal. 426, this court stated, "[A] distinction has been developed between mandatory and directory provisions in election laws; *a violation of a mandatory provision vitiates the election,* whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation. [Citations.]" (185 Cal. at p. 430, italics added.)

Although the distinction between "mandatory" and "directory" provisions in the election laws remains an important one today, the above underscored passage cannot be read for the proposition that every violation of a mandatory provision in the Elections Code will "vitiate"-i.e., invalidate or annul-the results of a contested election. In *Rideout* we explained that, "If the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory; otherwise directory. [Citations.]" (*Rideout v. City of Los Angeles, supra,* 185 Cal. at p. 431.) The modern Elections Code provisions, which postdate *Rideout,* in many instances explicitly state whether they are "mandatory" or "directory," and set forth the legislatively intended effect of such characterization.

For example, section 1013, which prescribes the manner in which absentee ballots are to be returned to election officials, states: "The provisions of this section are mandatory, not directory, *and no ballot shall be counted if it is not delivered in compliance with this section.*" (Italics added.) Hence, a violation of this "mandatory" provision results in disqualification of the ballot. The court's jurisdiction to confirm or annul the results of an election based upon one or more such violations is more broadly governed by sections 20021 (*ante,* at p. 273, fn. 3) (setting forth the statutory grounds for elections contests), 20086 (vesting the court with authority to pronounce judgment confirming or annulling an election), 20024 (authorizing the setting aside of an election where it appears illegal votes affected its outcome) and 20087 (authorizing the court to declare another person the winner of an election where it can be established such person has the highest number of legal votes).

(2) " 'The scope of review in an election contest is not different from other cases. Where the evidence is in conflict, [the appellate court] will defer to the trial court where events at trial and demeanor of the witnesses play an important part in the decision.' " (***279***Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1014 [241 Cal.Rptr. 199], quoting *Fair v. Hernandez, supra,* 116 Cal.App.3d at p. 874; see also *Hardeman v. Thomas* (1989) 208 Cal.App.3d 153, 166 [256 Cal.Rptr. 158].) "The contestant has the burden of proving the defect in the election by clear and convincing evidence. (*Smith v. Thomas* (1898) 121 Cal. 533, 536 [54 P. 71]; *Hawkins v. Sanguinetti* (1950) 98 Cal.App.2d 278, 283 [220 P.2d 58]; *Wilburn v. Wixson* [(1974)] 37 Cal.App.3d [730,] 737 [112 Cal.Rptr. 620].)" (*Wilks v. Mouton, supra,* 42 Cal.3d at p. 404.) "[W]e must consider the evidence in the light most favorable to the prevailing party, giving such party the benefit of every reasonable inference, and resolving all conflicts in support of the judgment. [Citation.]" (*Wilks v. Mouton, supra,* 42 Cal.3d at p. 408, fn. 7.) And "[w]e are ... bound by the trial court's determination of the facts except to the extent that they are not supported by substantial evidence. (*Wilburn v. Wixson, supra,* 37 Cal.App.3d 730, 737; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 278, p. 289.)" (*Wilks v. Mouton, supra,* 42 Cal.3d at p. 404.)

B. *Section 1013*

(3) Illegal votes are votes which have not been cast in the manner provided by law. (*Bush v. Head* (1908) 154 Cal. 277, 281-282 [97 P. 512].) Illegal votes include votes by persons receiving their absentee ballots in a manner that violates election laws governing absentee balloting. (*Hardeman v. Thomas, supra,* 208 Cal.App.3d 153, at p. 168.)

As noted above, the Court of Appeal concluded that substantial evidence supported the trial court's finding that counting the 930 absentee ballots violated the mandatory provisions of section 1013. We agree. Section 1013 provides, in pertinent part:

"All absentee ballots cast ... shall be voted on or before the day of the election. After marking the ballot, the absent voter shall either: (1) return the ballot by mail or in person to the official from whom it came or

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(2) return the ballot in person to any member of a precinct board at any polling place within the jurisdiction. However, an absent voter who, because of illness or other physical disability, is unable to return the ballot, may designate his or her spouse, child, parent, grandparent, grandchild, brother, or sister to return the ballot to the official from whom it came or to the precinct board at any polling place within the jurisdiction. [¶ ] ... [¶ ] The provisions of this section are mandatory, not directory, and no ballot shall be counted if it is not delivered in compliance with this section." [FN8]

FN8 The Legislature amended section 1013 in response to *Wilks v. Mouton, supra,* 42 Cal.3d 400, which had held that the provisions of section 1013 were directory, not mandatory. The Legislature specifically announced that its purpose in amending section 1013 was "to clarify potential ambiguity in *Wilks v. Mouton,* and to declare that its intent ' is and always has been' that section 1013 be given mandatory effect." (*Escalante v. City of Hermosa Beach, supra,* 195 Cal.App.3d at p. 1020; Stats. 1987, ch. 22, § 1, pp. 59-60.)

(4) In the present case, the 930 absentee ballots at issue were collected from the absentee voters by BAPAC and returned to the county clerk by ***280** BAPAC, a clear violation of section 1013. The fact that BAPAC may have been given permission by the absentee voters to return the ballots on behalf of them does not satisfy section 1013; in such instance the voter has not delivered the ballot to the official from whom it came or to a precinct board either personally, directly to such official by mail, or by one of the family members designated in the statute as authorized to hand- deliver the ballot when the voter is unable to do so because of illness or other physical disability. [FN9]

FN9 Our interpretation of section 1013 is not governed by the holdings pertaining to that statute in *Wilks v. Mouton, supra,* 42 Cal.3d at pages 410-412. and *Beatie v. Davila* (1982) 132 Cal.App.3d 424, 429 [183 Cal.Rptr. 179]-viz., that third parties may mail or deliver completed absentee ballots to election on behalf of the absentee voter-because those cases construed section 1013 prior to its amendment in 1987. (See *ante,* at pp. 279-280, fn. 8.) Although the language of *former* section 1013 was susceptible of an interpretation that third parties could return completed absentee ballots to election officials on behalf of an absentee voter, the amended statutory language precludes any such construction now. (Cf. Stats. 1976, ch. 1275, § 18, *with* Stats. 1987, ch. 22, § 2.) If the current version of section 1013 were to be construed to permit any absentee voter to hand his or her completed ballot to any third party for mailing or delivery to election officials, then the language expressly authorizing ill or physically disabled absentee voters to enlist the assistance of certain specified close family members in returning their completed absentee ballots to the election officials would be rendered superfluous. Section 1013 in effect specifies the method that will best protect against any tampering with, or nondelivery of, the absentee ballot: the voter may either personally deliver or mail the ballot, or, in the case of "illness or other physical disability," direct a close family member to return the completed ballot.

Accordingly, the 930 ballots delivered in violation of section 1013 are clearly illegal and cannot be counted. (*Rideout v. City of Los Angeles, supra,* 185 Cal. at p. 430; *Escalante v. City of Hermosa Beach, supra,* 195 Cal.App.3d 1009 [absentee referendum ballot returned by third party to city clerk's office at absentee voter's request, could not be counted]; *Fair v. Hernandez* (1982) 138 Cal.App.3d 578 [188 Cal.Rptr. 45] [ballots must be returned personally by voter without use of another person or agent].)

C. *Section 1006*

An application for an absentee ballot must provide a space for the address to which the ballot is to be sent. (§ 1006, subd. (a)(2).) Section 1006, subdivision (b)(1) requires that this information "shall be personally affixed by the voter." Section 1006, subdivision (b)(2) prohibits an applicant from entering the address of a political campaign headquarters as the address to which the absentee ballot is to be sent. ***281**

The trial court found that in the majority of cases, the VEP "solicitor" filled in the information regarding the address to which the absentee ballot was to be sent for the voter, and that the address provided was that of

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BAPAC. Defendants do not challenge the sufficiency of the evidence to support these findings. The trial court also found that BAPAC was engaged in a political campaign through the VEP to defeat the incumbents in the consolidated elections, and that entering BAPAC's address as the address to which the ballot was to be sent violated section 1006, subdivision (b)(2). (5) This finding, too, is supported by substantial evidence. In his 1991 report to the BAPAC statewide convention, Fresno Chapter President Mel Sanders indicated BAPAC's VEP "has targeted 13 seats of several of the smaller school district boards that serve the southwest urban area of metropolitan Fresno," and that "The central strategy in the election involves a highly selective process of both voter registration and absentee ballot applications. ... [W]e are projecting a landslide in seven of the elections and comfortable wins in the others."

Section 1006 is silent as to whether its provisions are mandatory or directory. As the Court of Appeal properly concluded, however, the point need not be decided in this case; the 930 BAPAC ballots were cast in violation of the mandatory provisions of section 1013, thereby rendering those ballots illegal.

D. *The Remedy*

As explained above, it is presently impossible to distinguish the 930 illegal BAPAC absentee ballots from the remaining valid ballots cast in the consolidated elections. Thus, it cannot now be determined with mathematical certainty how the illegal votes on the illegal ballots were cast. The trial court recognized it could not deduct the illegal votes from the defendants to see who received a majority of lawful votes for each office. (§ § 20024, 20087.)

The trial court nevertheless concluded, "in light of the wholesale violation" of the absentee voting laws in this case-including (i) the section 1013 and section 1006 violations, (ii) the improper involvement of BAPAC "solicitors" and candidates themselves in soliciting absentee votes (at least 4 of the 12 defendant-candidates were members of BAPAC; 11 of the 12 had been given BAPAC absentee ballots for delivery to the voters), (iii) BAPAC's inability to account for 269 mailed absentee ballots which were never returned to the elections department in any form, and (iv) the fraud, tampering, and overreaching established with respect to the 93 ballots disqualified by clerk's challenge-that the evidence showed the great majority of illegal-but-counted BAPAC ballots were voted for the defendant- candidates, and were sufficient to affect the election of many of them. The ***282** trial court therefore annulled the consolidated election results and ordered new elections.

In reversing that order, the Court of Appeal concluded that, "[e]ven assuming in these circumstances it could be calculated how many votes were cast on each illegal ballot, in what district they were cast and in what proportion they were cast, any attempt to apportion pro rata must still meet the test of section 20024." The court further stated its opinion that "it would be impossible in any multi-issue or multi-candidate primary or general election to determine the effect of illegal voting of the type and extent at issue here."

Section 20024 provides, "An election shall not be set aside on account of illegal votes, unless *it appears* that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person." (Italics added.)

(6a) The Court of Appeal's construction of the language of section 20024 fails to heed the fundamental premise that a court must not "sacrifice the integrity of the [elective] process on the altar of electoral finality." (*Hardeman v. Thomas, supra,* 208 Cal.App.3d at p. 167.) We do not believe the Legislature intended that under circumstances such as these, where clear and convincing evidence established pervasive illegalities that permeated the election process, and where, although it cannot be determined on a vote-by-vote basis for whom the illegal votes were cast, it nonetheless "appears" the illegal votes affected the outcome of the election, a trial court is without authority to annul and set aside the election results within its discretion under section 20086.

(7) Fundamentally, the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007 [239 Cal.Rptr. 656, 741 P.2d 154]; *People v. Overstreet* (1986) 42 Cal.3d 891, 895 [231 Cal.Rptr. 213, 726 P.2d 1288].) In determining intent, we look first to the words of the statute themselves.

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(*Woodhead, supra,* 43 Cal.3d at p. 1007; *Overstreet, supra,* 42 Cal.3d at p. 895; *People* ex rel. *Younger v. Superior Court* (1976) 16 Cal.3d 30, 40 [127 Cal.Rptr. 122, 544 P.2d 1322].)

(6b) Section 20024 states an election shall not be set aside on account of illegal votes unless "it appears" a number of illegal votes were given to the ***283** election winner. In utilizing the phrase "it appears," we think the Legislature contemplated circumstances, such as those at hand, in which illegal votes cannot be attributed to any one candidate, but nevertheless "appear" sufficient in number or effect to have altered the outcome of the election. In contrast, the Court of Appeal's construction of section 20024 reads the phrase "it appears" right out of the statutory language.

Likewise, section 20052, enacted at the same time as section 20024, which sets forth the pleading requirements for election contests based on illegal votes pursuant to section 20021, subdivision (d), provides that, "When the reception of illegal votes is alleged as a cause of contest, *it is sufficient to state generally* that in one or more specified voting precincts illegal votes were given to the defendant, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office." (Italics added; see Stats. 1961, ch. 23, § 3, p. 834.)

Our interpretation of section 20024 is further supported by our decision in *Canales v. City of Alviso, supra,* 3 Cal.3d 118. In *Canales,* several electors of the City of Alviso brought an action to contest an election held to determine whether that city should be consolidated with the City of San Jose. The electors complained that the vote to consolidate passed only because (i) the election board committed various acts of misconduct under section 20021, (ii) Alvisans were thereby induced to vote in favor of consolidation, and (iii) several illegal votes were cast for consolidation.

During trial on the contest, several votes were disqualified because the voters were nonresidents, or because city officials made illegal offers of consideration to prospective voters, including promises of improved city services in the event consolidation passed. These promises were in the form of contracts between the City of San Jose and the Alviso Improvement Corporation, an organization with close ties to the San Jose City Manager's office. The election results were 189 votes in favor of and 180 votes opposed to consolidation. (*Canales v. City of Alviso, supra,* 3 Cal.3d at pp. 123-124.) Thereafter, 21 votes were challenged by the contestants.

The trial court upheld the election after finding that "of the 21 challenged voters, 10 were disqualified by nonresidence in Alviso and one by virtue of a felony conviction; that of these 11 illegal votes, one was cast for and one against consolidation." (*Canales v. City of Alviso, supra,* 3 Cal.3d at p. 125.) The court could not, however, determine how the remaining nine illegal votes were cast. It therefore concluded the remaining nine votes should be apportioned by "tak[ing] half from each side-leaving a final tally of 183 1/2 ***284** votes in favor and 174 1/2 votes opposed to consolidation." (*Ibid.*) Based on this conclusion, the trial court confirmed the election results.

In reversing the judgment, we acknowledged that section 20024 requires a showing that "illegal votes were sufficient in number to account for the result but also that illegal votes were cast in such a manner as in fact to determine the result." (*Canales v. City of Alviso, supra,* 3 Cal.3d at p. 126.) Nonetheless, after noting that the only evidence as to how the remaining nine illegal votes were cast were the signatures of the voters on the "petition by virtue of which the election was held," we concluded such evidence, albeit circumstantial, was admissible on the question (citing *Robinson v. McAbee* (1923) 64 Cal.App. 709, 718 [222 P. 871]), that "[the] contestants met their burden as to the crucial nine votes," and that "in the absence of any contrary evidence, the trial court erred in refusing to so find." (*Canales, supra,* 3 Cal.3d at p. 126.)

We observed in *Canales* that, "[t]he policy in favor of upholding elections appears in the cases in conjunction with the rule that '[t]echnical errors or irregularities ... *which do not affect the result* will not [void] the election.' [Citations.]" (*Canales v. City of Alviso, supra,* 3 Cal.3d at p. 127; see discussion *ante,* at p. 278.) We further recognized that "neither [the policy nor the rule] has been invoked to uphold an election in the face of illegalities which affected the result-a situation in which the will of the people may be thwarted by upholding an election." (*Ibid.*)

We rejected the respondents' claim that the election contestants' evidentiary showing, which was largely circumstantial (illegal voters had signed a petition to put the consolidation measure on the ballot), was insufficient to establish that the election had in fact

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been affected by the illegal votes. Opining that "a voter's signature on a petition urging that an issue be put on the ballot so that a certain result may be obtained is circumstantial evidence which is admissible to show that he in fact voted in favor of that result [Citation]," we concluded that the "[r]espondents had the same ... opportunity to ask voters how they voted, but did not cross-examine the witnesses who testified that they signed the petition or favored consolidation to attempt to rebut [contestants'] circumstantial showing that the witnesses voted in accord with their signatures on the petition. [¶ ] Although an elector who signed the petition may subsequently have changed his mind, respondents made no effort to show that this ever occurred in fact. As a result the record clearly contains substantial evidence tending to show that all nine illegal votes were cast in favor of consolidation, and absolutely no evidence to the contrary. Accordingly, this judgment [confirming the election] must be reversed for lack of any evidentiary support. [Citation.]" (*Canales v. City of Alviso, supra,* 3 Cal.3d at p. 128.) ***285**

We are of the opinion that here, the election contestants made a much stronger circumstantial evidentiary showing that illegal votes affected the outcome of these consolidated elections than was made in *Canales, supra,* 3 Cal.3d 118. The widespread illegal voting practices that permeated this election-including fraud and tampering, the clearly established violations of sections 1006 and 1013, BAPAC's "loss" of 269 absentee ballots mailed to it by the Fresno County Clerk, the fact that nearly all of the candidates themselves, knowingly or otherwise, took part in the malconduct of "soliciting" absentee votes in violation of specific Elections Code provisions, the large percentages (40 percent to 72 percent) of illegal BAPAC absentee ballots cast and counted in each election, and the fact that all BAPAC-supported candidates won handily in each and every one of the election contests-together furnished sufficient, essentially uncontroverted circumstantial evidence in support of the conclusion that "it appear[ed]" the illegal votes affected the outcomes of the consolidated elections. (§ 20024.) [FN10]

> FN10 In light of our conclusion that there is substantial, uncontroverted evidence that illegal absentee ballot voting appears to have affected the results of these consolidated elections within the meaning of sections 20021, subdivision (d) and 20024, we need not and do not determine whether the trial court's findings of fact and conclusions of law, and its judgment annulling and setting aside the consolidated elections, agreed with contestants' further claim, pleaded in the complaint, that evidence of "other offense[s] against the elective franchise" (§ 20021, subd. (c)) furnished a separate and independent basis for annulling the election results. (See *ante,* at pp. 274-275, and fn. 4.)

III. Conclusion

For the foregoing reasons, we reverse the judgment of the Court of Appeal.

Mosk, J., Panelli, J., Arabian, J., Baxter, J., and George, J., concurred.

**KENNARD, J.,**

Dissenting.

In this case, plaintiffs, unsuccessful candidates for school board positions in five school districts in Fresno County, seek to set aside the election of their opponents on the ground that "illegal votes were cast." (Elec. Code, § 20021, subd. (d).) [FN1] A large number of illegal votes were cast in the elections for each of the five school districts, and, if all of those votes were cast for the successful candidates, the outcome of each of the elections would be affected. But the evidence plaintiffs introduced in support of their challenge to the election does not show for whom the illegal ballots were cast. The majority nonetheless concludes that the election should be set aside.

> FN1 Unless otherwise stated, all subsequent statutory references are to this code.

I disagree. In my view, the law permits an election to be set aside because of illegal votes only if the person challenging the election can show that a ***286** large enough number of illegal votes were cast for the winning candidate(s) so that, if the illegal votes for both the winning and the losing candidates were set aside and the remaining votes were tabulated, the outcome of the election would be different. Here, plaintiffs have not made such a showing, and the majority's conclusion that the election should be invalidated because of illegal votes is therefore erroneous. But, as I shall explain, plaintiffs may be entitled to prevail on the ground that the successful

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candidates engaged in "offense(s) against the elective franchise." (§ 20021, subd. (c).) I would direct the Court of Appeal to remand the matter to the trial court with directions to determine whether such a violation occurred.

I

Insofar as I can determine from the skimpy record furnished to this court, [FN2] the relevant facts are these: In November 1991, elections were held in Fresno County for positions on the boards of one high school and four elementary school districts. Either two or three positions were vacant on each of the various boards, so voters were entitled to vote for more than one candidate. The losing candidates (plaintiffs) challenged the results of the election.

> FN2 This appeal should arguably have been dismissed because of the inadequacy of the appellate record. (See *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1051 [236 Cal.Rptr. 526]; but see Cal. Rules of Court, rule 52.) As the Court of Appeal noted: "The reporter's transcript contains selected excerpts from the testimony of three out of approximately twenty- five witnesses. We have only a few of what appears to be approximately 60 exhibits." Nevertheless, neither the Court of Appeal nor the majority found the record to be inadequate. Accordingly, I shall attempt to analyze the issues on the limited record available.

Plaintiffs' challenge was directed primarily to the activities of the Voter Education Project (VEP), an organization created by the Fresno Chapter of the Black American Political Association of California (BAPAC). Although BAPAC did not endorse candidates in the elections, four of the winning candidates were BAPAC members, and the referee found that BAPAC had "assisted" the winning candidates by "providing and distributing materials and access to information concerning voters."

Before the election, VEP workers visited potential voters in their homes and urged them to sign registration affidavits and to apply for absentee ballots. The VEP workers encouraged these potential voters to agree to have their ballots hand-delivered to them by BAPAC; in most cases, VEP workers filled in BAPAC's address as the place to which the ballots were to be mailed.

The absentee ballots that were mailed to BAPAC were then brought to voters' homes by VEP workers, BAPAC members, and candidates in the ***287** school board elections. The voters were encouraged to vote in the presence of the persons who had delivered the ballots; in some cases, those persons gave information regarding candidates or issues. After voting, the voters placed their ballots in envelopes, signed and dated the envelopes, and gave them to the persons who had hand-delivered the ballots. These persons then took the ballots to BAPAC headquarters, from which they were mailed to the Fresno County Elections Department.

As the majority explains, the manner in which the VEP workers provided the ballots to the voters and the mode of casting the ballots violated the absentee voting requirements of sections 1006 and 1013. Under those statutes, BAPAC's address should not have been used as the place to which the absentee ballots were sent, and voters who chose to return their absentee ballots by mail should have personally mailed the ballots instead of giving them to the persons who brought the ballots to their homes. (Maj. opn., *ante*, pp. 279- 281.) As a result, the ballots so cast were illegal, and should not have been counted.

BAPAC mailed 1,023 absentee ballots to the county elections department. Of these, 93 ballots were disqualified. The elections department removed the remaining 930 from their envelopes, commingled them with the other ballots cast in the election, and counted them. As a result, 930 illegal ballots were tabulated in the high school district election, and smaller numbers of illegal ballots were tabulated in the elections for the elementary school districts.

II

Before considering whether, and on what basis, plaintiffs' challenge to the school board elections should be upheld, it is important to distinguish an election challenge brought on the ground of "illegal votes" under section 20021, subdivision (d) (hereafter section 20021(d)), from a challenge under section 20021, subdivision (c) (hereafter section 20021(c)), brought on the ground that the challenged candidate has committed an offense against the elective franchise. [FN3]

FN3 As relevant, section 20021 provides:

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> "Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes:
> "
> . . . . .
> "(c) That the defendant has given to any elector or any member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Division 17 (commencing with Section 21900).
> "(d) That illegal votes were cast."

An "illegal" vote is simply a ballot cast in violation of the procedures established by the Elections Code. A ballot may be illegally cast even ***288** though the voter, or the persons assisting the voter, did not intend to subvert the elections process. Thus a well-meaning voter may cast an illegal vote through ignorance or inadvertence rather than a conscious attempt to circumvent elections laws or to give any candidate an unfair advantage. Assume, for example, that a major civic organization such as the League of Women Voters, in a well-intended but misguided attempt to increase voter turnout, agreed to mail in the absentee ballots of a number of voters. The ballots mailed in this fashion would be "illegal," even though neither the League of Women Voters nor the voters themselves intended to undermine the electoral process.

If a trial court finds that the number of illegal votes cast for a winning candidate is so great that, when those votes are subtracted from the candidate's total, that candidate no longer has a plurality of the votes legally cast, the court must not only set aside the election (§ 20024), but it must also declare as the winner the candidate who received the plurality of the legally cast votes. (§ 20087.) In that situation, the result will be the election of a candidate who did not enjoy the support of a plurality of the people who cast ballots, because some of the persons voting for the candidate who received the most votes did not cast their votes in the statutorily approved manner.

Because a successful election challenge based on illegal votes may thus lead to the election of a candidate receiving a minority of the votes cast (but a plurality of the *legally* cast ballots), the Legislature has stated that absentee ballot provisions "shall be liberally construed in favor of the absent voter" (§ 1001) and this court has said that "[e]ven mandatory provisions [of the election laws] must be liberally construed to avoid thwarting the fair expression of popular will." (*Wilks v. Mouton* (1986) 42 Cal.3d 400, 404 [229 Cal.Rptr. 1, 722 P.2d 187].) To prevail, a contestant must show a defect in the election by "clear and convincing evidence." (*Ibid.*; see also *Smith v. Thomas* (1898) 121 Cal. 533, 536 [54 P. 71].)

When, by contrast, a challenge is based on offenses against the elective franchise under section 20021(c), the issue for the trial court is not whether individual votes were improperly cast; rather, the issue is whether the prevailing candidate has committed any one of a number of criminal acts proscribed by the Elections Code.

Here, plaintiffs' challenge to the election was twofold: illegally cast votes under section 20021(d), and the candidates' commission of offenses against the elective franchise under section 20021(c). Because the trial court ordered a new election on the ground that illegal votes were cast, it did not resolve plaintiffs' challenge under section 20021(c). The majority upholds the trial court's ruling. I do not agree, as I shall explain. ***289**

III

A challenge to an election based on illegally cast votes must satisfy the evidentiary burden imposed by section 20024. That statute provides: "An election shall not be set aside on account of illegal votes, unless it appears that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person."

In other words, under section 20024 an election challenge on the basis of illegal votes may be sustained only if the challenger shows "not only that illegal votes were sufficient in number to account for the result but also that illegal votes were cast in such a manner as *in fact* to determine the result." (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 126 [89 Cal.Rptr. 601, 474 P.2d 417], italics added.) The trial court may not simply assume that all illegal votes were cast for

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the prevailing candidate; rather, the challenging party must present evidence showing how the illegal votes were cast.

In this case, plaintiffs presented virtually no evidence of how the 930 illegal ballots BAPAC submitted to the county elections department were cast. According to the trial court's findings of fact, two voters testified that the VEP worker who brought them their absentee ballots assisted them in voting; their ballots, however, were among the ninety-three ballots that were disqualified by the county elections department and not counted. One voter testified that the VEP workers told him for whom to vote; his vote was counted by the elections department. Two other persons testified that they had not voted, although the records of the elections department showed that ballots had been submitted on their behalf. The elections department disqualified both of these ballots. The trial court's findings of fact contain no other evidence of the manner in which individual voters cast their ballots.

Plaintiffs could have called as witnesses each of the persons who had submitted illegal ballots, or, more realistically, a representative sample of those persons, and asked them how they voted. [FN4] Alternative, plaintiffs could have used other circumstantial evidence to show for whom the individuals cast their illegal votes. (See ***290***Canales v. City of Alviso, supra,* 3 Cal.3d at pp. 127-128.) Because plaintiffs did not do so, they failed to discharge their burden, imposed by section 20024, of showing that the number of illegal votes actually cast for the prevailing candidate was so great that the outcome of the election was altered.

> FN4 The general rule that ballots must be kept secret (Cal. Const., art. II, § 7) does not apply to illegally cast votes. "[T]he rule is that one who votes illegally forfeits the privilege of secrecy." (*Singletary v. Kelley* (1966) 242 Cal.App.2d 611, 613 [51 Cal.Rptr. 682]; see also *Patterson v. Hanley* (1902) 136 Cal. 265, 276 [68 P. 82] [68 P. 975]; 28 Cal.Jur.3d (rev.), Elections, § 251, Testimony as to How Voter Voted, p. 759.) Thus, in this case the challengers could have called as witnesses the persons who had cast each of the 930 illegal ballots, and asked them how they cast their votes. (*Canales v. City of Alviso, supra,* 3 Cal.3d at p. 128.)

Plaintiffs' failure to satisfy the statutory burden can be readily shown by an examination of the election in one school district. In the Pacific Union School District, for example, two seats were contested. Elected were Lawrence Cato and Rosemary Garcia, who defeated Roland Lawrence, Delbert Cederquist, Tami Gandy, and Toni Nagai. The totals were: Cato-358; Garcia-316; Lawrence-189; Cederquist-175; Gandy-80; Nagai-70. There were 310 illegal ballots. Because Cato's margin of victory over his nearest unsuccessful challenger (Lawrence) was 169 votes, plaintiffs had to show that 169 *more* illegal votes were cast for Cato than were cast for Lawrence to overturn Cato's election under section 20024.

Because voters could vote for more than one candidate, ballots could be cast in four different ways: (1) voters could vote for neither Cato nor Lawrence, (2) they could vote for both of them, (3) they could vote for Cato but not Lawrence, and (4) they could vote for Lawrence but not Cato. Illegal votes in categories (1) and (2) would not affect the outcome of the election, because they would not alter Cato's margin of victory; illegal votes in category (3) would, if deducted from Cato's total, reduce his margin of victory, while illegal votes in category (4) would, if deducted from Lawrence's total, increase Cato's margin. Because the margin of victory was 169 votes, Cato's election would be affected only if plaintiffs could show that of the 310 illegally cast ballots, there were 169 more of them in category (3) than there were in category (4).

Plaintiffs offered no evidence showing how many of the illegal votes fell into each of the four categories I just described. Consequently, it is impossible to determine from the evidence presented whether Cato's election was affected by the illegally cast votes.

The trial court recognized the problem in its findings of fact and conclusions of law: "This court cannot determine with certainty how the illegal ballots were cast. Thus, it cannot deduct the illegal votes directly from a defendant to see if he or she received a majority of the lawful votes for the office. (§ § 20024, 20087.)" The court nevertheless concluded that, because of the "wholesale violation of the mandatory requirements of the absentee voting laws in this case," there should be a remedy to prevent "a loss of ***291** public respect for and diminution of the integrity of the absentee ballot process" and to deter "greater abuse of the process in future elections." Because the trial court was

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convinced that the illegal votes cast were sufficient to affect the election of "many" of the defendants, it invalidated the election of *all* of the candidates in each of the five school districts.

Although the trial court's concern to achieve a "just" result is understandable, it was not entitled to disregard the mandate of section 20024. As discussed earlier, that statute permits the court to set aside an election because of illegal votes only if the plaintiff has shown that enough illegal votes were cast for the winning candidate that, if the illegal votes for both the winning and losing candidates were set aside and the remaining votes were counted, the election's outcome would be affected. The trial court's finding that "many" of the elections were affected does not support its conclusion that the election of *all* the candidates should be set aside. Once the court found that the evidence was insufficient to permit it to subtract the illegal votes from the candidates' totals, it should have recognized that plaintiffs had not met their burden, imposed by section 20024, of presenting evidence that would enable the trial court to perform this task, and should thus have concluded that plaintiffs had not demonstrated that the illegal votes required the election to be set aside.

Nonetheless, the majority concludes that the trial court's ruling setting aside the election should be upheld. The majority's reasons for its conclusion are not convincing, as I shall explain.

Section 20024 states that an election shall not be set aside unless "it appears" that a subtraction of the illegally cast votes from each candidate would alter the outcome of the election; seizing upon the words "it appears," the majority concludes that the Legislature intended that an election be invalidated whenever "illegal votes cannot be attributed to any one candidate, but nevertheless 'appear' sufficient in number or effect to have altered the outcome of the election." (Maj. opn., *ante,* p. 283.)

I cannot agree with the majority's analysis. Section 20024's use of the word "appear" certainly indicates a legislative conclusion that the trial court need not determine with *absolute certainty* for whom the illegal votes were cast before it may invalidate the election; nevertheless, the trial court must still decide, based on evidence presented, how the votes were cast. Such evidence was not offered here. The majority accuses the Court of Appeal of reading the words "it appears" out of section 20024; the majority, however, uses those very words to obliterate the remainder of the statute, which requires the trial court to determine how many illegal votes were cast for each candidate, and to subtract those votes from their totals. ***292**

The majority also attempts to find support for its holding by relying on *Canales v. City of Alviso, supra,* 3 Cal.3d 118. This reliance is misplaced. In *Canales,* an election was held to determine whether the City of Alviso should be annexed by the City of San Jose. There were 189 votes cast in favor of consolidation and 180 against. The contestants challenged 21 votes as illegal; with respect to 9 of those votes, the contestants attempted to show how they were cast by producing evidence that the 9 voters had signed a petition to place the measure proposing consolidation on the ballot. Based on that evidence, this court concluded, the trial court should have found that those 9 voters had cast their votes in favor of consolidation.

Under *Canales,* a challenger claiming that an election was affected by illegal ballots need not rely on the ballots themselves or the voter's testimony as to how he or she voted in order to demonstrate how an illegal vote was cast. Instead, the challenger may use circumstantial evidence to show how an illegal vote was cast. *Canales* does not, however, authorize the invalidation of an election when, as here, the challenger has presented virtually *no* evidence as to how individual ballots were cast. [FN5]

> FN5 Although there was ample evidence that showed which candidates BAPAC wanted voters to elect, this, in my view, does not constitute evidence of the preferences of the voters themselves. If BAPAC had been running a "slate" of candidates in the election or if VEP workers had consistently told absentee voters whom to vote for, one could perhaps draw the inference that voters agreeing to have their ballots delivered to them by the VEP desired the election of BAPAC's candidates. As I have explained, however, BAPAC made no official endorsements of any candidates in the election, and the record only shows a few isolated instances in which VEP workers told absentee voters for whom to vote.

Finally, the majority points to "widespread illegal voting practices ... permeat[ing] this

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election-including fraud and tampering" and "nearly all of the candidates themselves, knowingly or otherwise, [taking] part in the malconduct ...." (Maj. opn., *ante,* p. 285.) These "illegal voting practices" may well independently require the invalidation of the election in this case. They do not, however, permit us to set aside the election because of illegally cast ballots. To do so requires, under section 20024, evidence showing for whom the illegal ballots were cast, and evidence that a sufficient number of them were cast for the prevailing candidate so that the outcome of the election would be affected. Such evidence was not presented here. [FN6] ***293**

> FN6 If, as the majority asserts, there is sufficient evidence to set aside the elections under section 20024, the majority should, at the same time, declare new winners rather than hold new elections. Section 20087 provides: "If in any election contest it appears that another person than the defendant has the highest number of legal votes, the court shall declare that person elected." If the majority is correct in concluding that it "appears" that the number of illegal votes cast for the prevailing candidates would reduce their vote totals below those of other candidates for the same office," then it should equally "appear" that those other candidates should be declared the winners under section 20087, at least in the districts in which the number of unsuccessful challengers equalled the number of seats available. In the West Park district, for example, there were two positions open, for which there were four candidates. If, as the majority apparently concludes, the prevailing candidates have fewer legally cast votes than the other two, the latter candidates should be declared elected.

IV

In concluding that the school board elections challenged in this case may not be set aside on the ground of illegally cast votes, I do not necessarily conclude that plaintiffs' challenge to the election must be rejected. Although the trial court focused on plaintiffs' challenge to the election under section 20021(d) (the casting of illegal votes), plaintiffs did also challenge the election under section 20021(c), which permits a challenge on the ground that "the defendant has given to any elector or member of a precinct board any bribe ... or has committed any other offense against the elective franchise defined in Division 17 (commencing with section 29100)."

An election challenge based on illegally cast votes may be sustained only if it meets the standard set forth in section 20024. As I have explained, the evidence offered in this case is insufficient, under section 20024, to support the trial court's order setting aside the election. But a challenge to an election based on section 20021(c) is subject to no such limitation; indeed, the Elections Code contains no limitation whatsoever on a trial court's power to invalidate an election under section 20021(c). (*Stebbins v. White* (1987) 190 Cal.App.3d 769, 790 [235 Cal.Rptr. 656].)

In this case, because it concluded that the election of each of the successful school board candidates should be set aside under section 20024, the trial court did not determine whether the candidates had violated section 20021(c). The court did, however, find a "wholesale violation of the mandatory requirements of the absentee voting laws in this case." The majority agrees, concluding that "clear and convincing evidence established pervasive illegalities that permeated the election process" (maj. opn., *ante,* p. 282), and listing various Elections Code violations that were "arguably established " on this record. (Maj. opn., *ante,* p. 274, fn. 4.)

I express no view on whether the election in this case should be set aside under section 20021(c). Such a conclusion would be premature in the absence of factual findings by the trial court on the issue. Each candidate's involvement in offenses against the elective franchise must be separately examined, because under section 20021(c) a challenge may be sustained only if "the defendant" (i.e., the successful candidate) engaged in such ***294** violations. [FN7] It is thus possible that some of the elections should be set aside and others should not, depending on whether the particular candidate was a party to violations of the election laws. Accordingly, I would direct the Court of Appeal to remand the matter to the trial court with directions to determine which of the defendants, if any, committed offenses against the elective franchise that would warrant invalidating their election under section 20021(c).

> FN7 In my view (I am unaware of any case that has addressed the issue) an election may also be set aside under section 20021(c) if a

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person whose actions are directed or ratified by a prevailing candidate engages in such violations.

V

The majority speaks at length of the importance of safeguarding the integrity of the electoral process, and this proposition is beyond dispute. But as judges sworn to uphold the law we are not free to safeguard the electoral process in whatever way we think best; we must work within the statutory framework of elections laws. Under those laws, a court may invalidate an election on the basis of illegal ballots only if the challenger produces clear and convincing evidence of how those ballots were cast. In this case, plaintiffs failed to make the required showing, and therefore this one basis for invalidating the election-illegal ballots-is not available.

This conclusion, however, does not mean that an election must be upheld even in the face of pervasive voter fraud. The majority disregards another basis for invalidating an election, one that was pleaded and may well be available in this case: election law violations by the apparent winner of the election. Under the circumstances, the best means of preserving the democratic electoral process, without departing from the statutory framework, is to permit the trial court to determine the unresolved issues concerning the candidates' responsibility for the election law violations that the trial record has demonstrated.

Appellant's petition for a rehearing was denied July 15, 1993, and the opinion was modified to read as printed above. Kennard, J., was of the opinion that the petition should be granted. ***295**

Cal. 1993.

Gooch v. Hendrix

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Supreme Court of Wyoming.

HAMILTON

v.

MARSHALL.

**No. 1572.**

Dec. 17, 1929.

Error to District Court, Uinta County; Volney J. Tidball, Judge.

Action by Robert R. Hamilton against William Marshall. Judgment for defendant, and plaintiff brings error. Affirmed.

West Headnotes

**Elections 213**
144k213 Most Cited Cases
(Formerly 78k101, 78k1)
Voter, if he so desires, may waive privilege of secrecy secured by Const. art. 6, § 11, and Comp.St.1920, § 2631, subd. 21, W.C.S.1945, § 31-2312, and tell how he voted.

**Elections 287**
144k287 Most Cited Cases

**Pleading 214(3)**
302k214(3) Most Cited Cases
Demurrer admitted fourteen votes were cast after closing hour of polls where petition in election contest alleged fourteen or more.

**Elections 28**
144k28 Most Cited Cases
Voter may waive privilege of secrecy. W.C.S.1945, § 31-2312; Const. art. 6, § 11.

**Elections 271**
144k271 Most Cited Cases
Irregularity in keeping polls open after closing hour when votes were cast *held* insufficient ground of contest unless it materially affected result. W.C.S.1945, § 31-917.

**Elections 285(4)**
144k285(4) Most Cited Cases
Mere allegation that votes cast after closing hour of polls were enough to change result *held* inconclusive.

**Elections 285(4)**
144k285(4) Most Cited Cases
Petition in election contest merely alleging votes cast after closing hour were sufficient to change result *held* insufficient to state cause of action.

**Elections 285(4)**

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144k285(4) Most Cited Cases
Petition in election contest merely alleging votes cast after closing hour of polls were sufficient to change result *held* defective in failing to show plaintiff was prejudiced.

**Elections 289**
144k289 Most Cited Cases
In absence of fraud, where votes were cast after closing hour of polls without candidate's fault, defeated contestant must prove and allege sufficient illegal votes were cast for defendant to change result.

**Elections 291**
144k291 Most Cited Cases
If election contestant could not prove how alleged illegal votes affected result neither could defendant, and contestant having burden of proof must fail.

**Elections 298(2)**
144k298(2) Most Cited Cases
Court may purge poll of illegal votes cast without fault of candidates by deducting them proportionately from both candidates according to vote for each.

**Elections 298(2)**
144k298(2) Most Cited Cases
Where it was alleged sufficient votes were cast after voting hours to change result, court in election contest must deduct them proportionately from vote for each candidate.

***1059** M. A. Kline, of Cheyenne, and Samuel Corson, of Evanston, for plaintiff in error.

T. S. Taliaferro, Jr., of Rock Springs, for defendant in error.

KIMBALL, J.

Plaintiff and defendant were opposing candidates for the office of sheriff of Uinta county at the last general election. After the official canvass of the returns, defendant was declared elected, and plaintiff brought a contest. A demurrer to the petition was sustained, and, plaintiff declining to plead further, judgment was entered in favor of defendant. Plaintiff brings the case here by proceeding in error alleging that the district court erred in sustaining the demurrer.

The demurrer was on the ground that the petition did not state facts sufficient to constitute a cause of action. The material facts admitted by the demurrer appear in the following statement:

[1] The defendant, on the returns as canvassed, was elected by a majority of 10. The polls at the election were required to be closed at 7 o'clock in the evening. Chapter 29, Laws 1927. The poll in Lyman precinct was kept open until after 9 o'clock in the evening, and 14 electors voted in that precinct after 7 o'clock. The petition alleged the number as "fourteen or more," but we think the demurrer admitted only that there were 14. There were cast in Lyman precinct a total of 301 votes, but only 298 on the office of the sheriff. Of these 298 votes, 55 were for plaintiff and 243 for defendant. It is impossible to distinguish the ballots of the 14 electors who voted after 7 o'clock from the other ballots cast in said precinct.

[2] The petition does not charge that defendant had anything to do with the keeping of the poll open, nor with the reception of the 14 votes, after 7 o'clock; nor does it contain any charge of fraud or wrong motive on the part of the election officials. The poll was probably kept open until 9 o'clock as the result of the mistaken application of an earlier statute that referred to primary elections. There is no claim that the 14 persons who voted after 7 o'clock were not qualified electors of the precinct. It is not alleged that any of them voted for defendant, nor that it is impossible to prove for whom they did vote. It is alleged that the 14 votes, which are characterized as illegal, were enough "to have changed the result of the election." This allegation is inconclusive. Whether or not they did change the result would depend on facts that are not stated. The plaintiff evidently was unwilling to allege, and did not expect to prove, for which candidate the questioned votes were cast.

[3] If the petition had alleged that the votes cast after 7 o'clock changed the result, there would be good authority for holding that even then it failed to state a ground of contest unless it was charged that the poll was kept open as the result of fraud or collusion, or for the purpose of altering, changing, or affecting the result of the election, or that the persons who voted after hours were not qualified electors. In re Chagrin Falls, 91 Ohio St. 308, 110 N. E. 491, Ann. Cas. 1913E, 1004. Other cases do not go so far as the Ohio case in disregarding irregularities in the opening and closing of polls, but we think, when the facts of the various cases are examined, it will be found that all are in substantial agreement in holding that such an irregularity does not furnish a ground of contest unless

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it must be deemed to have affected materially the result. Vansant v. McPherson, 155 Ky. 34, 159 S. W. 630; McComb v. Dutton, 2 W. W. Harr. (Del.) 255, 122 A. 81; Williams v. Sherwood, 51 N. D. 520, 200 N. W. 782; Chambers v. Board of Directors, 172 Iowa, 340, 154 N. W. 581. The important conflict in the authorities arises from a difference in the views as to when the irregularity should be deemed to have affected the result to the prejudice of the contestant, and the method of determining that question.

[4] The plaintiff contends that the votes received after 7 o'clock were illegal because they would not have been cast if the poll had been closed at the proper time. We may assume, for the purposes of the case, that plaintiff's contention on that point ought to be sustained, though In re Chagrin Falls, supra, is authority to the contrary. But at least in a case where there was no fraud, and the votes were received without defendant's fault, the plaintiff has the burden of proving, and of course should allege, not only that illegal votes were cast, but that enough were cast for defendant to change the result. McCrary on Elections (4th Ed.) § 497; Piatt v. People, 29 Ill. 54, 72; Ex parte Murphy, 7 Cow. (N. Y.) 153; Lehlbach v. Haynes, 54 N. J. Law, 77, 23 A. 422; Tazwell v. Davis, 64 Or. 325, 130 P. 400; State v. Zanleoni, 97 Vt. 212, 122 A. 495, and other cases cited below.

[5][6] The plaintiff, however, contends that it would have been impossible to prove how the illegal votes were cast, because inquiry on that subject is forbidden by laws providing for secrecy of the ballot. Wyo. Const. art. 6, § 11; C. S. 1920, § 2631, subd. 21. While it may be conceded that these laws protect the voter from being required to tell how he voted, it may be doubted whether they have the effect of preventing inquiry of him on that subject. It is usually held that the voter, if he so desires, may waive the privilege of secrecy, and tell how he voted. Wigmore on Evidence, § 2214. And it may be that he waives the privilege, or never has it, if he votes without right. Hanson v. Village of Adrian, 126 Minn. 298, 148 N. W. 276. But see Locust Ward Election, 4 Pa. L. J. 341, 350. We do not deem it necessary for the purposes of this case to decide whether or not the plaintiff was prevented by law from proving for whom the alleged illegal votes were cast. ***1060** If we concede that he was, we still think his petition failed to state a cause of action.

[7] If, for the reason advanced, it was impossible for plaintiff to prove how the alleged illegal votes affected the result, it, of course, was equally impossible for defendant to make such proof. In such a case, it would seem but logical to hold that the plaintiff, having the burden of proof, must fail. Jaycox v. Varnum, 39 Idaho, 78, 226 P. 285; Atkinson v. Roosevelt County, 71 Mont. 165, 227 P. 811; M'Daniels' Case, 3 Pa. L. J. 310, 319.

[8] Other authorities hold that, when it is shown that illegal votes have gone into the ballot box without the fault of either candidate, and it is impossible to tell for whom they were cast, the court may purge the poll of the illegal votes by deducting them from the whole vote of the precinct. As said by Judge McCrary (section 495): "Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each." People v. Cicott, 16 Mich. 283, 315, 322, 97 Am. Dec. 141; Attorney General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Moore v. Sharp, 98 Tenn. 491, 41 S. W. 587; Potter v. Robbins, 155 Tenn. 1, 290 S. W. 396; Berg v. Veit, 136 Minn. 443, 162 N. W. 522; Russell v. McDowell, 83 Cal. 70, 23 P. 183; Heyfron v. Mahoney, 9 Mont. 497, 24 P. 93, 18 Am. St. Rep. 761 (but see Atkinson v. Roosevelt County, supra); Briggs v. Ghrist, 28 S. D. 562, 134 N. W. 321; Flowers v. Kellar, 322 Ill. 265, 153 N. E. 351.

If the above rule for deducting illegal votes be applied to the fourteen questioned votes in the case at bar, the calculation would show two and major fraction for plaintiff, and eleven and minor fraction for defendant. The fractional vote would have to be disregarded or deducted from plaintiff's total. The defendant's majority of ten, as declared on the official canvass, would not be overcome.

Counsel for plaintiff relies on cases holding that, where it cannot be shown for whom illegal votes, sufficient in number to affect the result, were cast, the result is rendered uncertain, and it becomes the duty of the court to reject the poll, and either declare the contestant elected or annul the election. The authorities that approve the application of this rule in cases of fraud or flagrant misconduct that has the effect of destroying the integrity of the returns may be put aside. Other cases, however, seem to approve the rule as applying to all cases where votes that should have been rejected have been received in number sufficient to have changed the result, and the court cannot tell for whom they were cast. Locust Ward

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Election, 4 Pa. L. J. 341; Clarke v. McCown, 107 S. C. 209, 92 S. E. 479; People v. Hanna, 98 Mich. 515, 57 N. W. 738 (but see Attorney General v. May, supra); Horning v. Fiscal Court, 187 Ky. 87, 218 S. W. 989. In Paine on Elections, § 513, it is said: "Where illegal votes have been cast, the true rule is to purge the poll by first proving for whom they were cast, and thus ascertain the real vote; but, if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties." It may be that this remark was intended to have reference only to cases of fraud. Mr. Paine, however, criticises the rule for proportional deduction of illegal votes, and apparently thinks it should not be resorted to in any case. His objections to it are set forth in a note to the above-cited section, where, among other things, he says that, "in the total absence of proof tending to show for whom illegal votes, sufficient in number to affect the result, were cast, the duty of the court would seem to be to choose, as wisely as possible, between a disregard of the illegality and a rejection of the entire precinct vote."

[9] We cannot approve of the application in the case at bar of a rule that would require the rejection of the whole vote of Lyman precinct, and result in the annulling of the election or the election of plaintiff. See Jaycox v. Varnum, supra; Atkinson v. Roosevelt County, supra; Briggs v. Ghrist, supra. If Mr. Paine is right in saying that it is the duty of the court to choose between a disregard of the alleged illegality and a rejection of the poll of the precinct, we think the court must choose the first of these courses, where, as in the case at bar, the election of a county official is in question, and the only misconduct charged is that in one precinct the election officials, acting without wrong motive, kept the poll open too long and received after closing time votes of qualified electors which probably did not affect the result.

[10] If we assume that the facts alleged showed the casting of 14 illegal votes, and that it was impossible to ascertain for whom they were cast, the petition, in our opinion, is defective in failing to show that the plaintiff was prejudiced. Whether this is because of the failure to allege that the illegal votes changed the result, or because the illegality should, under the pleaded facts, be disregarded, or because the deduction of the illegal votes proportionately would not change the result, we need not decide.

The district court did not err in sustaining the demurrer, and its judgment is affirmed.

BLUME, C. J., and RINER, J., concur.

41 Wyo. 157, 282 P. 1058, 66 A.L.R. 1154

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Supreme Court of Alaska.
Jay HAMMOND, Appellant in No. 4281,
Chancy Croft, Appellant in No. 4282,
Lowell Thomas, Jr., Lieutenant Governor of Alaska,
Patty Ann Polley, Director,
Division of Elections, Mary Jo Hobbs, Supervisor of Elections, Juneau, Jo Ann
Crane, Supervisor of Elections, Nome, Octavia Hansen, Supervisor of Elections,
Anchorage, and Ann Spielberg, Supervisor of Elections, Fairbanks, Appellants in No. 4283,
Jalmar Kerttula, Appellant in No. 4291,
v.
Walter J. HICKEL and Edward A. Merdes, Appellees.
Walter J. HICKEL, Cross-Appellant in No. 4284,
Edward A. Merdes, Cross-Appellant in No. 4285,
v.
Lowell THOMAS, Jr., Lieutenant Governor of Alaska,
Patty Ann Polley, Director,
Division of Elections, Mary Jo Hobbs, Supervisor of Elections, Juneau, Jo Ann
Crane, Supervisor of Elections, Nome, Octavia Hansen, Supervisor of Elections,
Anchorage, Ann Spielberg, Supervisor of Elections,
Fairbanks, Jay Hammond,
Chancy Croft, and Jalmar Kerttula, Cross-Appellees.
**Nos. 4281, 4282, 4283, 4284, 4285 and 4291.**

Oct. 20, 1978.

Winning candidate in gubernatorial primary appealed from an order of the Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., finding that there was malconduct on the part of election officials which was sufficient to impeach the integrity of the election process and place the true outcome in doubt. The Supreme Court held that there was no evidence of any irregularity causing bias in the vote and no malconduct to warrant vitiating the election results.

Reversed.

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West Headnotes

**[1] Elections 126(3)**
144k126(3) Most Cited Cases
If bias has been introduced into vote, "malconduct" exists if bias can be shown to be a result of significant deviation from lawfully prescribed norms. AS 15.20.540.

**[2] Elections 154(10)**
144k154(10) Most Cited Cases
In contest of gubernatorial primary election, there was no evidence of any irregularity causing bias in vote and no malconduct so as to warrant vitiating election results. AS 15.20.540.

**[3] Elections 158**
144k158 Most Cited Cases
Irregularities containing no element of bias, even if they amount to significant deviations from prescribed norms, do not necessarily constitute malconduct, but significant deviations which impact randomly on voter behavior will amount to malconduct if significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or reckless indifference to norms established by law; thus, evidence of election official's good faith may preclude finding of malconduct under certain circumstances. AS 15.20.540.

**[4] Elections 158**
144k158 Most Cited Cases
In election contest, each alleged deviation from statutorily or constitutionally prescribed norm must be analyzed individually to determine if it is significant and to ascertain if it involves element of scienter; once it is determined that individual instance of noncompliance amounts to malconduct, determination must be made of number of votes affected and total number of votes affected by all such incidents must then be considered in ascertaining whether they are sufficient to change result of election. AS 15.20.540.

**[5] Elections 158**
144k158 Most Cited Cases
In rare circumstances, it may be that election will be so permeated with numerous serious violations of law, not individually amounting to malconduct, that substantial doubt will be cast on outcome of vote, and under such circumstances, cumulation of irregularities may be proper and will support finding of malconduct. AS 15.20.540.

**[6] Elections 158**
144k158 Most Cited Cases
If bias caused by election malconduct tended to favor one candidate over another and number of votes affected by malconduct can be ascertained with precision, all such votes will be awarded to disfavored candidate to determine if result of election would be changed and, if number of votes affected by bias cannot be ascertained with precision, new election may be ordered, depending upon nature of bias and margin of votes separating candidates. AS 15.20.540.

**[7] Elections 158**
144k158 Most Cited Cases
Where election malconduct has not injected any bias into vote, but instead affects individual votes in random fashion, those votes should be either counted or disregarded, if they can be identified and results tabulated accordingly.

**[8] Elections 158**
144k158 Most Cited Cases
If malconduct has random impact on votes and those votes cannot be precisely identified, contaminated votes must be deducted from vote totals of each candidate in proportion to votes received by each candidate in precinct or district where contaminated votes were cast; similarly, if specified number of votes should have been counted but are no longer available for counting, they should be added to vote totals of each candidate in proportion to votes received by candidate in precinct or district in which votes would otherwise be counted. AS 15.20.540.

**[9] Elections 126(7)**
144k126(7) Most Cited Cases
Election certificate could be considered as evidence of election result, in absence of evidence of fraud, corruption, or scienter on part of any member of election board in tallying votes and executing certificate. AS 15.15.430, 15.15.440.

**[10] Elections 126(6)**
144k126(6) Most Cited Cases
Cross-precinct voting, when voter, registered in one precinct, votes questioned ballot in different precinct in same election district, was authorized by statute. Const. art. 5, § 1.

**[11] Elections 126(6)**
144k126(6) Most Cited Cases
Challenges to validity of cross-district voting are waived if not raised before ballots are separated and

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commingled. AS 15.15.215.

**[12] Elections 108**
144k108 Most Cited Cases
Lieutenant governor had no obligation to enter into formal reciprocal agreements with other states so as to insure that state's voter registration was accurate and up to date. AS 15.07.065.

**[13] Elections 126(6)**
144k126(6) Most Cited Cases
Mandatory requirement that absentee ballots be marked on or before election day was satisfied by date-received stamp, or postmark, or date of witnessing of voter's certificate, or any combination of those. AS 15.20.150, 15.20.170.

**[14] Elections 126(6)**
144k126(6) Most Cited Cases
Absentee ballot was required to have only one witness signature. AS 15.20.150.

**[15] Elections 126(7)**
144k126(7) Most Cited Cases
Early count of punch card ballots was authorized by statute. AS 15.15.330.

**[16] Elections 108**
144k108 Most Cited Cases
Lieutenant governor was not obligated to notify recently married women of necessity of updating their voter registration. AS 15.07.070.

***257** Robert H. Wagstaff, Wagstaff & Middleton, Anchorage, for Jay Hammond.

Douglas Pope, Anchorage, for Chancy Croft.

Avrum M. Gross, Atty. Gen., Juneau, and Ivan R. Lawner, Asst. Atty. Gen., Anchorage, for Lowell Thomas, Jr., et al.

***258** Edgar Paul Boyko, Edgar Paul Boyko & Associates, Anchorage, and David Young, Los Angeles, for Walter J. Hickel.

Henry J. Camarot, Merdes, Schaible, Staley & DeLisio, Anchorage, for Edward A. Merdes.

John R. Snodgrass, Jr., Palmer, for Jalmar Kerttula.

Allen McGrath and Stephen C. Hillard, Graham & James, Anchorage, for Douglas McConnell, et al., amici curiae.

C. R. Kennelly, Kennelly & Azar, Anchorage, for the Alaskan Independence Party and Donald Wright, amici curiae.

Roger A. McShea, Anchorage, for Sara Jansen, et al., amici curiae.

Fredric R. Dichter, Anchorage, for Jesse L. Carr, et al.

MEMORANDUM AND ORDER
INTRODUCTION

Before RABINOWITZ, Chief Justice, CONNOR, BOOCHEVER and BURKE, Justices, and DIMOND, Senior Justice.

PER CURIAM.

This case comes to this court on appeal from the decision of the superior court on cross-motions for summary judgment in an election contest brought pursuant to the provisions of AS 15.20.540. The superior court granted summary judgment to appellees and found that there was malconduct on the part of election officials which was sufficient to impeach the integrity of the election process and place the true outcome in doubt. Appellants have appealed from the summary judgment and appellees have cross-appealed as to those issues decided adversely to them by the trial court. For reasons set forth below we find it necessary to reverse the order of the trial court.[FN1]

> FN1. While we find it necessary to reverse Judge Moody, we commend him on his able analysis and comprehensive treatment of the numerous complex issues. We also express our appreciation to the law clerks who worked around the clock with him in order to expedite the urgent decision.

AS 15.20.540 specifies those persons who may contest an election and the grounds for such a contest. It provides:

> Grounds for election contest. A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election.

In bringing this election contest, appellees alleged

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malconduct, fraud, or corruption on the part of election officials sufficient to change the result of the election. The trial court found no evidence of either fraud or corruption, and this finding is not challenged by appellees and cross-appellants. We find no reason to reverse this finding. The lower court did find, however, that there was "malconduct" sufficient to impeach the integrity of the election process and place the true outcome in doubt. This ultimate legal conclusion is necessarily predicated on two lesser, but critical conclusions of law: (1) a finding of malconduct on behalf of election officials and (2) a finding that such malconduct was sufficient to change the result of the election.[FN2]

FN2. The lower court eventually concluded that there was "cumulative malconduct" sufficient to change the result of the election. However, this conclusion regarding "sufficient to change the result" rests upon a finding of "doubt" as to the true vote of the people.

1. THE CONCEPT OF "MALCONDUCT"

[1][2] Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972), held that " malconduct," as used in AS 15.20.540, means a significant deviation from statutorily or constitutionally prescribed norms. Boucher involved a ballot proposal whose wording introduced a "significant bias" into the vote, in addition to being a significant deviation from constitutionally and statutorily prescribed norms. Id. at 80-81. If a bias has been introduced ***259** into the vote, we read Boucher as holding that "malconduct" exists if the bias can be shown to be the result of a significant deviation from lawfully prescribed norms.

[3] In the case before the court, we find no evidence of any irregularity causing bias in the vote. All irregularities were random in their effect, if any, on the casting of votes. Irregularities containing no element of bias, even if they amount to significant deviations from prescribed norms, do not necessarily constitute malconduct. Significant deviations which impact randomly on voter behavior will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law.[FN3] Thus, evidence of an election official's good faith may preclude a finding of malconduct under certain circumstances.[FN4]

FN3. In common usage, malconduct is defined as: "Ill conduct, especially dishonest conduct, maladministration, or, as applied to officers, official misconduct." Black's Law Dictionary 1108 (rev. 4th ed. 1968). See also McGallagher v. Bosarge, 273 Ala. 133, 136 So.2d 181 (1961); Taliaferro v. Lee, 97 Ala. 92, 13 So. 125 (1893).

FN4. See Turkington v. City of Kachemak, 380 P.2d 593, 595 (Alaska 1963).

[4] In concluding that there was malconduct on the part of election officials, the superior court, in several instances, cumulated individual irregularities which, when analyzed separately, did not amount to malconduct because such irregularities did not constitute "significant deviations" from prescribed norms. Under the facts presented, it was error for the trial court to cumulate isolated instances of irregularity to support a finding of malconduct. We believe that each alleged deviation from a statutorily or constitutionally prescribed norm must be analyzed individually to determine if it is "significant" and to ascertain if it involves an element of scienter. Once it is determined that the individual instance of noncompliance amounts to malconduct, a determination must be made of the number of votes affected. The total number of votes affected by all such incidents must then be considered in ascertaining whether they are sufficient to change the result of the election.

[5] It may be that, in rare circumstances, an election will be so permeated with numerous serious violations of law, not individually amounting to malconduct, that substantial doubt will be cast on the outcome of the vote. Under such circumstances, cumulation of irregularities may be proper and will support a finding of malconduct. See, e. g., In re Contest of Election of Vetsch, 245 Minn. 229, 71 N.W.2d 652 (1955). In the case at bar, however, while we find instances of malconduct, the isolated instances of irregularity do not so permeate the election with numerous serious violations of law as to cast substantial doubt on the outcome of the vote.

Alaska elections are primarily conducted by many volunteer workers. Unique problems are presented in the vast area encompassed as well as the varied cultural backgrounds and primary languages of voters. Under these circumstances minor irregularities and other good faith errors and omissions may be anticipated, although we do not condone any such departures from lawful requirements. From the evidence presented, the errors that occurred in this

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election appear to be of that nature. There were no such numerous serious violations as to permeate the entire election process, so as to require the extreme remedy of a new election. Accordingly, the superior court's conclusion, based on cumulation of irregularities, that a new primary election is required, is reversed.

2. THE CONCEPT OF "SUFFICIENT TO CHANGE THE RESULT"

Any malconduct on the part of election officials must be of sufficient magnitude "to change the results of the election." AS 15.20.540.[FN5] In the present case, the trial ***260** court found cumulative malconduct sufficient to change the result of the primary election, but made no finding as to how the votes allegedly affected by malconduct could have changed the result of the election. Fulfillment of the statutory requirement rested on the court's belief that the malconduct impeached the integrity of the election process and placed the true outcome in doubt. This was error.

> FN5. We have interpreted this to mean that a party challenging an election must prove "that the alleged misconduct Could have changed the result of the election." Boucher v. Bomhoff, 495 P.2d 77, 80 n. 5 (Alaska 1972). The contestant need not show that the malconduct in fact changed the result of the election.

[6][7][8] We believe that more concrete standards must be applied in order to determine if votes affected by malconduct are sufficient in number to change the result of the election. The method used to determine if the malconduct could have changed the result of the election will depend upon whether the malconduct injected a bias into the vote. If the bias has tended to favor one candidate over another and the number of votes affected by the malconduct can be ascertained with precision, all such votes will be awarded to the disfavored candidate to determine if the result of the election would be changed. If the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending upon the nature of the bias and the margin of votes separating the candidates. See Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972). Where the malconduct has not injected any bias into the vote, but instead affects individual votes in a random fashion, those votes should be either counted or disregarded, if they can be identified, and the results tabulated accordingly. Finally, if the malconduct has a random impact on votes and those votes cannot be precisely identified, we hold that the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast. See, e. g., Grounds v. Lawe, 67 Ariz. 176, 193 P.2d 447, 453 (1948); Singletary v. Kelley, 242 Cal.App.2d 611, 51 Cal.Rptr. 682 (1966); Russell v. McDowell, 83 Cal. 70, 23 P. 183, 184 (1890); Thornton v. Gardner, 30 Ill.2d 234, 195 N.E.2d 723, 724 (1964). Similarly if a specified number of votes should have been counted but are no longer available for counting, they should be added to the vote totals of each candidate in proportion to the votes received by the candidate in the precinct or district in which the votes would otherwise be counted.[FN6] The invalid votes will be deducted in this pro rata fashion to determine if the malconduct could have affected the result of the election. This is the procedure which should have been followed here with respect to those votes randomly affected by those actions of election officials which amount to malconduct.

> FN6. If the proportion of votes to be counted to the proportion voted in the precinct or district is so great as to render this method unsuitable based on a statistical approach they should be counted according to the ratio of votes received in the statewide election. The remedy of a re-election may be required under certain circumstances. See Finkelstein & Robbins, Mathematical Probability in Election Challenges, 73 Colum.L.Rev. 241 (1973).

3. THE TAYLOR WEST INCIDENT

The superior court erred in concluding that malconduct committed by virtue of Taylor West's handling of approximately 2,000 questioned ballots should be considered, in determining whether there was cumulative malconduct sufficient to change the result of the primary election.

Taylor West, age seventeen, was employed by the Division of Elections as a full-time election clerk from June 12 to August 29, 1978. On the evening of August 22, 1978, he was working in the computer counting center at 5700 Tudor Road, in Anchorage. At approximately 10:00 p. m., in the performance of his official duties, West took possession of some 2,000 questioned ballots which were to be transported from the computer center to the Anchorage elections office. West placed the ballots, contained in two large bags, in his car. He then drove to his place of residence

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where he parked and locked the vehicle, leaving the ballots in it overnight. At approximately ***261** 7:00 a. m. the next morning West returned to the car. He found it still locked and the contents appeared to be undisturbed. He then drove to the elections office where he again parked and locked the car. The ballots were left in the car until later in the morning, when they were unloaded and taken into the elections office by West.

The superior court found that West and his supervisors were guilty of malconduct in the handling of these ballots, in that they failed to provide adequate security against possible tampering, thereby destroying public confidence in the election process. The court concluded that such action "constitutes a significant deviation from any conceivable norm of ballot security within the clear thrust of (the election code) and is malconduct."

We agree with the conclusion that West's handling of the questioned ballots was malconduct, and hold accordingly. However, we disagree with the superior court's further conclusion that such malconduct should be considered in determining whether there was cumulative malconduct sufficient to change the result of the primary election.

The superior court found: (1) that there was no evidence that the ballots had been disturbed or tampered with during the time they were in West's custody, (2) that West's possession of the ballots was "technically" lawful under AS 15.55.050 and AS 15.60.010(13), and (3) that there was no reason to invalidate them. We agree. Such being the case, we fail to understand how the malconduct connected with this particular incident could contribute in any way to change the result of the election.

4. HANDLING OF BALLOTS AND BALLOT SECURITY

(a) Ballots from Kotlik and Kwethluk

In Kwethluk and Kotlik a total of 141 ballots (104 from Kwethluk and 37 from Kotlik) were discarded rather than mailed to the lieutenant governor, as required by AS 15.15.370. This amounts to a significant deviation from the positive statutory duty placed upon the election board to mail the ballots to the lieutenant governor. This deviation does not in itself, however, require that these votes be disallowed.

[9] We hold that AS 15.15.430, read in conjunction with AS 15.15.440, permits the election certificate to be considered as evidence of the election result, in the absence of evidence of fraud, corruption, or scienter on the part of any member of the election board in tallying the votes and executing the certificate.

Appellees assert that the Kotlik and Kwethluk ballots, which were later recovered, cannot be utilized because they were mutilated and because there was an opportunity to tamper with those ballots. However, given the particular facts surrounding the recovery of the ballots, the ballots could be of some value in demonstrating that the certificate of the election board was entitled to be included in the canvass by the lieutenant governor.

The affidavit of Ms. Jo Ann Crane, election supervisor for Northwest Alaska for the August 22, 1978, primary election, states that Ms. Crane was informed by her staff that the only major mistake made by those election precincts was the failure of the respective election chairmen to send the used ballots to Juneau. The election results in each district were tallied in a tally book, reported to the election office in Nome by telephone, and ultimately by certificate on the cover of the tally book. Christopher Aketachunak, election chairman in Kotlik, sent unused ballots, ballot stubs, one tally book and two questioned ballots to Juneau. He stated that he "destroyed" the ballots thinking that he did not need to send them in to Juneau as he had certified the official count on the tally book. Similarly, the used ballots were "destroyed" in Kwethluk.

In recount proceedings the envelopes containing the unused ballots were presented. Thirty-seven ballots were cast in Kotlik, and unused ballots numbered from 38 upwards were presented upon recount.

In investigative proceedings subsequent to the recount, a state ombudsman investigator discovered 35 out of the 37 ballots ***262** from Kotlik, and 104 of the Kwethluk ballots, all 104 ballot bottoms, and 78 of the tops, were discovered. The return of the unused ballots to Juneau, coupled with the discovery of a significant portion of the used ballots from both locations, justifies a finding that election fraud was unlikely, and the vote tallies were entitled to be counted by the lieutenant governor in the original tally and the recount. The returning of the unused ballots, and the recovery of part of the used ballots tend to corroborate the validity of the local election boards' certificates.

(b) The 247 questioned ballots from District 6

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The superior court found that 247 questioned ballots from District 6 in Anchorage were misplaced by election officials and were discovered in an unlocked cabinet in the election office in Anchorage on September 23, 1978, well after the certification of the primary election nominees.

Each of these ballots is contained within two sealed envelopes. An expert witness called by the state testified that there was a high degree of probability that no tampering with the envelopes had occurred. Appellees' expert witness could find no evidence that the envelopes had been tampered with. Neither expert could say conclusively, i. e., with absolute certitude, that the envelopes had not been tampered with. We note the circumstance that if someone had tampered with the ballots it would be unlikely that he would put them in a place where they would not be discovered until after the election contest had commenced.

In these circumstances we hold that the state met its burden of proof, by a preponderance of the evidence, that the ballots were not the instrument of fraud and that it was probable that they had not been tampered with. See In re Democratic Primary Election of Somerset Township, 405 Pa. 169, 174 A.2d 23 (1961); Appeal of McCaffrey, 337 Pa. 552, 11 A.2d 893 (1940); Robinson v. Osborne, 314 S.W.2d 681 (Ky.1958); Tebbe v. Smith, 108 Cal. 101, 41 P. 454 (1895).[FN7] While we affirm the factual findings of the superior court, we reverse its holding as to the legal standard to be applied to those findings. Under the applicable law the ballots are entitled to be counted and added to the totals of the various candidates.

FN7. Appellees cite MacWherter v. Turner, 52 Ill.App.2d 270, 201 N.E.2d 325 (1964); Armbrust v. Starkey, 3 Ill.2d 131, 119 N.E.2d 910 (1954); Nickerson v. Aimo, 110 N.H. 348, 266 A.2d 828 (1970); Thoms v. Andersen, 235 N.W.2d 898 (S.D.1975); Ryan v. Montgomery, 396 Mich. 213, 240 N.W.2d 236 (1976); Bethard v. Mink, 10 Ill.App.3d 525, 294 N.E.2d 702 (1973); Coombs v. Barger, 100 Utah 451, 116 P.2d 390 (1941); Wilson v. Burridge, 346 P.2d 282 (Wyo.1959); and Kincer v. Holbrook, 307 S.W.2d 922 (Ky.1967). They assert that these cases require that in circumstances such as this it must be shown that there was no reasonable opportunity for tampering with the ballots. We find some of these cases distinguishable in various respects and others simply not persuasive. Moreover, some of these cases actually support the position of the state.

It follows that these ballots should be counted and added to the totals of the various candidates. The state asserts that election officials have determined that ten of these ballots were cast by persons not properly registered. Those ballots should be eliminated from the count if that is the case.

5. THE BAG OF BALLOTS FOUND IN JUNEAU ON SEPTEMBER 29, 1978

On September 29, 1978, Mr. James Thompson noticed a bag of ballots in Juneau while examining election materials on behalf of candidate Hickel. Upon seeing the bag and checking its contents, Mr. Thompson became suspicious of commingling and counting of improper ballots. The materials found by Mr. Thompson were the envelopes and other materials segregated as a result of the September 18, 1978, recount in which rejected questioned ballots were reviewed. The superior court found "no significant deviation from proper security" for these ballots. We agree and affirm the court's finding of no malconduct.

6. THE 15 BALLOTS FOUND IN JUNEAU

This item is not covered by the superior court's memorandum decision, but it is covered ***263** in the report of the special master and has been raised in this appeal. It appears that 12 of these ballots, inadvertently left among empty outer envelopes sent to Juneau from the Anchorage election office, have been kept under adequate security. They should now be counted and added to the totals of the various candidates. As to the remaining three ballots, our views are as follows.

The ballot from District 3 should not be counted, for the reasons stated in the Master's Report.

The ballot from District 20 may be counted if the qualifications of the voter, and the validity of the ballot, are established through the regular procedures of the election officials.

The ballot from District 17 should not be counted, for the reasons stated in the Master's Report.

7. ADMITTED IRREGULARITIES

The noncandidate appellants conceded for purpose of the summary judgment motion that 57 unregistered voters were permitted to cast ballots in the election, 38 additional ballots were improperly counted and two

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registered voters were wrongfully denied the franchise. In our view, the admitted mishandling of these 97 ballots constituted malconduct on the part of election officials, and the ballots should not have been included in the vote totals of the various candidates. Each candidate's final vote count must therefore be reduced on a pro rata basis to reflect the presumably random distribution of ballots invalidly cast,[FN8] for the purpose of determining whether the irregularly cast votes were sufficient to change the result of the election.

FN8. The result of the pro rata reduction in vote totals for each candidate is indicated in the Appendix.

8. DISCREPANCIES BETWEEN NUMBER OF BALLOTS CAST AND NUMBER OF SIGNATURES ON THE REGISTER

Appellees alleged in their motion for summary judgment before the superior court that several hundred ballots given to voters who signed the original registers were lost or unaccounted for.[FN9] This allegation was based on a comparison of the total number of ballots cast in certain districts and the number of voter signatures appearing on the original registers. The state's subsequent audit of the registers showed that most of these discrepancies were explainable as errors in the original register which were traceable through the duplicate register and the questioned voter register.[FN10] The noncandidate appellants conceded that ***264** approximately 80 of the apparent discrepancies remain unresolved.[FN11] However, the superior court found that the number of ballots involved were "not of such a magnitude . . . to warrant any conclusion of malconduct." This holding is affirmed.[FN12]

FN9. AS 15.15.180 provides for the keeping of an original register at the polling place:
The judges shall keep an original register in which each voter before receiving his ballot shall sign his name and give both his resident and mailing address. A record shall be kept in the registration book in space provided of the name of persons who offer to vote but who actually do not vote, and a brief statement of explanation. The signing of the register constitutes a declaration by the voter that he is qualified to vote.

FN10. The superior court's findings of fact establish that election officials were instructed regarding the use of three registers: the main original register, the duplicate register and the questioned voter register. The normal procedure on election day was as follows:
(A) voter would sign his or her name to the main original register upon entering the polling place. The election official would then check the name against the duplicate register, which consisted of a computer printout listing the names of all registered voters in the precinct. If the voter's name appeared on the duplicate register, he was given a regular ballot and allowed to vote.
If the voter's name was not on the duplicate register, election officials were instructed to place the person's name on the questioned voter register which, depending on the precinct, consisted either of a separate register book or a section at the back of the main original register. In addition, there was a space on the back of the envelope containing the duplicate register which could be used to list questioned votes.
In some precincts, a slightly different procedure was followed under which voters were asked their names and checked against the duplicate register before they signed the main original register. If the voter's name was not on the duplicate register he or she was asked to sign the questioned voter register only.

FN11. The audit first concluded that 89 total ballots could not be accounted for through signatures on the different registers. This number was later revised down to 80 as nine of the discrepancies were resolved.

FN12. It should be emphasized here that the 80 unexplained discrepancies are distinct from the 97 conceded irregularities discussed in a separate section of this memorandum and order.

9. CROSS-PRECINCT VOTING

[10] We affirm the superior court's holding that cross-precinct voting is authorized by statute. Cross-precinct voting occurs when a voter, registered in one precinct, votes a questioned ballot in a different precinct in the same election district. There is no constitutional requirement of precinct residency, and there is clear statutory authorization for persons claiming to be registered voters to vote a questioned ballot if there is no evidence of registration in the

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precinct in which the voter seeks to vote. The lieutenant governor or his representative is required to determine whether the voter is registered in the election district before counting the ballot. See Alaska Const. art. V, s 1, AS 15.07.090, 15.15.213, 15.15.215 and 15.20.210.

10. CROSS-DISTRICT VOTING

[11] A much more difficult problem is involved in considering the legality of cross-district voting. Cross-district voting occurs when a voter, registered in one district, casts a questioned ballot in a different district. Questions are presented with reference to the constitutionality of such voting under art. V, s 1 of the Constitution of the State of Alaska, which states that a voter shall have been a thirty-day resident of the election district in which he seeks to vote. Moreover, the statutory authority referred to in paragraph 9, Supra, is confusing as it pertains to cross-district voting because of the requirements that the lieutenant governor or his representative determine whether a voter is registered in the district before counting the ballot. AS 15.07.090(d). Since challenges of questioned ballots are to be determined in the same manner as challenged absentee ballots, AS 15.20.210(b) may possibly be construed as authorizing the counting of cross-district votes for statewide candidates.

The superior court found that since 1968 it has been the general policy of state election officials to allow persons outside their home districts to cast a questioned vote, and then count the ballots if the persons are properly registered. Allowing cross-district voting has been the practice of the Division of Elections, at least since the 1972 general election.

One voting in a district other than that in which the voter is registered must cast a questioned ballot. The voter places the ballot in a small blank envelope which is sealed and then put in a larger envelope on which the information concerning that voter's residence is located. The larger envelope is then sealed. AS 15.15.215.

The merits of the questioned ballot are determined in accordance with the procedure prescribed for challenged absentee ballots. AS 15.15.215.

Provision is made for the challenge by the election supervisor or the district absentee canvassing board of the name of an absentee voter when read from the voter's certificate on the back of the larger envelope if there is good reason to suspect that the challenged voter is not qualified to vote. AS 15.20.210. Challenged votes are segregated and the inner envelope is not removed, mingled with other votes, nor counted. Without a timely challenge, the votes are irretrievably mingled.

Representatives of candidates may be present at the district canvass. The superior court found that during the canvass, representatives for candidates Hickel and Merdes were present during the counting of cross-district questioned ballots. In fact, Mr. Mead Treadwell of the Hickel for Governor Committee, in a letter dated September ***265** 7, 1978, the day before the completion of the canvass, requested that certain cross-district ballots be counted. Certainly the candidates had every opportunity to make known to the canvassing board any objections to a long established procedure such as cross-district voting.

We affirm the trial judge's holding that challenges to the validity of cross-district voting are waived if not raised before the ballots are separated and commingled. To hold otherwise would permit parties to withhold challenges to await the outcome of an election and then, after it is too late to prevent the mingling of ballots, contest their validity. Opinion of the Justices, 371 A.2d 616, 619 (Me.1977); Bell v. Gannaway, 303 Minn. 346, 227 N.W.2d 797, 804-05 (1975).[FN13]

FN13. Chief Justice Rabinowitz and Senior Justice Dimond would hold that cross-district voting is no violation of the Constitution of the State of Alaska and is authorized by statute.

11. ADMINISTRATION OF CROSS-DISTRICT AND CROSS-PRECINCT VOTING

The superior court found that the administration of cross-precinct and cross-district voting by election officials at the local level constituted malconduct because of nonuniform and discriminatory application of voting procedures to individual voters. In addition, the trial court found that the state supplied inconsistent and conflicting information to voters and to election officials regarding policy on cross-district voting.

We believe that, based upon the law and the facts, a finding of malconduct on behalf of election officials was error. We do not think that the facts reveal a nonuniform or discriminatory application of voting procedures to individual voters. The affidavits presented by appellees [FN14] tend to prove that the

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state's policy with respect to cross-precinct/cross-district voting was applied in an evenhanded fashion.[FN15] The affidavits of Patricia Ann Polley, Director, Division of Elections, and Betty Irvine, an elections official, reveal that the facts asserted by appellees' affiants were in accordance with the state's instructions to election officials.[FN16] There is no evidence to support the ***266** trial court's finding that hundreds of voters were denied their right to vote by being turned away from the polls or that thousands of voters would have exercised their franchise had the state's policy been made a matter of general knowledge.[FN17] Accordingly, we find no evidence of nonuniform enforcement sufficient to constitute malconduct.

FN14. We rely only on those affidavits which are in proper order. These include the affidavits submitted by Roger L. Hartig, Dorothy F. Fetrow, Pauline May Farr, Phyllis D. Fishcer, Donna Agasti, Gertrude E. Wells, Hazel Gallagher, Virginia Ryder, and Oscar Geravitis.

FN15. The evidence indicated that the procedures followed by election officials with respect to cross-precinct and cross-district voters were as follows:
1) Those voters whose names were not discovered on the precinct registration list were advised to go to their own election precinct to vote.
2) In some cases, this precinct was located in another voting district.
3) Some of those voters whose names were not discovered on the registration lists insisted on voting questioned ballots and were permitted to do so.
4) Other voters did not insist and either journeyed to their proper precinct and cast their vote or chose not to vote.
5) Still other voters were not told to go to their proper precinct if it appeared that they might be disenfranchised because of time constraints (e. g., not being able to reach their proper precinct before the polls would close). They voted questioned ballots.

FN16. The area election supervisors and local election supervisors received the following instructions: (a) A voter is to be instructed to vote in the precinct in which he resides and is registered.
(b) When a voter moves to a new precinct he should transfer his registration to the new precinct at least 30 days prior to an election.
(c) If a voter fails to transfer his registration, he should either vote a regular absentee ballot in the precinct in which he is registered or vote a questioned ballot in the precinct in which he resides.
(d) If a person knows he will be absent from his precinct on election day, he should request an absentee ballot by mail or vote in an in-person absentee ballot before a local absentee ballot election official.
(e) If a person finds himself out of town on election day, he should vote a questioned ballot at the place he finds himself.
(f) If a person is in his town of residence, but through exigent circumstance or limited time cannot reach the polling place of his precinct of residence, he should vote a questioned ballot in any other precinct.
(g) Any voter insisting on voting a questioned ballot in any precinct for any reason should be allowed to do so.

FN17. The state's policy with respect to cross-precinct and cross-district voting was not contained in the "Alaska Voter Handbook" or in the "Instructions to Voters in State Elections." Public announcements were made, however, over radio and through the press of the opportunity so to vote.

The superior court also concluded that the state supplied inconsistent and conflicting information to voters regarding policy on cross-precinct/cross-district voting. While we believe that there was some conflict in the state's messages, we hold that such inconsistencies neither amounted to a significant deviation from statutorily prescribed norms nor were they the product of conduct involving scienter. The lieutenant governor and election officials were acting in good faith in an attempt to enfranchise as many qualified voters as possible in accordance with what they perceived to be a valid and long-standing state policy. The superior court's finding of malconduct must therefore be reversed.

12. VOTER REGISTRATION

[12] Concerning voter registration, the superior court held that "(i)n failing to follow the clear directive of AS 15.07.065, the lieutenant governor committed malconduct." [FN18] This statute provides:

FN18. The superior court further found that the lieutenant governor and key staff

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> members had callously disregarded statutory requirements pertaining to voter registration. More specifically, the court found: AS 15.07.065 has not been complied with at all. This court is not convinced by the proffered excuse that compliance would be too difficult or costly. Even assuming this to be true, the Lt. Governor had an affirmative duty to seek a more workable provision for ensuring the accuracy of Alaska's voter registration list.
>
> The lieutenant governor shall enter into reciprocal agreements or other arrangements for the exchange of voter registration information with the election officers in other jurisdictions to ensure that the state's voter registration register is accurate and up to date and to preclude a person from voting in Alaska and in another jurisdiction at the same election, thus preventing election fraud.

Counsel for the lieutenant governor conceded that no formal agreements have been entered into by the lieutenant governor pursuant to this statute but nevertheless contends that the lack of formal reciprocal agreements does not constitute malconduct in the circumstances of this case. Our review of the record and the statutes implicated convinces us that the superior court erred in holding that the lieutenant governor failed to comply with AS 15.07.065 and that such noncompliance constituted malconduct on his part.

Although it might have been preferable for the lieutenant governor to have made efforts to enter into formal reciprocal agreements with other states where feasible,[FN19] the record discloses that the lieutenant governor's staff routinely sends notices of cancellation of previous voter registration to other jurisdictions when informed by applicants that they are registered voters of other jurisdictions. It also appears that at times the registrant is given the cancellation notice card and requested to forward it to the former voting jurisdictions. The record further demonstrates that Alaska regularly receives information similar in character in return. Given the foregoing, we conclude that no basis exists for a holding that the lieutenant governor did not comply with the provisions of AS 15.07.065.[FN20]

> FN19. It appears that very few states have a central election office.
>
> FN20. We note that the second stated purpose of AS 15.07.065 is not applicable to the situation of Alaska's primary. This latter purpose of the statute is intended to prevent persons from voting more than once in elections for national offices.

***267** Additionally, the superior court observed that there had been only a perfunctory attempt on the lieutenant governor's part to comply with AS 15.07.060.[FN21] We have concluded that it is unnecessary to determine whether or not there is adequate factual basis for the superior court's characterization. The superior court did conclude that "There is no evidence showing that any individual did, in fact, vote in Alaska and elsewhere at the same time." Pursuant to voter registration forms furnished by the lieutenant governor, the registrant is required to supply the information called for by the form itself. The only information not supplied in the form is whether the voter has previously been registered to vote in another jurisdiction. As to this information, the record indicates that registration officials routinely request this data verbally when a person seeks to register.

> FN21. AS 15.07.060(a) provides:
> Each applicant who requests registration or re-registration shall supply the following information:
> (1) name and sex;
> (2) address and other necessary information establishing residence if requested;
> (3) election district and precinct as of the date of registration;
> (4) term of residence in state and in election district; and whether the applicant has previously been registered to vote in another jurisdiction, and if so, where;
> (5) a declaration that the registrant will be 18 years of age or older on or before the date of the next statewide election; (6) a declaration that the registrant is a citizen of the United States;
> (7) date of application;
> (8) signature or mark.
> (b) If the applicant has been previously registered to vote in another jurisdiction, he shall surrender to the registration official any voter registration or identification card or credentials from that jurisdiction the applicant may possess. The lieutenant governor shall notify the chief elections officer in that jurisdiction that the applicant has registered to vote in Alaska, request that jurisdiction to cancel the applicant's voter registration there, and return the applicant's voter registration or identification card or credentials, if any, to that jurisdiction.

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13. PRUDHOE BAY "PERSONAL REPRESENTATIVE" ABSENTEE BALLOTS

The superior court found that 532 voters working in the Prudhoe Bay area were issued absentee ballots obtained for them and delivered to them by business agents for Teamsters Local 959, who were acting as their "personal representatives." Each of these voters obtained their absentee ballot by filling out an application form which authorized a personal representative to obtain an absentee ballot for them. The election supervisor in Fairbanks ascertained that each of these voters was properly registered to vote in Alaska and issued the ballots pursuant to an interpretation of the various sections of Alaska's election code providing for absentee ballots.[FN22] Appellees agree that these voters were entitled to vote by absentee ballot pursuant to AS 15.20.010(3), but argue that these voters were not entitled to obtain absentee ballots by personal representative.

FN22. These provisions are AS 15.20.010 to 15.20.220 of Alaska's election laws. As appellees Hickel and Merdes made clear in their memorandum in support of their motion for summary judgment in the superior court, "(n)o contention is being raised that the persons who voted were not registered voters."

AS 15.20.010(3) allows a voter to vote by absentee ballot "if he believes he will be unable to be present at the polls because of the physical inaccessibility of the polling place causing undue travel expense, hardship, or hazard to (him)." [FN23] Each of these registered voters at Prudhoe Bay met this standard.[FN24] Other statutory sections provide that a "qualified voter" may apply in person, by personal representative, or by mail for an absentee ballot.[FN25] Yet another ***268** statutory section, AS 15.20.150, provides the methods by which a ballot obtained through a personal representative or by mail may be cast. In addition to technical standards designed to authenticate such a ballot,[FN26] this section provides that the ballot may be returned by personal representative to the election official who provided it or by the "most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in his district." [FN27]

FN23. AS 15.20.010(3).

FN24. No election district or polling place had been established at Prudhoe Bay. We agree with the superior court's conclusion that it was not malconduct for Lt. Governor Thomas to fail to establish a voting precinct at Prudhoe Bay, because he could have reasonably concluded that there were not sufficient permanent residents there to merit a voting precinct or that voters residing there were registered elsewhere in the state. See AS 15.10.050.

FN25. AS 15.20.060-70. Application in person or by a representative may be made to certain election officials in either the election district or precinct in which one is registered to vote. If time does not permit the voter to apply in this manner or by mail, he may apply for an absentee ballot in person or by a personal representative to any election supervisor. AS 15.20.065. The Prudhoe Bay voters here applied to the election supervisor in Fairbanks.

FN26. The voter "may proceed to mark the ballot in secret" in the presence of an attesting witness who is at least 18 years of age. The ballot is then to be placed in "the small blank envelope," which is in turn placed in a larger envelope to which is attached the "voter's certificate" signed in the presence of either certain officials or the attesting witness.

FN27. The evidence showed that some of these ballots which were cast were returned by personal representative and others returned by mail.

It was on these general provisions concerning personal representative absentee voting that election officials based their decision to issue the absentee ballots in question to registered voters at Prudhoe Bay who were qualified to vote by absentee ballot. However, AS 15.20.120(a), specifying the basis on which an election official is to make the decision to issue an absentee ballot to a designated personal representative, injects confusion into the statutory scheme. This section provides that the voter's application for such a ballot must be "signed by the applicant and . . . accompanied by a letter from a licensed physician or a statement signed by two qualified voters stating that the applicant will be unable to go to the polling place because of physical disability." While this section is anomalous and difficult to integrate consistently into the statutory scheme of provisions detailing the issuance and use of

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personal representative absentee ballots, it is the only section of the chapter which provides election officials with explicit standards for their decisions to issue such ballots. For this reason the superior court was arguably correct in its conclusion that personal representative absentee ballots should be issued only where the requisite showing of "physical disability" is made by the voter.[FN28] The superior court found that none of these Prudhoe Bay voters were in fact "physically disabled."

FN28. The statutory sections governing absentee ballot voting by personal representative are confusing and unclear. We strongly recommend that the legislature expressly define the requirements which a voter must meet in order to obtain and cast an absentee ballot by personal representative.

However, we do not conclude, as did the superior court, that the decision to issue these ballots amounted to an act of malconduct by election officials. These ballots were issued as a result of the good faith attempt by those officials to interpret and implement an ambiguous statutory scheme providing for personal representative absentee ballots.[FN29] The purpose and effect of this interpretation was to allow properly registered Alaskan voters, who otherwise might have been unable to register their political preferences, to vote by absentee ballot. There was no evidence that the election officials were motivated by bias or a partisan desire to influence the outcome of the election. As the superior court concluded, the decision to issue these absentee ballots to the Prudhoe Bay voters' personal representatives "arose from commendable intentions or good faith by the election officials involved." For these reasons, we cannot ***269** hold that election officials significantly deviated from a statutory mandate in a way that was knowingly or recklessly indifferent to that mandate.[FN30]

FN29. Election officials interpreted AS 15.20.120(a) as specifying only one basis for the issuance of absentee ballots to personal representatives. They considered physical inability to get to the polls an equally valid reason in light of the language in other sections of the statutory scheme. They used application forms which certified the voter as "unable to go to the polling place due to physical disability" for both types of ballot requests. They informed the personal representatives involved here that this form had not been changed in years, but as a matter of practice was used for requests based on either physical disability or inability.

FN30. Since we have concluded that these actions by election officials did not constitute "malconduct," we need not decide whether they affected the results of this contested election.

14. ABSENTEE BALLOTS

[13] AS 15.20.150 provides that an absentee ballot is to be marked by the voter and placed in a small blank envelope. The voter then places the small envelope in a larger envelope, and signs the voter's certificate on the back of the larger envelope in the presence of an election official or some other witness. The date that this is done is shown on the certificate. AS 15.20.150 also requires in part that an absentee ballot be postmarked not later than the day of election.

AS 15.20.170 provides that an election official shall stamp on the outer or larger of the two envelopes containing the voter's certificate or oath the date on which the ballot is received in his office.

The parties have stipulated for purposes of appeal that certain absentee ballots did not meet one or the other, or both of the above requirements relating to postmarking and stamp dating by election officials. Appellees contend that the postmark and date stamp requirements are mandatory, and that election officials committed malconduct by counting such ballots.

The state has conceded that 35 ballots were counted in contravention of statutory requirements. The absentee ballots which remained in question before the superior court amounted to more than 2,500.

The regional canvass board has the responsibility for determining the validity of absentee ballots before they are counted. The board is directed not to count certain absentee ballots as specified in AS 15.20.210. The failure of the absentee ballot to be properly postmarked or dated when received by an election official is not included as a violation of the absentee ballot statute mandating the canvass board to invalidate the ballot.

The superior court properly concluded that the provisions regarding postmarking and date stamping by an election official were not mandatory, and refused to reverse the determination of the regional election boards. The court did, however, conclude that "election officials have disregarded the statutory scheme in a way that impels this court to its ultimate

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conclusion of cumulative malconduct."

We hold that except for the 35 ballots conceded to by the state as having been improperly counted, there was no malconduct. The purpose of AS 15.20.150 and of AS 15.20.170 is to provide methods by which to insure that absentee ballots have been cast on or before election day. All absentee ballots in question here were objectively determined to have been cast on or before the election day. The mandatory requirement that ballots be marked on or before election day is satisfied by a date received stamp, or a postmark, or the date of witnessing of the voter certificate, or any combination of these.

15. ONE WITNESS SIGNATURE ON ABSENTEE BALLOT

[14] Appellees contend that certain absentee ballots should not have been counted because in each case the voter's certificate on the back of the absentee ballot envelope had the signature of only one attesting witness. They contend this was in violation of AS 15.20.150 which they allege requires the signatures of two witnesses.

The court below found that AS 15.20.150 was amended by s 1 ch. 16 SLA 1977 to eliminate the requirement of two witnesses for absentee ballots cast by mail or personal representative. The new version of the statute allows casting of an absentee ballot "in the presence of An attesting witNess . . . ." (emphasis added) Confusion has arisen because in the amended version of the statute there remains language from the old statute which refers to a now deleted portion, and to "attesting witNesses." (emphasis added) The use of the plural ***270** form of the word "witness," we determine, was a legislative oversight an error in drafting. See Informal Opinion of the Attorney General (3/30/77).

The superior court concluded that the clear intent of the legislature is that a single witness is sufficient and that the ballots with a single witness signature were properly counted. We agree with that conclusion. There is no malconduct involved.

16. COMPUTER BREAKDOWN

On election evening, the State of Alaska, Department of Administration computer was designated to process punch card ballots from the Juneau district. Shortly after processing began, problems developed with this computer. It was decided by the Data Processing Review Board that the Department of Labor computer, located in the same room, should be used instead.

Processing was begun on the Labor Department computer, and eight precincts were tallied before this computer also developed problems. By that time, the problems with the Department of Administration computer had been corrected. The Data Processing Review Board decided to complete the Juneau tally on that computer. This was done and calculation of the totals was completed using the summary cards and reports from both of the computers.

There is no indication that these calculations or the final totals were incorrect or inaccurate.

Both appellees and appellants agree that election officials violated provisions of AS 15.20.690. That statute requires, Inter alia, that when a computer malfunctions during processing, necessitating removal of ballots to an alternate computer, all of the ballots shall be counted at the alternate site, including those already counted at the main location. (AS 15.20.690(b).)

In addition to that requirement, AS 15.20.690(c) directs that all computer tapes resulting from the aborted counting operation shall be erased and the summary cards destroyed.

The superior court determined that these provisions are only technical requirements, violations of which should not cause disenfranchisement of such a large segment of the voting population.

We hold that the facts depicted indicate no significant deviation from a prescribed norm and we therefore conclude that there is no malconduct as to this issue.

17. PUNCH CARD BALLOTS

Appellees' contention on appeal that questioned or challenged ballots should have been cast on paper rather than punch card ballots has been disposed of by our order of October 6, 1978, in Carr v. Thomas, 586 P.2d 622 (Alaska). There, we concluded that it was not illegal to count certain questioned or challenged ballots merely because they were cast on punch card ballots. In the context in which this question is raised, punch card ballots are not distinguishable from paper ballots: the questioned and challenged punch card ballots were processed in the same manner as questioned and challenged paper ballots. Functionally, this satisfied the requirement of AS 15.15.215(a) to segregate challenged and questioned ballots until a determination as to their validity could be made.

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18. EARLY COUNT OF PUNCH CARD BALLOTS

[15] We agree with the superior court's conclusion that the early count of punch card ballots was permissible and did not constitute malconduct. AS 15.15.330 authorizes the early counting of paper ballots in precincts having 300 or more voters, which have been designated by the lieutenant governor. This early count provision also applies to punch card ballots, since we have decided that a punch card ballot is a form of paper ballot. (See discussion of use of punch cards for challenged and questioned ballots Supra.) Punch card ballots are not distinguishable from paper ballots, either in the context of early counting or in the context of segregation of questioned and challenged ballots. The statutory distinction is rather between paper ballots and ***271** machine ballots. Under AS 15.15.330 paper ballots, including punch card ballots, may be counted early.

Under the authority of AS 15.15.010 and 15.15.330, the lieutenant governor has promulgated regulations which govern the early counting of ballots. See 6 AAC 23.010-070. These regulations were presumably promulgated in accordance with the Administrative Procedure Act, AS 44.62.010-650, as required by Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973), and the early count was carried out in substantial compliance with them. We therefore hold that the early count of punch card ballots was authorized by statute and properly conducted under the applicable regulations.

19. CHANGE OF NAMES MARRIED WOMEN

[16] A number of women voters [FN31] attempted to vote under their married names when they had been previously registered under their maiden names. Their votes were rejected.

> FN31. The Report of the Special Master indicates that 20 married women were not allowed to vote because they attempted to vote under their married names rather than their maiden names under which they were registered. The Memorandum Decision of the superior court indicated that 14 votes were affected.

Appellees contend that AS 15.07.070 imposes a duty upon the lieutenant governor to promulgate rules and regulations to enable voters to register, and that he did not fulfill his duty with regard to informing recently married women of the necessity of notifying the lieutenant governor of their change of names.

A person who changes his or her name will invariably need to notify various agencies in order to modify documents. There appears to be no affirmative duty on the part of the lieutenant governor or other election officials to inquire as to whether such a change of name has occurred. A voter whose name is changed by marriage may vote under her previous name or, if she desires to vote under her married name, she must notify the lieutenant governor at least 30 days before an election so that her registration may be amended to reflect the change. AS 15.07.090(a). This information was set forth in the Alaska Voter Handbook.

The failure of the lieutenant governor to further notify recently married women of the necessity of advising him of their change of names under AS 15.07.090(a) does not constitute malconduct.

20. THE PROCEEDINGS OF THE 1977 LEGISLATIVE SESSION AND THEIR ASSERTED RELEVANCE TO THE ISSUE OF SCIENTER ON THE PART OF THE LIEUTENANT GOVERNOR AND OTHER ELECTION OFFICIALS

Appellees argue that the proceedings of the 1977 Legislature reflect that the lieutenant governor sought changes in Alaska's election code which would have allowed cross-district voting, the early counting of punch card ballots, and the use of non-election board members to transport punch card ballots. Based upon the foregoing, appellees further argue that the lieutenant governor was aware that the election code did not permit the aforementioned procedures without prior legislative sanction.

Legislative records reveal that two of the three bills which were introduced in the 1977 Legislature pertaining to election code reform were never reported out of committee. The single piece of electoral legislation which was enacted during the 1977 Legislature was vetoed by the governor. In his veto message to the Speaker of the House, the governor wrote, in part: "The objections to this bill all relate to those sections which provide for election-day registration of voters . . . ." [FN32] Given the foregoing, we find unimpressive appellees' attempt to use the 1977 legislative proceedings to demonstrate that the lieutenant governor, and other election officials, were ***272** guilty of malconduct in carrying out the 1978 primary elections.[FN33]

> FN32. The legislation which was vetoed also provided for cross-district balloting.

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FN33. Though the governor's action in vetoing a bill constituted a part of the legislative process and may therefore be considered in determining legislative intent, Shelton Hotel Co., Inc. v. Bates, 4 Wash.2d 498, 104 P.2d 478 (1940); C. Sands, 2A Sutherland Statutory Construction s 48.05, at 201 (4th ed. 1973), rejecting a bill by the governor or the legislature is not always persuasive of a legislative decision not to change existing law. The rejection "may be due . . . to the belief that the proposed provision would be mere surplusage," or it might have been intended for clarification of an existing act. Roderick v. Sullivan, 528 P.2d 450, 455 n.13 (Alaska 1974) (citations omitted). See People v. Puritan Ice Co., 24 Cal.2d 645, 151 P.2d 1 (1944); Standard Oil Co. of California v. Johnson, 24 Cal.2d 40, 147 P.2d 577 (1944). The governor's veto message was addressed only to election day registration, there is no basis for construing a specific legislative intent to change the law with respect to the other enacted portions of the bill.

CONCLUSION

Although at this time the court is not able to determine the prevailing candidates in the Merdes-Croft-Hickel-Hammond races, it is apparent, barring a contest resulting in a tie vote, or the reallocation of votes due to irregularities sufficient to change the results, that a general election should be held on November 7, 1978. As soon as is practicable, the votes for the respective candidates involved in the election contest and recount cases will be recomputed and certified pursuant to the terms of this memorandum and order and the separate order which will be entered in the recount case. Therefore, in order to insure the integrity of the forthcoming general election, the following specific further orders are entered:

1. The lieutenant governor is authorized to post the names of all registered voters, required by AS 15.07.140, as late as 10 days before the general election;

2. The lieutenant governor is authorized to conduct the staff training programs, required by AS 15.07.140, as late as 10 days before the general election;

3. The lieutenant governor is authorized to distribute sample and official ballots, original registers, duplicate registers and other forms and supplies to election supervisors, as required by AS 15.15.050, as late as 10 days before the date of the general election;

4. The lieutenant governor is authorized to distribute the election pamphlet, as required by AS 15.57.030 and AS 15.57.050, as late as 10 days before the general election;

5. The lieutenant governor is authorized to announce the general election, as required by AS 15.15.070, by publication of the date and nature of the election as late as 10 days before the general election;

6. The lieutenant governor is authorized to make absentee ballots available to voters, as required by AS 15.20.080, as late as 10 days before the general election;

7. The lieutenant governor is authorized to have available for distribution, as required by AS 15.20.080, all personal representative ballots, as late as 10 days before the general election;

8. The lieutenant governor is authorized to distribute absentee ballots for redistribution by election officials, as required by AS 15.20.040, as late as 5 days before the election.

FN1. This proration may have to be altered as a result of the counting of 249 ballots.

APPENDIX

TABLE 1

ALLOCATION OF 88 INVALID VOTES FROM STATE'S MEMO (pg. 85) TO BE DEDUCTED FROM CANDIDATES HAMMOND AND HICKEL [FN1]

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| District | Illegal Votes | Allocated to Hickel | Allocated to Hammond | Allocated to Other |
|---|---|---|---|---|
| 1 | 2 | 0.91 | 0.37 | 0.72 |
| 2 | 7 | 2.08 | 2.02 | 2.80 |
| 3 | 0 | - | - | - |
| 4 | 2 | 0.35 | 0.87 | 0.79 |
| 5 | 4 | 1.57 | 1.00 | 1.42 |
| 6 | 6 | 1.87 | 1.20 | 2.93 |
| 7 | 2 | 0.61 | 0.50 | 0.89 |
| 8 | 1 | 0.31 | 0.22 | 0.47 |
| 9 | 1 | 0.33 | 0.21 | 0.47 |
| 10 | 1 | 0.35 | 0.23 | 0.42 |
| 11 | 3 | 0.96 | 0.77 | 1.27 |
| 12 | 1 | 0.37 | 0.23 | 0.40 |
| 13 | 5 | 1.55 | 1.62 | 1.84 |
| 14 | 2 | 0.50 | 0.89 | 0.61 |
| 15 | 5 | 1.24 | 1.50 | 2.27 |
| 16 | 3 | 0.54 | 1.57 | 0.89 |
| 17 | 6 | 0.92 | 2.80 | 2.28 |
| 18 | 10 | 1.91 | 4.25 | 3.84 |
| 19 | 17 | 6.14 | 5.05 | 5.81 |
| 20 | 5 | 1.31 | 1.88 | 1.82 |
| 21 | 3 | 0.53 | 1.27 | 1.20 |
| 22 | 2 | 0.50 | 0.78 | 0.71 |
| TOTAL | 88 | 24.95 | 29.23 | 33.85 |

APPENDIX

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TABLE 2

TOTAL ALLOCATION OF 97 INVALID BALLOTS
-SEVEN INVALID-TWO TO BE ADDED
BACK IN-NET OF 5 DIFFERENT FROM
TABLE 1-ASSUMING ALL SEVEN ADDTIONAL
BALLOTS AND THE TWO DEDUCTED
ARE ALL FROM ONE DISTRICT

| District | Total 97 Vote Allocation for Hickel | Hammond | Other |
|---|---|---|---|
| 1 | 27.22 | 30.15 | 35.66 |
| 2 | 26.51 | 30.68 | 35.85 |
| 3 | 26.03 | 31.35 | 35.66 |
| 4 | 25.83 | 31.41 | 35.80 |
| 5 | 26.92 | 30.48 | 35.63 |
| 6 | 26.51 | 30.23 | 36.30 |
| 7 | 26.48 | 30.48 | 36.08 |
| 8 | 26.51 | 30.33 | 36.19 |
| 9 | 26.58 | 30.27 | 36.18 |
| 10 | 26.71 | 30.39 | 35.94 |
| 11 | 26.59 | 30.51 | 35.97 |
| 12 | 26.75 | 30.37 | 35.87 |
| 13 | 26.50 | 30.85 | 35.69 |

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| | | | |
|---|---|---|---|
| 14 | 26.21 | 31.46 | 35.37 |
| 15 | 26.19 | 30.73 | 36.12 |
| 16 | 25.86 | 31.85 | 35.33 |
| 17 | 25.72 | 31.57 | 35.75 |
| 18 | 25.91 | 31.36 | 35.77 |
| 19 | 26.76 | 30.72 | 35.56 |
| 20 | 26.26 | 31.11 | 35.67 |
| 21 | 25.83 | 31.34 | 35.89 |
| 22 | 26.19 | 31.19 | 35.65 |
| High | 27.22 | 31.85 | 36.30 |
| Low | 25.72 | 30.15 | 35.33 |
| Average | 26.37 | 30.86 | 35.82 |
| Median | 26.49 | 30.70 | 35.88 |

Thus, based on the average, the number of votes to be deducted from candidate Hickel is 26 and from candidate Hammond, 31. A similar computation should be utilized to determine the deductions from candidates Merdes and Croft.

588 P.2d 256

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Appellate Court of Illinois,
Fifth District.
Susan C. HILEMAN, Petitioner-Appellee,
v.
Sharon McGINNESS, Respondent-Appellant (Louis Maze, Respondent).
**No. 5-00-0381.**

Oct. 25, 2000.

Candidate for circuit clerk filed petition to contest primary election, requesting court to declare all of ballots cast void due to election irregularities, illegalities and fraud. The Circuit Court, Alexander County, John Speroni, J., declared invalid the result of primary election for political party's candidate for circuit clerk, and ordered a new primary election. Opposing candidate appealed. The Appellate Court, Chapman, J., held that remand was necessary so that trial court could hold evidentiary hearing on allegations of fraud in election process.

Reversed and remanded with directions.

Welch, J., dissented with opinion.

West Headnotes

**[1] Appeal and Error 893(1)**
30k893(1) Most Cited Cases
Disputed questions of law are reviewed de novo.

**[2] Elections 239**
144k239 Most Cited Cases
Exclusion of invalid ballots rather than apportionment is the procedure of
choice where fraud is involved in the election process.

**[3] Elections 239**
144k239 Most Cited Cases
In an election contest where no fraud is involved, the exclusion of ballots is a simple remedy if the irregular ballots are easily distinguishable from the total tally; however, in cases with no fraud but where it cannot be determined for which candidate a ballot is cast, exclusion is impossible, thereby making apportionment of the invalid ballots an appropriate remedy.

**[4] Elections 154(6)**
144k154(6) Most Cited Cases
Finding as to whether fraud existed in the primary election process was necessary in order to determine appropriate remedy for the commingling of presumably-invalid absentee ballots, in election contest brought by candidate for circuit clerk in primary election, and thus remand was necessary to permit trial court to hold evidentiary hearing on allegations of fraud.

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**[5] Elections 126(7)**
144k126(7) Most Cited Cases
If fraud was shown to have permeated electoral process in primary election, presumably-invalid absentee ballots had to be excluded; but, because those ballots were commingled with other ballots, court would have no choice but to void election and to order a new primary election.

**[6] Elections 126(7)**
144k126(7) Most Cited Cases
If there was no evidence of fraud in primary election, presumably-invalid absentee ballots, where were commingled with other ballots, were to be apportioned between candidates in the same percentages that they received in the initial canvas.
****81 *868 ***620** C. David Nelson, Harrisburg, for Appellant.

Morris Lane Harvey, Law Offices of Morris Lane Harvey, Mt. Vernon, for Appellee.

Justice CHAPMAN delivered the opinion of the court:

On March 16, 2000, five days before the Alexander County primary election, agents of the Illinois State Police and the Illinois Attorney General's office appeared at the Alexander County clerk's office with a search warrant. Six hundred eighty-one absentee ballots designated for the March 21, 2000, Democratic Party primary election were confiscated. The 681 ballots ****82 ***621** were returned to the county clerk on the day of the primary. These ballots were commingled with and counted with all of the ballots that were cast at the polls.

Louis Maze is the Alexander County clerk. Susan Hileman is the current Alexander County circuit clerk. Both Susan Hileman and Sharon McGinness were candidates in the March 21, 2000, primary election for the Democratic nomination for circuit clerk. The initial primary election results indicated that 1,299 votes were cast for McGinness and 1,089 votes were cast for Hileman. The total number ***869** of votes cast was 2,388. The winning margin for McGinness was 210 votes. In terms of percentages, McGinness won with approximately 54.3% of the vote, while Hileman received approximately 45.7% of the vote.

After the primary, Hileman filed a petition to contest the election and asked the court to declare all of the ballots cast void due to election irregularities, illegalities, and fraud. Hileman also asked for the absentee ballots to be declared void and to be excluded from the vote count or, in the alternative, for the primary election to be declared void and for a new election to be held. The circuit court declared the result of the primary election for the Democratic candidate for circuit clerk invalid, and it ordered a new primary election to be held. McGinness appeals. We reverse and remand for further proceedings.

[1] The trial court did not hold an evidentiary hearing regarding the allegations of fraud; thus, no fraud was actually established. The parties agree, however, that the absentee ballots are presumed invalid. The parties also agree that there are no markings or indications upon the absentee ballots which would allow them to be segregated from all other ballots cast. Thus, there is no way to distinguish the 681 ballots from any other vote cast in the primary election. The parties disagree as to the appropriate solution to the situation. The dispute concerns the legal issue of how to remedy the commingling of the invalid ballots. Disputed questions of law are reviewed *de novo*. *Statler v. Catalano*, 293 Ill.App.3d 483, 486, 229 Ill.Dec. 274, 691 N.E.2d 384, 386 (1997).

McGinness argues that although the 681 absentee ballots must be presumed invalid, the loss of those votes must be prorated or apportioned between Hileman and McGinness. McGinness contends that the 681 void ballots should be apportioned to the candidates in the same percentages that they received in the initial canvass. Those votes would then be deducted from the current totals, which include the admittedly indistinguishable and illegal ballots. McGinness cites *Neff v. George*, 364 Ill. 306, 4 N.E.2d 388 (1936), in support of her argument.

*Neff* concerned an election for county sheriff in which 71 votes were deemed illegal because they were cast by nonresidents. In that case it could not be determined for which candidate the 71 ballots were cast. The court declined to exclude or apportion any of the votes. Using the terms "exclude" and "apportion" interchangeably, the court noted that if it had excluded the votes, it would have apportioned them between the candidates in the proportions that the number of votes cast for each bore to the total votes cast in the precinct. *Neff*, 364 Ill. 306, 4 N.E.2d at 392. Although the court recognized apportionment as an appropriate option, it noted that it was not going

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to ***870** consider whether exclusion was improper, because an apportionment or exclusion of the 71 votes would not change the result of the election.

Throughout the years the Illinois Supreme Court and the Fifth District of the Appellate Court have addressed the issue of apportionment versus exclusion under various scenarios. The cases can generally be divided into two types: those that favor exclusion of the ballots and those that favor apportionment.

In some election-contest cases, the ballots either are improperly endorsed by election judges or are not otherwise endorsed in accordance with statutory election ****83 ***622** procedure. As a rule, if there is no showing of fraud but the election process has been tainted by the failure to follow proper statutory procedures, the supreme court has held that the tainted ballots should be excluded. See *DeFabio v. Gummersheimer,* 192 Ill.2d 63, 248 Ill.Dec. 243, 733 N.E.2d 1241 (2000); *Laird v. Williams,* 281 Ill. 233, 118 N.E. 73 (1917); *Brents v. Smith,* 250 Ill. 521, 95 N.E. 484 (1911); *Choisser v. York,* 211 Ill. 56, 71 N.E. 940 (1904).

The Fifth District Appellate Court has followed the supreme court holdings. See *DeFabio v. Gummersheimer,* 307 Ill.App.3d 381, 240 Ill.Dec. 447, 717 N.E.2d 540 (1999) (an entire precinct's ballots were excluded because ballots were not initialed by an election judge), *aff'd,* 192 Ill.2d 63, 248 Ill.Dec. 243, 733 N.E.2d 1241 (2000); *Leach v. Johnson,* 20 Ill.App.3d 713, 313 N.E.2d 636 (1974) (36 nonresident voters' ballots were excluded); *Webb v. Benton Consolidated High School District No. 103,* 130 Ill.App.2d 824, 264 N.E.2d 415 (1970) (10 ballots were excluded because an improper election procedure was utilized).

[2] Exclusion rather than apportionment is also the procedure of choice where fraud is involved. See *Weston v. Markgraf,* 328 Ill. 576, 160 N.E. 215 (1928); *Emery v. Hennessy,* 331 Ill. 296, 162 N.E. 835 (1928); *Clark v. Quick,* 377 Ill. 424, 36 N.E.2d 563 (1941); *Lehman v. Hill,* 414 Ill. 173, 111 N.E.2d 120 (1953).

[3] In an election contest where no fraud is involved, the exclusion of ballots is a simple remedy if the irregular ballots are easily distinguishable from the total tally. However, in cases with no fraud but where it cannot be determined for which candidate a ballot is cast, exclusion is impossible. In those cases, the supreme court has opted for apportionment. See *Thornton v. Gardner,* 30 Ill.2d 234, 195 N.E.2d 723 (1964) (7 voters voted at the wrong polling place); *McNabb v. Hamilton,* 349 Ill. 209, 181 N.E. 646 (1932) (election judges improperly initialed ballots); *Flowers v. Kellar,* 322 Ill. 265, 153 N.E. 351 (1926) (voters were ineligible to vote); *Choisser v. York,* 211 Ill. 56, 71 N.E. 940 (1904) (6 nonresidents voted and 30 votes were cast outside the voting booth); see also ***871***Smoda v. Gallagher,* 412 Ill. 271, 106 N.E.2d 181 (1952) (the court could not apportion because there was only one precinct, but the court would have apportioned it if it were possible); *In re Contest of Election for Offices of Governor & Lieutenant Governor,* 93 Ill.2d 463, 67 Ill.Dec. 131, 444 N.E.2d 170 (1983) (the court would have apportioned if the pleadings had been sufficient).

It appears that the Fifth District Appellate Court also chooses apportionment if tainted ballots are commingled but there is no evidence of fraud. See *Webb v. Benton Consolidated High School District No. 103,* 130 Ill.App.2d 824, 264 N.E.2d 415 (1970) (absentee ballots were tainted because of numerous procedural violations); *Whitsell v. Davis,* 67 Ill.App.3d 962, 24 Ill.Dec. 588, 385 N.E.2d 729 (1978) (6 missing ballots were apportioned); *Jordan v. Officer,* 170 Ill.App.3d 776, 121 Ill.Dec. 760, 525 N.E.2d 1067 (1988) (600 to 700 ineligible voters' ballots were apportioned).

[4][5] Here, the trial court did not hold an evidentiary hearing on the allegations of fraud. Given case precedent, if fraud is shown to have permeated the electoral process, the ballots should be excluded. Because the absentee ballots were commingled in this case, the court would then have no choice but to void the election and to order a new primary election.

[6] If there is no evidence of fraud, case precedent suggests that the 681 confiscated absentee ballots should be apportioned between the candidates in the same percentages that they received in the initial canvass. The 681 votes would then be deducted from the current totals.

Given the effect a finding of fraud would have on this election contest, we remand this cause to the trial court with directions ****84 ***623** that the trial court hear evidence if necessary and then make a decision as to whether fraud was evident in the electoral process.

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Depending on the trial court's findings on the fraud issue, a ruling should then be made in accordance with this opinion-either to apportion the ballots or to hold a new primary election.

Reversed; cause remanded with directions.

MAAG, J., concurs.

Justice WELCH, dissenting.

The majority remands this case so that an evidentiary hearing can be conducted to determine whether there was fraud in the electoral process. The majority then states that if the trial court finds fraud, the ballots should be excluded and a new election should be conducted. The majority states, however, that if the trial court does not find ***872** fraud, "case precedent suggests" that the 681 illegal ballots should be apportioned between the candidates "in the same percentages that they received in the initial canvass." 250 Ill.Dec. at 622, 739 N.E.2d at 83. It is my belief, a belief shared by the trial court, that a new election is required because, due to the commingling of the legal and illegal ballots, apportionment cannot be performed without counting the illegal ballots. Counting the illegal ballots is contrary to Illinois law, is contrary to the agreement of the parties, and offends the integrity of this election. As apportionment in this case legitimizes the illegal ballots by essentially treating them in the same capacity as the legal ballots, I believe that apportionment is improper and that a new election is required to uphold the sanctity and integrity of this election.

The parties agree that 681 of the 2,388 total ballots are illegal and *should not be counted.* The parties also agree that these 681 illegal ballots are commingled with the 1707 legal ballots and that there is no way to determine which ballots are the legal ballots and which ballots are the illegal ballots. In other words, due to the commingling of the legal and illegal ballots, the pool of total ballots has been permanently contaminated. The solution requested by defendant, and the alternative solution that the majority claims "case precedent suggests," requires a counting of the 681 illegal ballots along with the 1,707 legal ballots (because there is no way to distinguish the legal from the illegal ballots) to determine what percentage of the vote went to each candidate. Then that percentage is multiplied by the 681 illegal ballots (which were counted to reach that percentage) to determine how many ballots are apportioned to each candidate. I believe that such a result is absurd in that it legitimizes the illegal ballots while diminishing the effect of the legal ballots.

In *McNabb v. Hamilton,* 349 Ill. 209, 181 N.E. 646 (1932), our supreme court was very instructive in how to handle apportionment. The court was faced with a situation where there were several legal and illegal votes cast and some of the legal votes were commingled with the illegal votes. The supreme court was extremely careful not to count the illegal votes when determining what percentage of unidentifiable legal votes should be apportioned to each candidate. In *McNabb,* the total number of votes cast was 633. Seventeen votes were identified and rejected as defective, lowering the total to 616. Of these 616 votes, 325 votes were found to be legal and 291 were found to be illegal. Of the 325 legal votes, there was no difficulty in determining for whom 195 of these legal votes were cast. However, the remaining 130 legal votes were commingled with the 291 illegal votes so that it was impossible to determine from these remaining votes for whom the 130 legal votes were cast. The court then decided that the proper way to apportion ***873** these 130 legal votes was to calculate what percentage of votes each candidate obtained based on the 195 legally identifiable votes and then to apply that percentage to the 130 unidentifiable legal votes and apportion that number to the respective candidate. Most importantly, in *McNabb,* the supreme court derived this ****85 ***624** percentage by counting only the legally identifiable votes and did not derive the apportionment percentage by counting the contaminated pool of legal and illegal votes, like the majority in the instant case says "case precedent suggests."

Our supreme court has made clear that the apportionment of votes must be based on the number of *legal* votes cast. *Thornton v. Gardner,* 30 Ill.2d 234, 235, 195 N.E.2d 723 (1964). Furthermore, where the illegal votes cannot be "segregated, proved, and exactly computed," apportionment is not proper. *Lehman v. Hill,* 414 Ill. 173, 178-79, 111 N.E.2d 120 (1953). In *Drolet v. Stentz,* 83 Ill.App.2d 202, 207, 227 N.E.2d 114 (1967), this court stated: "We cannot determine the number of legal votes cast for either party. We cannot apportion."

As I stated earlier and the majority notes in its opinion, *both parties* agree that the illegal ballots should not be

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counted. However, if an apportionment is performed in this case, the illegal ballots essentially will be counted because they are commingled with the legal ballots. I acknowledge that there appears to be some authority which does count illegal votes in determining how to apportion illegal votes (*Webb v. Benton Consolidated High School District No. 103*, 130 Ill.App.2d 824, 264 N.E.2d 415 (1970)), but I believe that such a method runs contrary to the law in Illinois and wrongfully legitimizes the illegal votes by allowing the illegal votes to have an impact in the election. In conclusion, I agree with the trial court that apportionment is inappropriate in the instant case, and therefore, I would affirm the judgment of the circuit court.

316 Ill.App.3d 868, 739 N.E.2d 81, 250 Ill.Dec. 620

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Supreme Court of Arizona.
Bret H. HUGGINS, Petitioner,
v.
The SUPERIOR COURT of the State of Arizona, in and for the COUNTY OF NAVAJO; and the Honorable Allen Minker, Judge of the Superior Court, Respondents,
and
Dale K. PATTON, Jr.; Navajo County, a body politic; the Navajo County Board of Supervisors; Sharon Keene, in her capacity as Clerk of the Navajo County Board of Supervisors; and The Navajo County Election Board, Respondents-Real Parties in Interest.
**No. CV-88-0413-SA.**

Feb. 15, 1990.

Unsuccessful candidate in primary election for county attorney brought suit challenging outcome of election, based on evidence that number of illegal votes that were cast in primary exceeded successful candidate's margin of victory. The Superior Court, Navajo County, No. 24,890, Allen Minker, J., entered order denying relief, and appeal was taken. The Supreme Court, Noel Fidel, Vice Chief Judge, Court of Appeals, held that: (1) unsuccessful candidate who succeeds in showing that a sufficient number of illegal votes were cast to change result of election need not present voter testimony to prove precisely how illegal votes were cast, in order to succeed in challenge to election; (2) election would not be nullified solely upon showing that number of illegal votes that were cast exceeded margin of electoral victory; and (3) court would determine impact of illegal votes by proportionate deduction in each precinct in which they were cast.

Affirmed.

West Headnotes

**[1] Elections 295(1)**
144k295(1) Most Cited Cases
Unsuccessful candidate who succeeds in showing that a sufficient number of illegal votes were cast to change result of election need not present voter testimony to prove precisely how illegal votes were cast, in order to succeed in challenge to election. A.R.S. § 16-671.

**[2] Elections 227(8)**
144k227(8) Most Cited Cases
Election should not be nullified merely upon showing that number of illegal votes that were cast exceeds successful candidate's margin of victory. A.R.S. § 16-671.

**[3] Elections 227(8)**
144k227(8) Most Cited Cases
Impact of illegal votes on multidistrict election should be tested, in case in which number of illegal votes exceeds margin of electoral victory, by proportionate deduction in each precinct in which illegal votes were cast. A.R.S. § 16-671.

****82 *349** Brown & Bain, P.A. by Paul F. Eckstein and David J. Bodney, Phoenix, for petitioner.

Magnum, Wall, Stoops & Warden by Charles H. Apt, Flagstaff, for real party in interest (Patton).

John Verkamp, Coconino County Atty. by Terence C. Hance, Chief Deputy County Atty., Flagstaff, for real parties in interest (Navajo County, Navajo County Bd. of Supervisors and Keene).

NOEL FIDEL, Vice Chief Judge, Court of Appeals.

In a contested primary election decided by an eight vote margin, sixteen illegal votes were cast. The loser claims in this petition for special action that the

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election must be set aside because one cannot know which of the candidates received the highest number of legal votes. We have taken jurisdiction to reexamine the law that governs elections when illegal votes exceed the margin of victory.

FACTS

In the 1988 primary election for Navajo County Attorney, petitioner Bret H. Huggins narrowly lost the Democratic Party nomination to real party in interest Dale K. Patton. After conducting a recount pursuant to A.R.S. § 16-661, the Secretary of State reported that Patton had won by 3,593 votes to Huggins's 3,585. This eight-vote margin, however, was exceeded by sixteen votes illegally cast. Fifteen voters registered as independents or non-partisans had been improperly permitted to vote Democratic Party ballots. The sixteenth illegal voter was a convicted felon whose electoral rights were unrestored.

Huggins contested the election, as A.R.S. § 16-671 permits, but lost because he was unable to prove for whom the illegal votes were cast. Though he proved that illegal votes were cast in sufficient number to change the election result, he could not prove that they changed the result in fact. This special action arises from the trial court's rejection of Huggins's election challenge.

By order at the time this matter was submitted, we accepted jurisdiction but denied relief. We explain our ruling in this opinion.

THE MORGAN-MILLET RULE

[1] A challenger's burden of proving how illegal votes were cast derives in Arizona from *Morgan v. Board of Supervisors,* 67 Ariz. 133, 192 P.2d 236 (1948), where this court quoted the following statement from C.J.S.:

> Legality of votes. Where an election is contested on the ground of illegal voting, the contestant has the burden of showing [1] that sufficient illegal votes were cast to change the result, and [2] *of showing for whom or for what they were cast.*

67 Ariz. at 143, 192 P.2d at 243 (quoting 29 C.J.S., Elections, § 274) (emphasis added).

Only the first of the quoted burdens was material in *Morgan.* Because the *Morgan* challengers failed to prove sufficient illegal votes to change the election result, the court had no need to determine what, if any, further burden might have faced them. The *Morgan* dictum, however, became holding in *Millet v. Board of Supervisors,* 6 Ariz.App. 16, 429 P.2d 508 (1967), where the court of appeals rejected an election challenge by a contestant who, like ****83 *350** Huggins, had carried the first burden, but not the second. [FN1]

> FN1. In *Moore v. City of Page,* 148 Ariz. 151, 713 P.2d 813 (App.1986), the court of appeals reiterated the *Morgan-Millet* rule. In *Moore,* however, as in *Morgan,* the challengers' failure to meet the first burden made it unnecessary to consider the suitability or fairness of the second.

In this case, the trial court criticized, but felt obliged to follow, the *Morgan-Millet* rule. Huggins now urges us to abandon that rule and to relieve election contestants of the burden of proving how illegal votes were cast. Huggins directs us to *Baggett v. State Election Board,* 501 P.2d 817 (Okla.1972), where, under circumstances similar to these, the Oklahoma Supreme Court nullified an election, stating:

> If election officials have not conducted an election according to law and knowingly permit non-registered Democrats to vote in a Democratic runoff primary election, the inexcusable conduct of the election officials should not inure to the benefit of any candidate either directly or indirectly.

*Id.* at 824. The trial court described *Baggett* as having "the force of reason behind it," and Huggins urges us to make the Oklahoma approach our own.

We too see much reason in *Baggett.* Like the majority in that case, we recognize the inequity of burdening the challenger "to prove for which candidate the unlawful ballots were cast [in order] to be relieved from having the illegal ballots counted as legal ballots." *Id.* Moreover, the challenger's burden increases with the size of the unlawful vote. As Huggins argues persuasively, "it hardly seems fair that as the amount of illegal voting escalates, the likelihood of redressing the wrong diminishes."

There are additional difficulties with the *Morgan-Millet* rule, which stem from the need to prove how illegal votes were cast through the testimony of those who cast them. First, as Justice Jackson pointed out in concurrence in *Baggett,* voters who have cast unlawful ballots may choose to assert their fifth amendment privilege not to testify. *Id.* at 825. The resulting exacerbation of the challenger's burden is even more pernicious than Justice Jackson described. Though an illegal voter might be motivated to maintain silence by a genuine fear of criminal sanctions, a supporter of the challenger's opponent might equally be motivated by the recognition that an invalid vote against the challenger would likely be cancelled only if the voter revealed

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how it was cast. Thus, the *Morgan-Millet* rule not only burdens a challenger onerously; it actually empowers partisans of the opposition to frustrate an election challenge and preserve illegal votes by exercising fifth amendment rights.

There is a second and related weakness to the *Morgan-Millet* rule. Voter disclosure testimony, even where offered, is highly suspect. Courts have long recognized this weakness when contemplating testimony by legal voters whose attempted votes were erroneously unrecorded. As the Utah Supreme Court stated:

> We know from common experience that those who do vote are usually unwilling that the character of their votes be made public, and that whenever there is an investigation as to the actual vote cast it is almost certain to bring about prevarication and uncertainty as to what the truth is.... The temptation to actual fraud and corruption on the part of the candidates and their political supporters is never so great as when it is known precisely how many votes it will take to change the result....

*Young v. Deming,* 9 Utah 204, 212, 33 P. 818, 820-21 (1893); *see also Briscoe v. Between Consol. School Dist.,* 171 Ga. 820, 824, 156 S.E. 654, 656 (1931) ("[I]t would ... be dangerous to receive and rely upon the subsequent statement of the voters as to their intentions, after it is ascertained precisely what effect their votes would have upon the result."); *Babnew v. Linneman,* 154 Ariz. 90, 93-94, 740 P.2d 511, 514-15 (App.1987) (same).

We concur in these comments and attribute comparable weakness to the testimony of illegal voters asked to disclose accomplished votes. *See* ***351****84*McCavitt v. Registrars of Voters,* 385 Mass. 833, 849. 434 N.E.2d 620, 630-31 (1982).

There is a third and especially troublesome problem associated with the *Morgan-Millet* rule: the prospect of judges compelling good faith voters who have cast invalid ballots to reveal what they supposed were private votes. Division Two of the court of appeals has recently approved such compulsion in *Babnew,* 154 Ariz. at 95, 740 P.2d at 516 ("If a witness discloses that he did vote, and it is shown clearly to be an illegal vote, then he may be compelled to disclose for whom he voted."). The *McCavitt* opinion records the outrage of a voter so compelled: "I will not answer that question because, as far as I'm concerned, that is illegal. Nobody has the right to know who I voted for." 385 Mass. at 846 n. 16, 434 N.E.2d at 629 n. 16.

Massachusetts rejects compelling voter testimony in these circumstances as "a kind of inquisitorial power unknown to the principles of our government and constitution." *Id.* 434 N.E.2d at 630 (quoting *Johnston v. Corp. of Charleston,* 1 S.C.L. (1 Bay) 441 (1795)). The court continues: "We cannot sanction a result which tends to reduce citizen participation in the election process. That is too high a price to pay in a participatory democracy." *McCavitt,* 385 Mass. at 848, 434 N.E.2d at 630.

This criticism strikes a responsive chord in Arizona, where our constitution explicitly assures secrecy in voting. [FN2] We need not now determine whether, under any circumstances, our constitutional commitment to ballot secrecy might accommodate compelling good faith voters to disclose invalid votes. It is sufficient for present purposes to recognize the force of that commitment and to explore alternative solutions that permit us to avoid compulsion so offensive to democratic sensibilities and assumptions. *See Clay v. Town of Gilbert,* 160 Ariz. 335, 343, 773 P.2d 233, 241 (App.1989) (Fidel, J., concurring) (commending avoidance of "the democratic anathema of compelling good faith voters to reveal their votes").

> FN2. Ariz. Const. art. VII, § 1 provides: "All elections by the people shall be by ballot, or by such other method as may be prescribed by law; provided, that secrecy in voting shall be preserved." *See also* Ariz. Const. art. II, § 8, which provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

NULLIFICATION AND RESUBMISSION

[2] The solution commended by Huggins is to nullify the contested election and to order a new election when, as here, a challenger has proven that the margin of victory is exceeded by the number of invalid votes. This solution, the one chosen in *Baggett* and *McCavitt,* permits the public a second effort to achieve a properly conducted election.

A second election, however, is not immune from illegal ballots and may prove no better than the first. Moreover, a second election is costly, and the costs are not limited to the heavy fiscal expense of running an election another time. Some votes will be lost in a second election that were properly recorded in the first; these include voters who have died, voters who have moved, and voters whose interest in the office or electoral issue is too attenuated to pull them to the polls a second time. Additionally,

> there may ... be identifiable biases in second elections. Candidates with ready access to

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> financing and with strong and continuing party organizations will be able to mobilize a second campaign in the short time available much more effectively than opponents who lack such advantages. Candidates with support concentrated among less active voters may be disadvantaged in a second election if such supporters do not turn out to cast ballots when only one office is at stake.

Note, *Developments in the Law: Elections,* 88 Harv.L.Rev. 1111, 1315 (1975).

These costs and biases make us hesitant to nullify first elections automatically upon proof that the winner's margin of victory was exceeded by the number of illegal votes.

****85 *352** THE GROUNDS RULE

[3] Oddly, we find a better alternative in a case that this court issued in the same year as *Morgan*--*Grounds v. Lawe,* 67 Ariz. 176, 193 P.2d 447 (1948). In *Grounds,* unlike *Morgan,* illegal votes were cast in sufficient number to change the outcome; thus, the issue was squarely presented whether to require the challenger to prove how they were cast. We declined to place this burden on the challenger, but also declined to set the election aside. *Grounds,* 67 Ariz. at 184-85, 193 P.2d at 452-53. Instead, we considered whether the outcome would be altered by a proportionate, precinct-by-precinct extraction of the illegal votes. That is, for each district in which invalid votes were cast, we calculated a "pro rata deduction of the illegal votes according to the number of votes cast for the respective candidates in [that] election district." *Id.* at 182, 193 P.2d at 451. [FN3] Because the illegal votes were insufficient, when extracted in this fashion, to change the election result, the victory of the declared winner was confirmed.

> FN3. For example, consider a pair of hypothetical precincts with a mathematically convenient turnout of 100 voters in each. In the first precinct, Smith receives 60 votes, Jones receives 40, but 10 invalid votes are cast. Pro rata deduction would reduce Smith's tally by 6 votes (60% of the invalid votes) and Jones's tally by 4 (40%). In the second precinct, Jones wins 80 votes, Smith wins 20, but 5 invalid votes are cast. Here, pro rata deduction takes 4 of the invalid votes (80%) from Jones and 1 (20%) from Smith. Application of this method precinct-by-precinct is a neutral method to extract invalid ballots from the overall total. As we point out *infra,* however, it only functions neutrally in elections where more than one precinct has experienced invalid votes. *See* footnote 4.

*Grounds,* though less often cited than our *Morgan* dictum, was recently rediscovered by the court of appeals in *Clay v. Town of Gilbert,* 160 Ariz. at 338-39, 773 P.2d at 236-37. *Grounds* has also been cited with approval by the Supreme Court of Alaska, *Hammond v. Hickel,* 588 P.2d 256, 260 (Alaska 1978), and we reaffirm its application in this case.

We recognize an arbitrary element to proration. As we said in *Grounds:* "[T]he truth might be, if it could be shown, that all the illegal votes were on one side, while it is scarcely to be presumed that they would ever be divided between the candidates in exact proportion to their whole vote." 67 Ariz. at 183, 193 P.2d at 451-52, quoting *McCrary on Elections,* 4th Ed., § § 495-97. This element has led the Supreme Judicial Court of Massachusetts to reject proration in favor of nullification and resubmission to the voters " 'whenever the irregularity ... of the election is such that the result ... would be placed in doubt.' " *McCavitt,* 385 Mass. at 850, 434 N.E.2d at 631 (quoting *Callison v. Peeples,* 102 S.C. 256, 265, 86 S.E. 635, 637 (1915)).

The Supreme Court of Alaska, however, has recognized that proration is a useful "analytical tool ... for the limited purpose of determining whether ... [there] were errors of sufficient magnitude to change the result...." *Fischer v. Stout,* 741 P.2d 217, 226 (Alaska 1987). Alaska has not yet determined what it will do if a case arises where "the election result is put in doubt by application of the proportionate reduction rule." *Id.* at 226 n. 15. Where, however, as in *Grounds* and *Clay,* proportionate reduction does not change the result, Alaska certifies the declared winner of the first election. *Id.* at 226.

Huggins challenges the *Grounds* approach as constitutionally invalid. Article VII, § 7 of the Arizona Constitution, the source of Huggins's argument, provides: "in all elections held by the people in this state, the person, or persons, receiving the highest number of legal votes shall be declared elected." Huggins reasons from this provision that, because proration does not permit us to be certain who won the highest number of *legal* votes, it is constitutionally proscribed.

We disagree. Justice Holmes cautioned long ago against pressing constitutional provisions to their "grammatical extreme." "[S]ome play must be allowed to the joints if the machine is to work." *Tyson*

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*and Brother v. Banton,* 273 U.S. 418, 446, 47 S.Ct. 426, 434, 71 L.Ed. 718 (1927) (Holmes, J., dissenting). *See also* ***353****86*Missouri, Kansas & Texas Ry. Co. v. May,* 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971 (1904) ("Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine....").

The problem we confront is practical; the solution we choose is "workable." *Clay,* 160 Ariz. at 338, 773 P.2d at 236. The Arizona Constitution, in our view, permits us room to make this choice. While proration is imperfect, we lack the luxury of perfection, and proration strikes us as a sensible screening device in a multi-district case. [FN4] First, proration spares the body politic the offensive voter compulsion of the *Morgan-Millet* rule. Second, when limited as in *Fischer,* it permits us at least sometimes to avoid the cost and delay of a second election.

> FN4. We observed in *Grounds,* and the court of appeals reiterated in *Clay,* that proration can only work fairly where more than one district has undergone invalid ballots. To make a prorated deduction of invalid ballots in a single district election would functionally amount to ignoring the invalid votes. *Grounds,* 67 Ariz. at 184, 193 P.2d at 452; *Clay,* 160 Ariz. at 339 n. 2, 773 P.2d at 237 n. 2. Thus, we only announce a rule today for multi-district elections. We will deal with single district elections when the need arises.

Moreover, though proration leaves some doubt that we have discovered the true winner, the other options fail to bring us nearer to that mark. The practical impact of the *Morgan-Millet* rule, with its virtually impossible burden on the challenger, is to let illegal votes count. The nullification remedy invalidates a multitude of first election legal votes, passes the choice to the inevitably different electorate that turns out for a second election, and accepts the second election biases and distortions earlier described. Proration, by comparison, has the virtue of neutrality; and in election contests, neutrality is a major constituent of fairness.

Like the Supreme Court of Alaska, we defer deciding what must be done when proration would change an election result. The law advances incrementally; we address the increment before us; the legislature may wish to consider the subject before we visit it again. For now, we reaffirm the *Grounds* approach as a limited screening device. When, as here, the margin of electoral victory is exceeded by the number of invalid votes and the invalid votes were cast in more than one precinct, the impact of those votes shall be tested by proportionate deduction. When, as here, proportionate reduction does not change the result, the declared victory may be confirmed.

CONCLUSION: PRORATION APPLIED

Proration in this case changes the tally in eight Navajo County precincts, taking six votes from Patton's overall tally and nine from that of Huggins. [FN5] By this method ****87 *354** Patton remains the winner with 3,587 votes to 3,576 for Huggins. Thus, we conclude that Huggins's election challenge was properly denied.

> FN5. Of the sixteen illegal votes, we can account for the precincts of fifteen. As for the sixteenth, which was cast by absentee ballot, our limited special action record does not tell us the precinct from which it was cast. This is a record limitation, not a systemic one, however, as the precinct of an absentee voter is statutorily required to be recorded. A.R.S. § 16-542(D).
>
> Our inability to identify the precinct of one illegal voter is fortunately inconsequential in this case. Proportionate deduction of the fifteen votes identifiable by precinct establishes Patton's victory by a margin of eleven.
>
> The deductions are calculated as follows:

Illegal Votes Deducted from Patton's Total

| Precinct | Illegal Votes | Percent of Vote Rec'd | Deduction |
|---|---|---|---|
| Bird Springs | 2 | 31.6 | .632 |
| Black Mesa | 1 | 65.6 | .656 |
| Chilchinbeto | 2 | 48.7 | .974 |
| Cibecue | 3 | 22.8 | .684 |
| Low Mountain | 1 | 47.0 | .470 |
| Pinon | 2 | 61.1 | 1.222 |
| Whitecone | 2 | 48.4 | .968 |
| White River | 2 | 36.7 | .734 |

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| | |
|---|---|
| VOTES DEDUCTED FROM PATTON'S TOTAL: | 6.340 |

Illegal Votes Deducted from Huggins's Total

| Precinct | Illegal Votes | Percent of Vote Rec'd | Deduction |
|---|---|---|---|
| Bird Springs | 2 | 68.4 | 1.368 |
| Black Mesa | 1 | 34.4 | .344 |
| Chilchinbeto | 2 | 51.3 | 1.026 |
| Cibecue | 3 | 77.2 | 2.316 |
| Low Mountain | 1 | 53.0 | .530 |
| Pinon | 2 | 38.9 | .778 |
| Whitecone | 2 | 51.6 | 1.032 |
| White River | 2 | 63.3 | 1.266 |
| VOTES DEDUCTED FROM HUGGINS'S TOTAL: | | | 8.660 |

After rounding off the totals, we deduct six of the illegal votes from Patton's total and nine from Huggins's total, leaving Patton the winner with 3,587 votes over Huggins's 3,576.

FELDMAN, V.C.J., and MOELLER and CAMERON, JJ., concur.

GORDON, C.J., did not participate in this decision; pursuant to Ariz.Const. art. 6, 3, NOEL FIDEL, Vice Chief Judge, Court of Appeals, Division One, was designated to sit in his stead. WILLIAM A. HOLOHAN, J., participated in this matter but retired prior to the filing of the opinion. CORCORAN, J., did not participate in the determination of this matter.

163 Ariz. 348, 788 P.2d 81

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Supreme Court of Idaho.

JAYCOX

v.

VARNUM.

**No. 4307.**

May 7, 1924.

Appeal from District Court, Jerome County; Hon. O. R. Baum, Judge.

Election contest by Thomas Jaycox against C. A. Varnum. From a judgment for defendant, plaintiff appeals. Affirmed.

West Headnotes

**Elections 97**
144k97 Most Cited Cases
Under C.S. § 565, registration is a necessary condition precedent to the right to vote.

**Elections 115**
144k115 Most Cited Cases
Where qualified voter diligently attempts to legally register, and does everything within his power to comply with the law, he cannot be disfranchised by failure of the officers to do their duty.

**Elections 228**
144k228 Most Cited Cases
Vote of precinct should not be rejected unless for fraud or irregularity which taints or affects the whole vote thereof.

**Elections 291**
144k291 Most Cited Cases
In an election contest, based on ground that illegal votes were received sufficient to change result, the burden is on contestant to show for whom the illegal votes were cast.

***285** Bothwell & Chapman, of Twin Falls, for appellant.

J. C. Johnston and Gustave Kroeger, both of Boise, for respondent.

E. D. Reynolds, of Jerome, amicus curiae.

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McCARTHY, C. J.

This action was brought to contest the election of respondent to the office of clerk of the district court and ex officio auditor and recorder of Jerome county, Idaho. Both parties were candidates in the general election of November 7, 1922. Ten days thereafter the board of county commissioners canvassed the returns of said election and declared respondent elected to the office in question for the term commencing the second Monday in January, 1923.

Appellant alleged that there were certain illegal votes cast in Hazelton precinct which were sufficient in number to change the result of the election. Respondent by answer denied that the votes in Hazelton precinct were illegal, and alleged that, should the court find them to be illegal, such votes were not sufficient to change the result of the election. Respondent also alleged that certain votes had been cast illegally in North Jerome and South Jerome precincts. The court found that certain votes in all three ***286** precincts were illegal, but that there were not enough to cast any doubt as to the result of said election in said precincts, since the polls could be purged of the illegal votes. The action was dismissed, and respondent adjudged to be duly elected to the office in question. From this judgment appeal is taken.

More particularly the facts are as follows:

The returns showed that respondent received 802 votes and appellant 798 votes. Appellant contended that 17 votes cast in Hazelton precinct were illegal, in that the voters had failed to register as provided by law. Only 15 of those named in the complaint were put on the witness stand. Respondent contended that a large number of voters in North Jerome precinct and South Jerome precinct had voted illegally. Of these only five were put on the stand. The votes actually in controversy were 20 in number. Of these three were held to be legal. No objection is made by either party to this holding. It is undisputed that the 17 other votes were sworn in on election day, without any registration. The court found that seven had voted for respondent, six for appellant and one for Hill, a third candidate who is not affected by this controversy, and that three votes should be disregarded, since it was not possible to tell for whom they voted. Under the finding of the court the vote stood 795 for respondent and 792 for appellant, after deducting the number of illegal votes cast for each candidate and disregarding the other three. The seven votes found to have been cast for respondent and two of the votes cast for appellant are not in controversy, as no objection to them has been taken by either party. The controversy as presented to this court centers around the votes of Mrs. Elsie Hunt, Annie M. Comstock, Lucy Doyle, Mrs. C. W. McHenry, Eugene Branson, Nora Poole, and G. M. York. Appellant contends that the votes of Elsie Hunt and Anna Comstock were not illegal, but that they were merely irregular. These two were found by the trial court to be illegal and to have been cast for appellant. Appellant also contends that there was insufficient evidence to sustain the finding that the votes of Lucy Doyle and Mrs. C. W. McHenry were cast for appellant. If these contentions are well founded then there should be but two votes deducted from the number of votes cast for appellant, and the result would be that appellant would have a majority of one vote. The lower court found that illegal votes were cast in Hazelton precinct by Eugene Branson, Nora Poole, and G. M. York, and that it was impossible to determine from the evidence for whom they voted for the office in question. Appellant contends that the result in Hazelton precinct was in doubt, and the court should have rejected all the votes in that precinct. If this contention were sustained by this court it would result in the finding that 729 votes had been cast for appellant and 644 for respondent.

The following are the principal specifications of error: The court erred in finding that Anna M. Comstock, who cast her vote for appellant in North Jerome precinct, was an illegal voter; in finding that Elsie Hunt, who cast her vote for appellant in South Jerome precinct, was an illegal voter; in finding that Lucy Doyle, an illegal voter in Hazelton precinct, cast her vote for appellant; in finding that Mrs. C. W. McHenry, an illegal voter in Hazelton precinct, cast her vote for appellant; in refusing to reject the vote of Hazelton precinct cast in said election; and in entering judgment in favor of respondent and against appellant.

While respondent has not perfected a crossappeal, he contends that the court erred in holding that votes were illegal on the ground that voters were not registered. If this be true the judgment was correct, irrespective of other matters raised. This question, therefore, requires consideration. Respondent contends that registration is not a condition precedent to the right to vote.

To reach a proper conclusion as to the intention of the

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Legislature it is necessary to look into the history of the registration laws.

"*Qualifications of Electors.* Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; and until otherwise provided by the Legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory." Idaho Constitution, art. 6, § 2.

Construing this provision we have held:

"By the provisions of said section 2, article 6, registration is not one of the substantive qualifications of an elector. Registration is simply a regulation of the right of suffrage and is prima facie evidence of the right to vote. The terms 'elector' and 'qualified elector' are used interchangeably in the Constitution and laws of the state. The authority to fix the rule by which a majority of the qualified electors may be ascertained is with the Legislature." Wilson v. Bartlett, 7 Idaho, 271, 62 Pac. 416.

We have also said:

"Section 2, art. 6, of the Constitution of this state, commits the subject of registration of voters entirely to the Legislature, * * * to enact such registration law as it deems wise; provided, of course, such law in no way contravenes any constitutional right of the elector." Gillesby v. Board of County Commissioners, 17 Idaho, 586, 107 Pac. 71.

***287** [1] The matter is thus committed to the Legislature. In the early years of statehood the Legislature passed a law making registration a condition precedent to voting. Sess. Laws 1890-91, p. 57, § 44; Sess. Laws 1899, p. 3, § 35; R. C. § 397. In 1913 the Legislature amended the registration laws so that electors could be registered on election day. In 1917 this law was repealed and the old law re-enacted. The law now reads as follows:

"All persons offering to vote at any election are subject to challenge, as provided by the election laws, but registration of any elector's name is prima facie evidence of his right to vote, and no person shall vote unless he is first registered." C. S. § 565.

Thus the legislative intent clearly appears that a person must be registered to vote. Huffaker v. Edgington, 30 Idaho, 179, 163 Pac. 793, construes the 1913 law, and is not in point.

Appellant takes exception to the finding and conclusion of the trial court that Annie M. Comstock's vote for him was illegal. She had registered in Blaine county in May, 1922, and moved to Jerome October 6, 1922. On the Saturday before election she applied to the register of North Jerome precinct for registration, and was informed by him, and also by the county attorney, that it would be necessary for her to obtain a transfer certificate from her former precinct in Blaine county before she could register and vote in Jerome county. She phoned for and received a transfer from Blaine county on November 6, 1922. She had applied for registration on November 4, and was misinformed by the county officers that she needed a transfer certificate in order to be registered. She subscribed the elector's oath on November 6, 1922, and was registered as of November 4, 1922. When a person otherwise qualified to vote diligently attempts to register in the manner and time provided by law, and does everything in his power to comply with the law, he cannot be deprived of his right of franchise by the failure of the officers to do their duty.

"It has been held frequently that a strict, literal compliance with the provisions of the law as to registration will not be required in the absence of fraud or intentional wrongdoing. If a person is a citizen, has the other qualifications of a voter and does everything required of him to register and vote, the failure of the election officers to do their part in every detail will not deprive the citizen of the right to vote. * * * As a general rule, statutes prescribing the duties of election officers relative to registering voters should not be so construed as to make the right of citizens to vote depend upon a strict observation of the law by such officers." Huffaker v. Edgington, supra.

Mrs. Comstock did everything that was required of her by law when, within the time provided for registration, she applied to the proper officials for registration. She even went further and complied with the requirements of the registrar even though these requirements were unwarranted under the statutes. The lower court erred holding that her vote was illegal.

The holding of the trial court that the vote of Mrs.

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Hunt was illegal was correct. She did not apply for registration until the day before election, which was after the registration books had been closed. No reason was given for her lack of diligence. In fact, she made no effort to register at all, but was sought out by election officers and procured to subscribe the elector's oath and her name was enrolled by the registrar after the statutory period for registration had closed.

> "While the right of a person having the constitutional qualifications of a voter cannot be impaired, either by the Legislature or the malfeasance or misfeasance of a ministerial officer, the voter himself may waive the exercise of the right, and he does so whenever he stays away from the polls, or fails to offer to vote at the polls, or neglects to properly apply for registration." Earl v. Lewis, 28 Utah, 127, 77 Pac. 238.

[2] Appellant also contends that there is not sufficient evidence to sustain the findings of the lower court that the illegal votes of Lucy Doyle and Mrs. McHenry were cast for appellant. Mrs. Doyle testified that she was a Democrat; that she did not just remember whether she voted for Mr. Varnum; that she did not vote for any of the Progressive candidates running on the ticket; and in answer to the question "Do you know whether you voted for Mr. Jaycox or not? What is your best recollection on that?" she said, "Well, I think I did."

Mrs. McHenry testified that if she remembered right she voted for Mr. Jaycox for clerk and recorder; that she voted a scratch ticket; that she thought there were three columns on the ticket, Republican, Democrat, and Progressive; that she did not remember if there were any others, but she thought not; that she might have stated on several occasions that she did not altogether know whom she voted for, and that she wasn't positive for whom she voted for sheriff, or assessor, or treasurer, or clerk of the district court, the office in question, but her best recollection was that she voted for Mr. Jaycox, the appellant. This testimony is not as satisfactory as might be desired. However, the district court enjoyed the advantage which we lack of seeing and hearing the witnesses. We cannot say from this record that it was an abuse of discretion to find that these two witnesses voted for appellant. Certainly there is nothing in their testimony to show that they voted for respondent or Hill, the Republican candidate. If their best recollection should be held insufficient ***288** to prove that they voted for appellant, then the finding would have to be that it was impossible to tell for whom they voted.

Our conclusion so far changes the number of votes legally cast for appellant, as found by the lower court, by one vote. Under this ruling appellant would have 793 votes to respondent's 795, with three uncertain.

[3] This brings us to the most important question in the case. Appellant contends that the true result of the election in Hazelton precinct is uncertain because of the illegal votes; that there is no way of purging the polls of said precinct of sufficient of such illegal votes to make the result certain; that therefore the entire vote of Hazelton precinct should be rejected and excluded in so far as it affects this contest, with the result that appellant would have a vote of 729 and respondent would have a vote of 644, and appellant should be declared elected. He contends that the result is uncertain because of the three uncertain illegal votes, and asks this court to adopt the very drastic measure of rejecting the entire vote of the precinct.

In Chamberlain v. Woodin, 2 Idaho, 642, 23 Pac. 177, this court held that, when an election is so fraudulent and irregular that the true result cannot be ascertained from the return of the polls, they should be rejected, and the true result shown by other evidence.

In Huffaker v. Edgington, supra, we said:

> "While the vote of a precinct may be rejected in certain instances, it is a drastic measure used only in emergencies, and should not be resorted to whenever it is possible to purge the election of irregularities without depriving citizens of their vote. Such action has the effect of punishing and invalidating the votes of loyal citizens in order to prevent the fraud and wrongdoing of dishonest persons seeking to vote illegally."

A good analysis of the problem presented and different methods by which courts have tried to solve it is found in the following note in Paine on Elections, pp. 433, 434:

> "The party who demands the exclusion of votes actually cast and canvassed for his opponent, on the ground of their illegality, must show, not only that illegal votes were cast, but also that they were canvassed for his competitor. If they were canvassed for the party making the demand, they are not to be subtracted from the vote of his opponent, upon mere proof of their illegality. That would be

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double robbery. And yet that is a possible, not to say probable, result of the rule to permit a party to make mere proof of the illegality of votes cast, and stop there, without showing for whom they were cast, or canvassed, and demand the apportionment of the fraud among the candidates. The chances are at least equal that the party making the demand, and failing to make the proper proof, will by such an apportionment, not only secure a part of the illegal votes cast and canvassed for himself, but will also cause an equal number of illegal votes, cast and canvassed for himself, to be subtracted from the poll of his competitor. If the proofs show that persons voted, who are not qualified voters, but do not show for whom they voted, the illegality will, as we have seen, be disregarded, when such votes are not sufficient, in number, to affect the result of the election. But when such illegal votes are sufficient, in number, to affect the result, the case may be one of great practical difficulty. Four distinct courses will be open to the court, or tribunal, charged with its determination: (1) To reject the entire poll; (2) to disregard the illegality; (3) to make a pro rata reduction of the vote of each candidate; and (4) to take all the illegal votes from one candidate. The adoption of the first course as an inflexible rule would secure to the minority an easy method of destroying a close election. The adoption of the second would secure an equally easy method of carrying a close election. The adoption of either of the other courses would be a purely arbitrary act; and the result would be not established by the facts, but fabricated by the court; and it would, at the same time, enable the minority to carry the election, by a dexterous adjustment of the illegal vote to the real majority. For illustration, if one candidate should receive 220 legal votes and no illegal votes, but the other should receive 210 legal and 20 illegal votes, the legal majority of the first candidate would be ten votes. But the apportionment of the 20 illegal votes, between the two candidates, would secure to the second candidate a fictitious majority of not less than ten votes. Again, if the aggregate majority of a candidate, in the district, the illegal votes being excluded, amount to twenty, and the illegal votes, twenty-one in number, be all taken from him the will of the majority may be defeated. In the total absence of proof tending to show for whom illegal votes, sufficient in number to affect the result, were cast, the duty of the court would seem to be to choose, as wisely as possible, between a disregard of the illegality and a rejection of the entire precinct vote. There ought to be no arbitrary presumption of law, either that all the illegal votes were cast by the political party in the majority, or that they were cast by different parties in proportion to their numbers. To take the illegal votes all from one candidate, or pro rata from several candidates, would be, not to decide, but to make a case for the parties."

It must be borne in mind that in this case there were no general irregularities, no fraud, no corruption, charged or established, and that neither appellant nor respondent was shown to have been responsible for the casting of the illegal votes. The situation is merely one in which three illegal votes were cast through honest mistake and the court found it impossible to tell for whom they were cast for the office in question.

We will consider the different methods of solving the problem outlined by Paine. Respectable authorities have followed the course of making pro rata reduction of the vote of each candidate. People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; Choisser v. York, 211 Ill. 56, 71 N. E. 940; Heyfron v. Mahony, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757; ***289**Moore v. Sharp, 98 Tenn. 491, 41 S. W. 587; Attorney General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183. This method is justly open to the criticism made by Paine. It is purely arbitrary, and decides nothing.

The method of rejecting the entire vote of the precinct is also favored by some authorities. In most of the cases, however, fraud or irregularities had occurred which tainted or affected the entire vote of the precinct. Londoner v. People, 15 Colo. 557, 26 Pac. 135; Vigil v. Garcia, 36 Colo. 430, 87 Pac. 543; Attorney General ex rel. Seavitt v. McQuade, 94 Mich. 439, 53 N. W. 944. In Scholl v. Bell, 125 Ky. 750, 102 S. W. 248, the court declared that there was no election because of the illegal votes and declared the office vacant. The decision was apparently based upon a statute. In Clarke v. McCown, 107 S. C. 209, 92 S. E. 479, the election was also set aside. In People ex rel. Saunders v. Hanna, 98 Mich. 515, 57 N. W. 738, no fraud or irregularity which tainted or affected the entire vote of the precinct appeared, and yet the court rejected the entire vote of the precinct because of the uncertainty arising out of the illegal votes. This is the one case which seems to be absolutely in point and support appellant's contention. There is a clear distinction between cases of fraud and corruption and a case like the present. Fraud, corruption, or irregularities in

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regard to the method of holding the election in a precinct may well affect the entire vote. The illegal acts of the three voters in the present case affected only their own votes and not those of the other voters in the precinct. The election was a county election for the election of a county officer, to wit, clerk of the court. It was held in the precincts pursuant to the statute merely for administrative convenience. It was not a precinct election. There is neither justice nor reason in rejecting all of the valid votes in Hazelton precinct merely because there were three illegal votes. There is no reason why the other votes of that precinct should be affected any more than any other votes in the county.

No sound argument can be advanced in favor of taking all the illegal votes from one candidate, another method mentioned by Paine.

There are two alternatives left: To set the election aside, or find for respondent on the ground that appellant has not made out his case. The first course has not been urged by either party, and we doubt the power of the court to declare an election void on any ground presented by this case. Our statutes provide that an election may be contested when illegal votes have been received or legal votes rejected sufficient to change the result. C. S. § 7274, subd. 6.

> C. S. § 7294. "The judgment of the court in cases of contested election shall confirm or annul the election according to the right of the matter; or, in case the contest is in relation to the election of some person to an office, shall declare as elected the person who shall appear to be duly elected."

[4] Respondent contends that the contestant had the burden of proving for whom the illegal votes were cast in order to show that he was elected. This is unquestionably the general rule. In all the cases cited by respondent it appeared that contestant had not used all means within his power to prove for whom the illegal votes were cast. It has been said that, if contestant proves the illegal votes, but is, for reasons beyond his control, unable to prove whether the votes were cast for himself or the contestee, he should not be placed at a disadvantage because of this fact. Scholl v. Bell, supra. In that case the court declared the election void, acting under statutory authority. In the present case appellant asks us to reject the entire vote of a precinct, and declare him elected. There were three candidates. The three illegal votes may have been cast for appellant or the third candidate, or divided among them. In order to overcome the prima facie effect of the returns, it would seem incumbent on appellant to prove not only the illegal votes, but also for whom they were cast. Both these elements of proof were required to show that the illegal votes affected the result, and that but for them appellant would have been elected. It would be neither just nor logical to put the contestee at a disadvantage, because contestant was unable to sustain the burden of proof which rested upon him, contestee not being responsible for that fact. The rule that the party who is seeking affirmative relief has the burden of proof is one which necessarily underlies all our procedure. A party may have a just cause, and lose the benefit of his evidence through causes not of his making and beyond his control; yet we hold he is not entitled to recover because of failure of proof. It is true that there is not a complete analogy between an election contest and the ordinary civil proceeding, because in the former the public have an interest lacking in the latter. Nevertheless, we conclude that the general rule as to burden of proof must apply to election contests. Appellant did not sustain this burden, and failed to prove that the result of the election would have been different if the illegal votes had not been received. The court was therefore not in a position to declare that respondent was not duly elected, and that appellant was.

The judgment is affirmed, with costs to respondent.

DUNN, WILLIAM A. LEE, and WM. E. LEE, JJ., concur.

39 Idaho 78, 226 P. 285

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JAMES RUSSELL, APPELLANT,
v.
S. A. MCDOWELL, RESPONDENT.
**No. 13323.**

Supreme Court of California

February 3, 1890.

ELECTION CONTEST--ILLEGAL VOTES--APPORTIONMENT--MALCONDUCT OF ELECTION BOARDS--REVIEW ON APPEAL.

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When upon an election contest a recount of the ballots shows that a large number of illegal votes were cast, but the record on appeal does not disclose for whom they were cast, or that any of them were cast for respondent, no prejudicial error appears in a *pro rata* apportionment of the illegal votes by the superior court between the respective candidates; and the reception of such votes, though it may amount to malconduct on the part of the election boards, cannot be considered on that ground, if it does not appear in what precincts they were cast.

ID.--DEDUCTION OF ILLEGAL VOTES--BURDEN OF PROOF.

In order to justify the deduction of illegal votes from the total vote of the contestee, it devolves upon the contestant to show not only that they were illegally cast, but that they were cast for the contestee.

ID.--SPURIOUS PRINTED BALLOTS--AMENDMENT OF ELECTION LAW NOT RETROSPECTIVE.

Under the election law as it stood in 1888, before the amendment of 1889 (Stats. 1889, p. 209), while party ballots fraudulently pasted with the names of candidates of the opposite party must be counted for the candidate of the party whose ballot was cast, that law did not apply to fraudulently printed ballots of similar character; and ballots cast at the election in 1888 for a Democratic candidate for sheriff, whose name was fraudulently printed on the Republican ticket, must be counted for the Democratic candidate. The amendment of 1889 was not retrospective in its operation.

ID.--ELECTION LAW--MANDATORY AND DIRECTORY PROVISIONS--REJECTING VOTE OF PRECINCT.

It is only those provisions of the election laws relating to the time and place of holding elections, the qualifications of voters, and such others as are made essential prerequisites to the validity of an election, that are mandatory. All others are directory merely, and an honest or mistaken disregard of them, not resulting in manifest fraud, will not justify the rejection of the entire vote of a precinct; but a neglect of directory provisions designed to prevent fraudulent voting, followed by actual fraud of that character sufficient to throw a doubt on the result of the election, is ground for rejecting the entire vote of a precinct, where there is no means of purging the poll.

ID.--MALCONDUCT OF ELECTION BOARD--CONSTRUCTION OF CODE--FRAUDULENT DISREGARD OF DIRECTORY PROVISIONS--ANNOUNCING RESIDENCE OF VOTERS.

Misconduct of an election board will warrant exclusion of the entire vote of the precinct as illegal, under section 1112 of the Code of Civil Procedure, without requiring proof of particular illegal votes cast, if the board has disregarded mandatory provisions of the statute, or such directory provisions as were designed to prevent fraudulent voting, followed by such actual fraud as throws suspicion on the result, without any means of purging the poll. Disregard of the provisions of sections 1225 and 1226 of the Political Code, requiring the residence of voters in incorporated towns to be announced and recorded on the poll-list, followed by proof that many more persons voted than there were qualified voters actually resident on each lot in the precinct on the day of election and for thirty days previous, establishes a *prima facie* case of fraudulent voting, which justifies rejection of the entire vote of the precinct, in the absence of rebutting evidence.

EVIDENCE--PROOF OF NEGATIVE--REBUTTAL.

Slight proofs make out a *prima facie* case when a negative is to be proved. In all such cases rebuttal is comparatively easy, and is of imperative obligation.

FINDINGS--REVIEW ON APPEAL--REVERSAL OF JUDGMENT.

When the findings are insufficient to support the judgment, or are contrary to the evidence, the appellate court cannot supply findings, but will reverse the judgment, and remand the cause for a new trial.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion of the court.

***71** *Monteith & Goodwin,* for Appellant.

*Hunsaker & Britt, Edwin Parker,* and *John M. Lucas,* for Respondent.

BEATTY, C. J.

This is an election contest. At the general election held November 6, 1888, Russell, the contestant, was the Republican, and McDowell, the contestee, was the Democratic, candidate for sheriff of San Diego County.

According to the official canvass of the returns of the

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election made by the supervisors, the whole number of votes cast in the county was 8,203, of which McDowell received 4,010 votes, Russell received 3,844 votes, W. J. Gould (Prohibition) received 277 votes, and two votes were counted as scattering. McDowell having received a certificate of election, Russell, in due time, filed his petition, in pursuance of sections 1111 et seq. of the Code of Civil Procedure, contesting his right to the office.

The grounds of contest were the first and fourth enumerated in said section, viz.: 1. Malconduct of the election boards; and 2. Illegal votes.

***72** At the trial, the sealed packages of ballots were opened and recounted; the result being, according to the findings of the superior court, that the whole number of votes cast in the county was 8,262, distributed as follows:--

```
McDowell (Dem.) .. 4,035
Russell (Rep.) ... 3,865
Gould (Pro.) ..... 275
Scattering ..... 87
```

But it was found that 210 votes had been cast by persons whose names were not on the great register, and 21 votes by persons who were not residents of the wards in which they voted, making an aggregate of 231 illegal votes. Of these it was proved that two had been cast and counted for McDowell and one for Russell. As to the remaining 228 illegal votes, there was no evidence as to how they had been cast. The superior court deducted two from the vote of McDowell and one from that of Russell, on account of the illegal votes known to have been received by them respectively; and as to the remaining 228 illegal votes, they were deducted from the vote of each candidate, and from the total of the scattering votes in the same proportion that each vote respectively bore to the total vote,--with the following result, leaving--

```
McDowell .... 3,923 legal votes.
Russell ..... 3,759 legal votes.
Gould ..... 268 legal votes.
Scattering ..... 85 legal votes.
```

Upon this finding of a plurality of 164 legal votes for McDowell, judgment passed in his favor, confirming his election, and for costs, from which Russell appeals, assigning error as follows:--

1. He contends that the court erred in apportioning among the candidates the 228 illegal votes as to which there was no evidence to show how they were cast, and deducting them *pro rata* from the respective scores.

***73** But counsel does not make it very clear what other course he thinks the court ought to have taken with respect to these votes. He argues--and very justly--that such a method of disposing of illegal votes can never change the result of an election; that the different candidates must always stand in the same relative position after the *pro rata* deduction as before it, and consequently that it is a vain and nugatory proceeding to make the deduction. He also argues, with equal force, that there is but one means of proving how the illegal voter has cast his vote; that is to say, by his own testimony, which is more likely to be false than true; and consequently that the attempt to prove how illegal votes have been cast can only result in an aggravation of the fraud. But what consequence would he have us deduce from this reasoning? He does not contend that all of the illegal votes should be deducted from the vote of the candidate standing highest in the poll, and there is neither reason nor authority to support such a proposition. In truth, a court can do nothing better, in the absence of proof as to how illegal votes have been cast, than to make the apportionment as was done in this case, or to throw out the precincts at which they have been received, on the ground of malconduct of the election board. Considering such illegal votes with reference to the ground of contest mentioned in subdivision 4 of section 1111 of the Code of Civil Procedure,-- the second ground of appellant's contest in this case,--they can avail the contestant only so far as he is able to prove not only that they were illegally cast, but that

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they were cast for the contestee. This is made clear by the provisions of section 1114 of the Code of Civil Procedure.

"Sec. 1114. Nothing in the fourth ground of contest, specified in section 1111, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, ***74** which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person."

In the absence of any proof, therefore, that any of these 228 illegal votes were cast for McDowell, the court certainly had no right to deduct from his vote more than his just proportion.

But the reception of illegal votes--votes of persons not on the registry lists, or not residing in the precinct where they offer to vote--may amount to malconduct on the part of the board of judges, and might come under the first ground of appellant's contest, based on subdivision 1 of section 1111 of the Code of Civil Procedure. We do not, however, understand appellant's counsel to contend that these particular illegal votes are to be considered with reference to his first ground of contest. And indeed, they could not avail him upon that ground, for it nowhere appears in what particular precinct or precincts they were cast, and if the malconduct of the judges who received them was such as to warrant the court in throwing out the entire vote of the precincts where they were received, we cannot tell what precincts would be thrown out. For aught that appears, the contestant may have received more votes than the contestee in the precincts where these illegal votes were given.

There was no error--certainly none injurious to the appellant--in the apportionment of the 228 illegal votes.

2. It was discovered by the recount that eight tickets, headed "Regular Republican Ticket," and in fact regular in all respects except that they contained the name of McDowell, instead of Russell, as candidate for sheriff, had been voted at the election. They were counted for McDowell, and the appellant contends that the court erred in not counting them for him.

Under the election law, as amended since the last ***75** general election (Stats. 1889, p. 209), these eight ballots would be counted as appellant contends they should have been counted; but that statute has no retrospective operation, and the question is, whether, under the law as it stood in November, 1888, a court or board of canvassers would have been authorized in counting these spurious tickets as if they had been what they pretended to be,--regular Republican tickets. There was no express provision of law at that date to warrant such action. The general object of the law was, of course, to give effect to the real intention of the voter,--to secure the counting of his ballot in favor of the candidates of his choice,--and it contained many specific provisions to that end. But the general rule for ascertaining the intention of the voter was to read his ballot as printed or written, and be guided by that. To this rule there were no exceptions, save those expressly provided for. One of these, contained in section 1204 of the Political Code, related to *pasters*,--a fraud of the same kind, though clumsier and more easily detected than spurious tickets. It is surprising that the legislature did not from the beginning deal with names fraudulently *printed* on tickets exactly as it dealt with names fraudulently *pasted* on tickets.

But for some reason it did not make such provision until its last session, and therefore we cannot say that the superior court erred in counting these tickets as they were printed.

3. In support of his first ground of contest,--malconduct of the election boards,--the appellant introduced a large amount of evidence in regard to the manner of conducting the election in the first and third precincts of the third ward and the first precinct of the fifth ward of the city of San Diego. In these three precincts, respectively in the order named there were 331, 326, and 487 votes cast, making a total of 1,144, of which McDowell received 642 and Russell 472; remainder scattering. ***76** McDowell's plurality of 170 in these three precincts was greater than his plurality in the whole county, and consequently, if they were thrown out his election would be invalidated. Appellant contends that the superior court erred in failing to set aside and disregard the vote of these precincts for malconduct of the election boards. His counsel makes a number of separate assignments of error under this head, but they may all be conveniently considered together.

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Sections 1225 and 1226 of the Political Code are as follows:--

"Sec. 1225. The person offering to vote must hand his ballot to the inspector, or to one of the judges acting as inspector, and announce his name and the number affixed to it on the register in use at the precinct where he offers to vote; provided, that in incorporated cities and towns the said person shall also give the name of the street, avenue, or location of his residence, and the number thereof, if it be numbered, or such clear and definite description of the place of such residence as shall definitely fix the same.

"Sec. 1226. The inspector, or judge acting as such, must receive the ballot, and before depositing it in the ballot-box, must, in an audible tone of voice, announce the name and register number; provided, that in incorporated towns and cities, the said inspector, or judge acting as such, shall also announce the residence of the person voting, and the same shall be recorded on the poll-list by the poll-clerk."

San Diego was, in November, 1888, an incorporated city, laid off into blocks and lots, with its streets numbered upon a simple and definite system. But the poll-lists of precincts 1 and 3 of the third ward show that no record was kept of the place of residence of the voters, and presumably that they gave no place of residence. The poll-list of the first precinct of the fifth ward shows that a record was kept of the streets or blocks where voters ***77** resided, but not of their street numbers, in many instances. In other words, they were so indefinitely located that it could not be told upon which of eight or a dozen lots they claimed to reside.

It is very clear that in these three precincts the election boards disregarded the requirements of sections 1225 and 1226 of the Political Code, and in so doing were guilty of malconduct.

This brings us to the serious question of the case: What is the consequence of this malconduct? Must the vote of these precincts be thrown out, thus invalidating the election of the contestee? or may the vote of these precincts be counted, notwithstanding the omission to require the voters to state the street and number of their residence?

The answer to these questions would be very plain and easy, if nothing had been shown beyond the mere fact that the election boards neglected to require the voters to give their places of residence, for it is well settled that disregard of directory provisions of election laws, in the absence of actual fraud, is no ground for rejecting the entire vote of a precinct, and the provisions quoted cannot be regarded as other than directory. It is only those provisions of the statutes relating to the time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory; all others are directory merely, and a failure to observe them caused by honest ignorance or mistake, and not resulting in manifest fraud, does not afford ground for rejecting the entire vote of a precinct. But on the other hand, it is equally well settled that neglect of directory provisions of a statute designed to prevent fraudulent voting, followed by actual fraud of that character sufficient in extent to throw doubt on the result of the election, is ground for rejecting the entire vote of a precinct, if there is no means of purging the poll. We have not ***78** time to cite and review the numerous decided cases by which this doctrine is established, but we refer to Pine on Elections, sections 497-509, where a full discussion of the subject will be found. (See also chapter 17, Cooley on Constitutional Limitations.) But it is claimed by respondent that such is not the law of this state, for the reason that the statute under which this contest is made lays down a different rule. He relies on section 1112 of the Code of Civil Procedure, which reads as follows:--

"Sec. 1112. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes."

According to respondent's construction of this section, no amount or character of misconduct of an election board will warrant the exclusion of the entire vote of a precinct, but the contestant of the election must assume the burden of showing how the illegal or fraudulent votes were cast, and can have no relief except the deduction from his adversary's score of such illegal votes as he may be able to prove were cast for him.

This construction cannot be maintained. If it could, it would follow that an election held miles away from

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the appointed place would be valid, contrary to the decision in *Knowles v. Yates,* 31 Cal. 82; and it would follow that the votes of a precinct must be counted, though the election was held on a different day from that appointed, contrary to all authority; for the language of this section is equally applicable to mandatory as to directory provisions of the election law, and it must receive a construction reconcilable with the doctrine as to the effect of disregarding mandatory provisions. We conclude its meaning to be merely that the election of a county officer, as sheriff, will not be avoided unless enough precincts ***79** are excluded for malconduct of the election boards to destroy his majority; and that the law of this state is as it is everywhere else, and ought to be, that disregard of mandatory requirements of the election law, or of merely directory provisions coupled with such actual fraud as makes the true result doubtful, is ground of throwing out the entire vote of a precinct, where there is no means of purging the poll.

This brings us to a consideration of the evidence offered to sustain the allegation of fraud.

The evidence showed beyond any doubt that the officers of the three city precincts above named disregarded the provisions of sections 1225 and 1226 of the Political Code. The manifest object of these provisions is to prevent fraudulent voting. Compliance with them makes fraud difficult and improbable; disregard of them makes fraud easy, difficult of detection and punishment, and therefore probable. Officers of election are, like all other persons, presumed to know the law, and their deliberate omission to follow directions designed to prevent fraudulent voting certainly calls for explanation. It casts suspicion upon their integrity, and is sufficient *prima facie* to make out a case of fraud. No doubt such omission is susceptible of explanation, and we are very willing to believe that the officers of these precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But as the case is presented, we cannot indulge that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not with fraudulent purpose; and in the absence of any rebutting proof on this point, we feel constrained to hold that the contestant made out a case of malconduct on the part of the election boards.

But upon another point of more serious import the evidence of fraud was much stronger. The contestent called hundreds of witnesses, residents of all parts of ***80** the three precincts in question, by whom he undertook to prove the names of all those qualified by residence to vote in those precincts. These witnesses, testifying with reference to maps of the precincts showing all the subdivisions of blocks and lots, proved the names of all male residents over twenty-one years of age who had resided on any particular lot on the day of the election, and for thirty days previous. The names of all such persons were considerably less than half of the number of votes--1,144--cast in the three precincts.

From this contestant argues that more than half of the votes so cast, about six hundred, were illegal and fraudulent votes. Respondent, on the other hand, argues that the proof, allowing it the utmost effect, was not sufficient to prove that any fraudulent or illegal votes were cast. For, he says, proof that a man did not reside on a particular lot on the day of the election, and for thirty days prior thereto, is not inconsistent with the supposition that he may have lived for thirty days prior to the election within the precinct, part of the time in one house and part of the time in another. Nor is it inconsistent with the supposition that he might have been living in the precinct thirty days before election, and removed to another precinct of the same county within the thirty days, in which case he would be a qualified voter of the precinct by virtue of subdivision 3, section 1239, Political Code, which reads as follows:--

"3. A person must not be held, by reason of having moved from one precinct to another, in the same county, within thirty days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election."

It is to be observed, however, with respect to this provision of the Political Code, that it was adopted while the old constitution was in force, and though perfectly valid at the time of its adoption,--the old constitution ***81** not requiring any length of residence in a voting precinct as a prerequisite of the right to vote (Const. 1863, art. 2, sec. 1),--it has ceased to be law since the adoption of the new constitution, with which it is in direct conflict. By the new constitution (art. 2, sec. 1) residence in his election precinct for thirty days preceding the election is just as essential a condition of the right to vote as is residence in the county for ninety days, and in the state for one year.

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As to the other point, however, it is true that proof that a particular person has not resided continuously on one lot or in one house for thirty days prior to an election is entirely consistent with the supposition that he may have resided in the precinct the whole period, part of the time in one house and part in another. But it is equally true that proof of this character with reference to more than half of the persons voting in a ward is not consistent with the supposition that all, or any considerable number of them, have lived in the precinct thirty days. It is not in accordance with ordinary experience that men generally move so frequently; and so, notwithstanding the flaw in plaintiff's proof, considered with reference to any particular person, we cannot avoid the conclusion, that, in the aggregate, and considered with reference to the mass of persons affected by it, it did establish a strong *prima facie* case of fraudulent voting on a large scale in these three precincts.

Moreover, it is to be considered that the contestant was assuming the difficult task of proving a negative, i. e., the want of qualification of a large number of voters, and the doctrine is well established that slight proofs make out a *prima facie* case where a negative is to be proved. In all such cases rebuttal is comparatively easy, and is consequently of imperative obligation. Here no proof in rebuttal was offered, and the evidence for contestant stands absolutely uncontradicted.

***82** Such being the case, we are forced to the conclusion that the superior court erred in finding no material malconduct of the election boards.

For this error the judgment must be reversed. But we cannot accede to the proposition of contestant that we should pronounce a final judgment either declaring the contestant elected or avoiding the election of the contestee. There are no findings to sustain such a judgment, and we cannot supply findings. Beside, the contestee is entitled to an opportunity to show, as he may be able to do on a new trial, that, despite the irregularities complained of, there was in fact no fraud, actual or intended, on the part of the election boards, or those voting in the three precincts, whose vote the contestant seeks to exclude.

Judgment reversed and cause remanded.

FOX, J., SHARPSTEIN, J., PATERSON, J., and MCFARLAND, J., concurred.

Mr. Justice WORKS did not participate in the decision of this case.

THORNTON, J., concurring.

I concur in the judgment, and in all that is said in the opinion, except that which relates to the constitutionality of section 1239 of the Political Code. The section is not clearly opposed to any provision of the constitution, and in such case, the deference due to the legislature requires that the section be held constitutional. The constitution should not be so construed as to cut off the right to vote of any citizen who has resided in the state one year preceding the election, in the county ninety days, including a residence in the precinct on the thirtieth day preceding the election. The opportunity of committing fraud under such circumstances is reduced to a *minimum,* for many citizens must know of the residence of such a person who has resided in the county ninety days, and a ***83** portion of the thirty days' limit in that precinct of the county where he offers to vote. It must be observed that the person offering to vote must have resided in the county ninety days and a portion of the thirty days to give him a right to vote, and his removal is only from one precinct to another of the same county.

Cal. 1890.

JAMES RUSSELL, APPELLANT, v. S. A. MCDOWELL, RESPONDENT.

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BERTHA M. SINGLETARY et al., Plaintiffs and Appellants,
v.
TOM M. KELLEY, as County Clerk, etc., et al., Defendants and Respondents.
**Civ. No. 22761.**

District Court of Appeal, First District, Division 3, California.

June 2, 1966.

HEADNOTES

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(1) Elections § 96--Election Contests--Statutory Provisions.
Elec. Code, § 20024, forbidding an election to be set aside for illegal votes unless the winner has fewer legal votes than another after the illegal votes are deducted from both, bars a presumption that all illegal votes favored the winning side.

See **Cal.Jur.2d,** Elections, § 177.

(2) Elections § 96--Election Contests--Statutory Provisions.
Contestants of an election held on a proposal for incorporation of a city were able to resort to contest, rather than quo warranto procedure, only because the contest chapter is made applicable to such a ballot measure by Elec. Code, § 20089, and § 20024, forbidding the setting aside of an election for illegal votes unless the legal votes of the winner are below the number given to another after illegal votes are deducted from both sides, applies to an incorporation election.

(3) Elections § 121(3)--Election Contests--Evidence--Ballots as Evidence.
One who votes illegally forfeits the privilege of secrecy, and to require proof in an election contest of how a particular vote was cast does not violate the requirement of secrecy of the ballot (Const., art. II, § 5).

SUMMARY

APPEAL from a judgment of the Superior Court of Santa Cruz County. Gilbert B. Perry, Judge. Affirmed.

Action contesting the legality of an election held on a proposal for incorporation of a city. Judgment for defendants affirmed.

COUNSEL

Lucas, Wyckoff, Miller, Stanley & Scott and Ray J. Scott for Plaintiffs and Appellants.

William H. Card, County Counsel, Dennis J. Kehoe and Henry J. Faitz, Assistant County Counsel, for Defendants and Respondents.

Faber L. Johnston and Faber L. Johnston, Jr., as Amici Curiae on behalf of Defendants and Respondents. ***612**

DRAPER, P. J.

This is a contest (Elec. Code, § § 20050, 20089) of an election held upon a proposal for incorporation of the City of Scotts Valley. The official canvas declared 344 votes in favor of incorporation and 323 against. The trial court found that 27 ballots were cast by persons not living within the boundaries of the proposed city. Of these, 13 favored incorporation, and there was no evidence as to how the remaining 14 voted. The trial court deducted the 13 ballots from the total favoring incorporation, and deemed the remaining 14 to have been cast for and against the measure in the same proportion as were the total votes, i.e., 7 for and 7 against. The net result was determined to be 324 for incorporation and 316 against. Judgment was for defendants, confirming adoption of the incorporation proposal. Contestants appeal.

This appeal turns upon disposition of the 14 illegal votes which cannot be identified as either for or against incorporation. Contestants assert that their only burden is to show that "enough illegal votes were cast to affect the result of the election." Obviously, if all 14 unidentified votes opposed incorporation, the net valid vote would be against the measure. Hence, it is argued, contestants have met their burden, and a new election should be ordered.

(1) But our statute bars the presumption that all illegal votes favored the winning side. "An election shall not be set aside on account of illegal votes, unless ... a number of illegal votes has been given to [the winner] which, if taken from him, would reduce ... his legal votes below the number of votes given to [another], after deducting therefrom the illegal votes ... given to that other person" (Elec. Code, § 20024; see also § 20052).

Under a like statute in effect in 1890 (Code Civ. Proc., § 1114), the contention here made by contestants was rejected (*Russell v. McDowell,* 83 Cal. 70, 72-74 [23 P. 183]). The court, for the purpose of determining the contest, deemed the illegal votes apportioned among the candidates in the same proportion as the total votes were cast-the procedure adopted by the trial court here.

Contestants place unwarranted emphasis upon a stray judicial sentence in one case. (*People* ex rel. *Russell v.*

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*Town of Loyalton,* 147 Cal. 774 [82 P. 620].) There, an election had favored incorporation by a vote of 79 to 30. Five votes were shown to have been illegal. The appellate court said (p. 780) "It may be assumed, for the purpose of this decision, that ***613** every illegal vote was cast for incorporation." But this is by no means a holding that this assumption must be made. Rather, its completely hypothetical nature is emphasized by the last sentence of the same paragraph, pointing out that the result would not be affected "even though all such illegal votes be deducted from the total vote cast for incorporation." Neither the language of *Loyalton,* read in context, nor its holding, supports appellants.

Appellants rely strongly upon a South Carolina decision (*Creamer v. City of Anderson,* 240 S.C. 96 [124 S.E.2d 788]). Both compulsion and preference lead us to follow the California rule laid down in *Russell.*

(2) Contestants argue that section 20024 can apply only to "an election between candidates". But the Legislature has expressed the contrary view. The provisions of the chapter containing section 20024 "shall also apply to the recount of votes cast on a ballot measure, insofar as they can be made applicable" (Elec. Code, § 20089). There is no merit in the suggestion that the contest provisions should not be made applicable to an incorporation election. Contestants were able to resort to contest, rather than the quo warranto procedure used in *People v. Town of Loyalton, supra,* only because the contest chapter is, by section 20089, made applicable to such a ballot measure.

(3) Appellants suggest that to require proof of how a particular vote was cast is to violate the requirement of secrecy of the ballot (Cal. Const., art II, § 5). But the rule is that one who votes illegally forfeits the privilege of secrecy (*Patterson v. Hanley,* 136 Cal. 265, 276 [68 P. 821, 975]; *Robinson v. McAbee,* 64 Cal.App. 709, 714-715 [222 P. 871]).

Judgment affirmed.

Salsman, J., and Devine, J., concurred. ***614**

Cal.App.1.Dist.,1966.

Singletary v. Kelley

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Supreme Court of Nebraska.
The STATE of Nebraska ex rel. John R. BROGAN, Appellant,
v.
Harold F. BOEHNER, Appellee.
**No. 35314.**

Jan. 25, 1963.

Action in quo warranto to oust respondent from office and to declare relator to be entitled to office. The District Court, York County, Zeilinger, J., dismissed action and overruled relator's motion for new trial and relator appealed. The Supreme Court, Boslaugh, J., held that, in absence of evidence as to how ballots found to be invalid were cast, they would not be deducted proportionately from both candidates according to entire vote returned for each and court would not substitute its judgment for that of electorate as declared by proper authorities.

Affirmed.

West Headnotes

**[1] Quo Warranto 34**
319k34 Most Cited Cases
Person claiming office that is usurped or invaded by another may maintain action in quo warranto upon his own relation, if prosecuting attorney refuses or neglects to file information after application to him for that purpose. R.R.S.1943, § 25-21,146.

**[2] Quo Warranto 34**
319k34 Most Cited Cases

**[2] Quo Warranto 63**
319k63 Most Cited Cases
Defeated candidate for office was authorized to bring action in quo warranto, upon his own relation, for ouster of candidate declared elected and to have himself declared elected and he was not required to file bond for costs, attorney's fee and prosecution without delay. R.R.S.1943, § § 25-21,122, 25-21,146.

**[3] Elections 216.1**
144k216.1 Most Cited Cases

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Failure of certificates executed by armed forces commissioned officers, who administered oath to civilian absentee voters, to state place of execution of oath and certificate did not invalidate ballots, in absence of territorial restriction upon authority of officers. R.R.S.1943, § 32-810.

**[4] Elections 216.1**
144k216.1 Most Cited Cases
In absence of certificate on identification envelope, which contained ballot cast by sick or disabled voter, being dated or other evidence showing when ballot was voted, ballot should not be counted. R.R.S.1943, § 32-813.

**[5] Elections 216.1**
144k216.1 Most Cited Cases
Ballots cast by sick and disabled voters of York county should have been counted where there was compliance with statute in all respects except that venue was shown on each of identification envelopes to be "State of York". R.R.S.1943, § 32-813.

**[6] Evidence 83(1)**
157k83(1) Most Cited Cases
Where no venue is shown on identification envelopes containing ballots cast by sick and disabled voters there is presumption that officer who administered oath acted within his jurisdiction. R.R.S.1943, § 32-813.

**[7] Elections 216.1**
144k216.1 Most Cited Cases
Where certificate of officer who administered oath to absentee voter, together with other information appearing on identification envelope, fairly indicates that officer who administered oath and executed certificate was authorized to do so, ballot is valid. R.R.S.1943, § 32-813.

**[8] Elections 216.1**
144k216.1 Most Cited Cases
Absentee ballot should not have been counted where certificate on identification envelope showed that it was executed by "Executive Officer, U.S.W.B." R.R.S.1943, § 32-813.

**[9] Elections 216.1**
144k216.1 Most Cited Cases
Identification of person, who executed certificate on identification envelope for absentee ballot, showing her commissioned rank, name and assignment as chief of nursing service substantially complied with election statute and ballot should have been counted where voter was identified by oath as being member of Nursing Corps, United States Air Force. R.R.S.1943, § 32-813.

**[10] Elections 216.1**
144k216.1 Most Cited Cases
Officers who executed certificates on identification envelopes for five absentee ballots as "1/Lt. USMC", "Captain, Inf.", "Captain United States Air Force," "Lieutenant, USNR" and "1/Lt. USAF" substantially complied with election statute and ballots should have been counted. R.R.S.1943, § 32- 813.

**[11] Elections 291**
144k291 Most Cited Cases
Generally, party who wishes to dispute election upon basis that illegal votes were cast has burden of proving for which candidate illegal votes were cast as necessary incident to proving that illegal ballots affected result of election. R.R.S.1943, § § 32-817, 32-1001.

**[12] Elections 298(1)**
144k298(1) Most Cited Cases
Where record does not clearly show what result of election should be, court will not substitute its judgment for that of electorate as declared by proper authorities.

**[13] Elections 298(2)**
144k298(2) Most Cited Cases
In absence of evidence as to how ballots found to be invalid were cast they would not be deducted proportionately from both candidates according to entire vote returned for each and court would not substitute its judgment for that of
electorate as declared by proper authorities; overruling McMaster v. Wilkinson, 145 Neb. 39, 15 N.W.2d 348.

****148** Syllabus by the Court*

***689** 1. A person claiming an office that is usurped or invaded by another may maintain an action in quo warranto upon his own relation under section 25-21,146, R.R.S.1943, if the prosecuting attorney refuses or neglects to file the information after application to him for that purpose.

2. In an action brought under section 25-21,146, R.R.S.1943, the relator is not required to file the bond

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required by section 25-21,122, R.R.S.1943.

3. Where there is no territorial restriction upon the authority of the officer who administered the oath to an absentee voter, the failure of the certificate of the officer to state the place of the execution of the oath and certificate does not invalidate the ballot.

4. Where the venue is omitted from an affidavit there is a presumption that the officer acted within his jurisdiction.

5. Where the certificate of the officer who administered the oath to an absentee voter, together with other information appearing on the identification envelope, fairly indicates that the officer who administered the oath and executed the certificate was authorized to do so by section 32-813, R.R.S.1943, the ballot is valid.

6. A party who wishes to dispute an election upon the basis that illegal votes were cast has the burden of proving for which candidate the illegal votes were cast.

7. Where the record does not clearly show what the result of an election should be, the court will not substitute its judgment for that of the electorate as declared by the proper authorities.

8. McMaster v. Wilkinson, 145 Neb. 39, 15 N.W.2d 348, 155 A.L.R. 667, overruled in part.

***690** Ginsburg, Rosenberg & Ginsburg, Norman Krivosha, Lincoln, for appellant.

Waring & Gewacke, Geneva, for appellee.

Heard before SIMMONS, C. J., and CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

****149** BOSLAUGH, Justice.

This is an action in quo warranto brought by John R. Brogan as relator against Harold F. Boehner as respondent. Both the relator and the respondent were candidates at the 1960 general election for the office of district director of Consumers Public Power District, District No. 5. The canvassing board declared the respondent elected. The relator then brought this action to oust the respondent from the office and to declare the relator to be entitled to the office. The trial court found generally for the respondent and dismissed the action. The relator's motion for new trial was overruled and he has appealed.

By various pleadings filed in the trial court the respondent questioned the right of the relator to maintain the action without filing a surety bond as provided in section 25-21,122, R.R.S.1943. This section, which was a part of the original Code of Civil Procedure, was amended in 1921 to provide that where the action is instituted by a person other than the county attorney, a bond shall be filed with the information.

The relator contends that the action is brought under section 25-21,146, R.R.S.1943. This section was originally enacted as a part of a separate statute by the Territorial Legislature in 1858. Laws 1858, p. 232.

[1] The distinction between the two sections was recognized in Thompson v. James, 125 Neb. 350, 250 N.W. 237. In that case this court said: 'By section 20-21,137, Comp.St.1929, a citizen of the state claiming an office ***691** that is usurped or invaded by another may maintain this form of action in a district court with or without the consent of the prosecuting attorney, upon his own relation. * * * Relators are given capacity to maintain this action by the above cited section of the statute upon their own relation, and are not required to comply with section 20-21,113, Comp.St.1929, which provides for such an action by an elector, upon refusal of the prosecuting officer to bring the action and upon the giving of bond for costs, attorney's fee and prosecution without delay.'

[2] The relator in this case was authorized to bring the action upon his own relation and was not required to file a bond for costs, attorney's fee, and prosecution without delay.

The principal controversy concerns the validity of certain ballots cast by absentee or disabled voters and the effect to be given to invalid ballots. The ballots in question may be grouped into several categories, each of which will be discussed separately.

[3] The first category consists of 11 ballots, cast by absentee voters, which were counted by the canvassing board and the trial court. The relator contends that these ballots should not have been counted because in each case the certificate of the

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official who administered the oath to the voter fails to state where the oath and certificate was executed. The statute provides that the certificate shall state '* * * the date of the execution of the oath and certificate and the place of such execution, if the voter is not in the military or naval service of the United States * * *.' Section 32-810, R.R.S.1943. None of the voters were in the military or naval service of the United States.

The form of the oath and certificate is printed in blank upon the reverse side of the identification envelopes in which the ballots were returned to the county clerk. Above the oath is printed: 'State of _____, County of _____.' In each case these blanks ***692** were filled in to indicate that the oath was executed in a county in Nebraska. However, the postmark on 10 of the envelopes shows that they were mailed from outside of the State of Nebraska.

Each of the certificates was executed by a commissioned officer in the armed forces of the United States. Section 32-813, R.R.S.1943, authorizes any commissioned officer in the armed forces of the United States ****150** to administer oaths, make certificates, and perform such other acts as are necessary to enable a voter to exercise his absent voting privilege. The trial court held that there had been a substantial compliance with the statute, and that any failure of the certificates to state the place of execution was not a material defect because there was no territorial restriction upon the authority of the officers who executed the certificates. We arrived at the same conclusion and hold that the 11 ballots were properly counted.

The second category consists of 8 ballots, cast by sick and disabled voters of York County, Nebraska, which were not counted by the canvassing board and the trial court. The relator contends that these ballots should have been counted.

The parties stipulated that these ballots were rejected by the canvassing board because the venue shown on each of the identification envelopes was 'State of York, County of York' and in each instance they were notarized in York County, Nebraska. The trial court found that these ballots should not be counted for the same reason.

[4] The certificate on one of the identification envelopes is not dated, and there is no other evidence showing when the ballot contained therein was voted. We find that this ballot should not be counted.

[5] As to the remaining 7 ballots, the evidence shows a compliance with the statute in all respects except that the venue is shown to be 'State of York.' The respondent ***693** concedes in his brief that there is no State of York and we take judicial notice of that fact.

[6] So far as these ballots are concerned, the situation is the same as if the venue had been left blank so that the venue would have read: 'State of _____.' Where no venue is shown, there is a presumption that the officer acted within his jurisdiction. Merriam v. Coffee, 16 Neb. 450, 20 N.W. 389; Crowell v. Johnson, 2 Neb. 146.

The respondent relies upon Miller v. Mersch, 152 Neb. 746, 42 N.W.2d 652, and McMaster v. Wilkinson, 145 Neb. 39, 15 N.W.2d 348, 155 A.L.R. 667. In Miller v. Mersch, supra, the venue was shown to be Thayer County, Nebraska, but the jurat indicated the oath had been administered in the Province of Saskatschewan, Canada, and no seal was affixed. In McMaster v. Wilkinson, supra, the venue was shown to be Adams County, Nebraska, and Saunders County, Nebraska, but the seal of the notary public indicated that he was a notary public of Sarpy County, Nebraska. In each of these cases the record on its face indicated that the authority of the officer administering the oath and executing the certificate did not extend to the county where the oath was administered and the certificate executed.

The evidence here is that the oaths were administered and the certificates executed by an officer who was duly authorized to act. The certificates on the identification envelopes for these ballots were executed by C. T. Moline. The evidence, including the seal affixed to the certificates, shows that C. T. Moline was a notary public of York County, Nebraska, at the times the certificates were executed. The evidence supports a finding that these ballots were voted, the oath taken, and the certificates executed in York County, Nebraska. We find that these 7 ballots should have been counted.

[7] The third category consists of 7 ballots, cast by absentee voters, which were counted by the canvassing board and the trial court. The relator contends that ***694** these ballots should not have been counted because it does not appear that the oaths were administered and the certificates executed by a duly

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authorized officer.

Section 32-813, R.R.S.1943, provides that the oath of an absentee, sick, or disabled voter may be subscribed and sworn to before any commissioned officer, noncommissioned officer not below the rank of sergeant, or petty officer, in the armed forces ****151** of the United States, and that any such official may make the certificate and do and perform such other acts as are necessary to enable a voter to exercise his absent, sick, or disabled voting privilege.

[8] The certificate on the identification envelope for one of the ballots shows that it was executed by an 'Executive Officer, USWB.' This description does not identify the officer as one of those authorized by section 32-813, R.R.S. 1943, and this ballot should not have been counted.

[9] The certificate on the identification envelope for one of these ballots was executed by 'Lt/Col Sara C. Hall, Chief of Nursing Service.' The voter is identified by the oath as being a member of the Nursing Corps, United States Air Force. Although the identification of the officer executing the certificate is not as complete as it could have been, there was a substantial compliance with the statute, and we find that this ballot should have been counted.

[10] The officers who executed the certificates on the identification envelopes for the other 5 ballots were identified as follows: '1/Lt. USMC'; 'Captain, Inf.'; 'Captain United States Air Force'; 'Lieutenant, USNR'; and '1/Lt. USAF.' This was a substantial compliance with the statute and these ballots should have been counted.

When the 7 ballots, cast by sick and disabled voters of York County, Nebraska, are counted and added to the number of votes cast for each of the parties as declared by the canvassing board, the relator is found to ***695** have received 7,833 votes and the respondent 7,835 votes.

In the district court the relator contended that 109 invalid ballots had been counted. The trial court found that 90 invalid ballots had been counted. On appeal, the relator has contended that 18 ballots held valid by the trial court were invalid and should not have been counted. Of the 18 ballots questioned on appeal, we find that 17 were valid. We therefore conclude that 91 invalid ballots were counted. The remaining question is how these ballots affect the result of the election.

The ballots cast by absentee and disabled voters are separated from their identification envelopes when they are counted by the canvassing boards. Section 32-817, R.R.S.1943. After the ballots have been removed from the identification envelopes and counted, there is no way to identify a ballot as having been contained in a particular identification envelope.

There is no evidence as to how the 91 invalid ballots were cast. There is no showing as to how many of these ballots were voted for each of the candidates. It is probable that some of the invalid ballots were not cast for either candidate.

[11] The general rule is that a party who wishes to dispute an election upon the basis that illegal votes were cast has the burden of proving for which candidate the illegal votes were cast. It is a necessary incident to proving that the illegal ballots affected the result of the election. The requirement is statutory in election contests. Section 32-1001, R.R.S.1943. In Mehrens v. Election Canvassing Board, 134 Neb. 151, 278 N.W. 252, this court held: 'In an election contest on the ground that, through 'ignorance and mistake' of election officers, enough illegal votes were cast in a voting precinct to change the result of the election, the burden is on contestant to prove the casting of the illegal votes and also the candidates for whom they were cast.'

In a recent decision, ***696**Arends v. Whitten, 172 Neb. 297, 109 N.W.2d 363, this court followed the rule of the Mehrens case and held that where no attempt was made to show how allegedly unqualified voters had actually voted, the appellant's contentions in regard to such illegal ballots would be disregarded.

The relator relies upon McMaster v. Wilkinson, supra, and contends that the invalid ballots should be deducted proportionately from the total votes received by ****152** the relator and the respondent. In the McMaster case this court held: 'When illegal ballots have been cast, the loss due to such ballots should be so apportioned that each candidate shall have deducted a share of them, proportioned according to the whole number of votes received by him.'

In the McMaster case, which was an election contest between two candidates for the office of city councilman in the city of Lincoln, Nebraska, the court

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found that 5 illegal absentee and disabled ballots had been counted. The court found in that case that the contestant had a plurality of 9 votes. The result of the election would not have been affected if the entire 5 votes had been deducted from the total vote of the contestant.

The relator contends that the formula set out in the McMaster case should be used in this case on a county-by-county basis. If that were done, the result would be that the relator would have a plurality of approximately 2 votes. However, if the invalid ballots are deducted on the basis of the 'entire vote' or 'whole number of votes' received by each candidate, the result is unchanged.

The authority cited in the opinion in the McMaster case is McCrary on Elections (4 Ed.), s. 495, p. 364. The rule is stated there as follows: 'In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. ***697** Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each.'

In discussing the rule stated above, Judge McCrary further states ss. 496, 497, pp. 365, 366: 'This is probably the safest rule that can be adopted in a court of justice, where there is no power to order a new election, and where great injury would result from declaring the office vacant; but it is mainifest that it may sometimes work a great hardship, inasmuch as the truth might be, if it could be shown, that all the illegal votes were on one side, while it is scarcely to be presumed that they would ever be divided between the candidates in exact proportion to their whole vote. * * * Let it be understood that we are here referring to a case where it is found to be impossible by the use of due diligence to show for whom the illegal votes were cast. If in any given case it be shown that the proof was within the reach of the party whose duty it was to produce it, and that he neglected to produce it, then he may well be held answerable for his own neglect; and because it was his duty to show for whom the illegal votes were cast, and because he might, by the use of reasonable diligence, have made this showing, it may very properly be said that he should himself suffer the loss occasioned by deducting them from his own vote.'

In Paine on Elections, s. 513, p. 433, the author states: 'Where illegal votes have been cast the true rule is to purge the poll, by first proving for whom they were cast, and thus ascertain the real vote; but, if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties.'

The author further states on p. 434: 'In the total absence of proof tending to show for whom illegal votes, sufficient in number to affect the result, were cast, the duty of the court would seem to be to choose, ***698** as wisely as possible, between a disregard of the illegality and a rejection of the entire precinct vote. There ought to be no arbitrary presumption of law, either that all the illegal votes were cast by the political party in the majority, or that they were cast by different parties in proportion to their numbers. To take the illegal votes all from one candidate, or pro rata from several candidates, would be, not to decide, but to make a case for the parties.' See, also, Hamilton v. Marshall, 41 Who. 157, 282 P. 1058, 66 A.L.R. 1154.

****153** [12][13] We do not believe that courts should adopt and apply arbitrary rules which will determine elections upon the basis of chance. This court will not substitute its judgment for that of the electorate as declared by the proper authorities unless the record shows clearly what the result of the election should be. The record in this case fails in that respect.

To the extent that McMaster v. Wilkinson, supra, conflicts with this opinion, it is overruled.

The judgment of the district court declaring the respondent elected and dismissing the action of the relator is affirmed.

Affirmed.

SIMMONS, C. J., not participating.

174 Neb. 689, 119 N.W.2d 147

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Supreme Court of Delaware.

STATE ex rel. WAHL

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v.
RICHARDS, Chief Justice et al. (ARMSTRONG, Intervener).

Feb. 25, 1949.

Proceeding by the State of Delaware, upon the relation of Robert H. Wahl, against Charles S. Richards, Chief Justice of the State of Delaware, and another, for a writ of mandamus directing Judge of the Superior Court sitting as the Board of Canvass for New Castle County to reconvene such court and recanvass the vote for office of representative in General Assembly from Second Representative District for New Castle County and reject all ballots cast for the office in specified election district, wherein Robert L. Armstrong was permitted to intervene as a defendant.

Writ denied.

TERRY, J., dissenting.

**401 No. 10 November Session 1948.

HARRINGTON, Chancellor, TERRY, CAREY, and PEARSON, JJ., sitting.

Amended petition for the issuance of a writ of mandamus against the defendants and rule to show cause issued returnable November 30, 1948.

The original defendants filed an amended answer.

Robert L. Armstrong, a candidate for the office of Representative in the General Assembly from the Second Representative District for New Castle County at the General Election held November 2, 1948, was permitted to intervene as a defendant, subject to the right of the relator to move to strike off that order. He also filed an amended answer to the relator's petition.

There were few controverted facts.

West Headnotes

**[1] Mandamus 77(1)**
250k77(1) Most Cited Cases
Title to office of representative in the General Assembly could not be tried in mandamus proceeding to compel Superior Court sitting as Board of Canvass to reconvene and recanvass votes cast and writ, if issued, would only be directed to judge of Superior Court sitting as Board of Canvass.

**[2] Mandamus 153**
250k153 Most Cited Cases
Successful candidate for office of representative in the General Assembly was entitled to intervene in mandamus proceeding instituted upon the relation of defeated candidate to compel Superior Court sitting as Board of Canvass to recanvass the votes and reject all ballots cast for the office in specified election district. Rules of Superior Court, rules 24(b)(2), 81; Rules of Supreme Court, rule 49.

**[3] Constitutional Law 68(3)**
92k68(3) Most Cited Cases
Supreme Court had jurisdiction to issue writ of mandamus compelling Superior Court as Board of Canvass to recanvass votes cast for office of representative in General Assembly and reject all ballots cast for the office in specified election district, notwithstanding constitutional power given each house of Legislature to determine the election and qualifications of its own members. Const. art. 2, § 8; art. 4, § 12(5).

**[4] States 30**
360k30 Most Cited Cases
The House of Representatives has the exclusive right to determine whether one seeking recognition as a member of that body is a duly elected member, even though he possesses a certificate indicating his election, but presentation of such certificate would bring the question before the house and would be pertinent evidence for its consideration in determining his rights. Const. art. 2, § 8.

**[5] Mandamus 3(4)**
250k3(4) Most Cited Cases
Defeated candidate for office of representative in the General Assembly did not have an adequate remedy at law by writ of error, writ of certiorari, or election contest which would preclude maintenance of mandamus proceeding to compel board of canvass to recanvass votes and reject all ballots cast for the office in a particular district because 101 of the 296 ballots voted in that district were contained in envelopes not signed by clerks. Rev.Code 1935, § 2011 et seq.; Const. art. 4, § 12(5).

**[6] Elections 236**
144k236 Most Cited Cases

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Repeal of statutory provision that in counting ballots each ballot should be immediately returned to envelope and secured therein by rubber band did not affect the general purpose of statutory proviso requiring ballots contained in envelopes not signed by clerks and all disputed ballots and envelopes to be preserved for official canvass by Superior Court. Rev.Code 1935, § 1859; 46 Del.Laws c. 154, § 2.

**[7] Elections 227(1)**
144k227(1) Most Cited Cases
Courts are reluctant to reject the entire vote of an election district because of irregularity committed by election officers, unless there is a clear statutory provision requiring such rejection.

**[8] Elections 227(1)**
144k227(1) Most Cited Cases
Ordinarily ignorance, inadvertence, mistake, or even intentional wrong of election officers should not be permitted to disfranchise voters who are innocent of any wrongdoing, if it can be avoided.

**[9] Elections 229**
144k229 Most Cited Cases
Where it is impossible to determine for whom illegal votes sufficient in number to affect the result of election were cast, whether such illegality should be disregarded or entire vote of election district rejected depends upon the particular facts of each case.

**[10] Elections 186(3)**
144k186(3) Most Cited Cases
Ballots in envelopes not signed by both clerks of election were illegal and should have been rejected by election officers. Rev.Code 1935, § § 1853, 1854, 1859.

**[11] Elections 229**
144k229 Most Cited Cases
Where illegal ballots have been cast in an election district in such number as to affect the result or make it uncertain, and they cannot be identified and segregated from valid ballots, justice may require that entire vote of election district be rejected, particularly where fraud is alleged and proved.

**[12] Elections 177**
144k177 Most Cited Cases
The statutory provisions requiring use of envelopes signed by both clerks in voting are among those intended to identify the official ballots and prevent fraud. Rev.Code 1935, § § 1853, 1854, 1859.

**[13] Elections 285(3)**
144k285(3) Most Cited Cases
Allegation that 101 of 296 ballots cast in a particular election district were inclosed in envelopes not signed by both clerks did not constitute an allegation of fraud as ground for rejecting entire vote of district, where it was impossible to identify and separate illegal ballots. Rev.Code 1935, § § 1853, 1854, 1859.

**[14] Elections 227(1)**
144k227(1) Most Cited Cases
Possible injury to public from failure of election officers to comply with statutory provisions, even in absence of fraud, may be so great as to justify rejection of entire vote of election district, without any actual proof of improper results from such failure.

**[15] Evidence 45**
157k45 Most Cited Cases
Supreme Court would take judicial notice that Republican and Democratic Parties were the major political parties in a particular county at a particular general election.

**[16] Elections 186(3)**
144k186(3) Most Cited Cases
Where no fraud or suspicious circumstances connected with violation of election law were alleged or proved, all ballots from which the intent of voter could be ascertained should be counted, though 101 of the 296 ballots cast in election district were contained in envelopes not signed by both clerks when voted and such illegal ballots had not been segregated by election officers and could not be identified. Rev.Code 1935, § § 1853, 1854, 1858, 1859.

**[17] Elections 186(3)**
144k186(3) Most Cited Cases
Where 101 of 296 ballots cast in election district were contained in envelopes not signed by both clerks when voted but board of canvass could not identify such illegal ballots because they had not been segregated by election officers, it was improper to deduct such ballots pro rata from the total vote received by each candidate for office. Rev.Code 1935, § § 1853, 1854, 1858, 1859.

***569** E. Ennalls Berl, William E. Taylor, Jr., James L. Latchum, and Michael A. Poppiti, all of Wilmington, for relator.

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Henry M. Canby, William S. Satterthwaite, John S. Walker, and Louis Finger, all of Wilmington, for intervening defendant.

John P. Sinclair was permitted to appear as amicus curiae for the purpose of suggesting **402 that the relator's petition be dismissed on jurisdictional ground which will be discussed later.

HARRINGTON, Chancellor, delivering the majority opinion of the Court:

Robert H. Wahl and Robert L. Armstrong were the duly nominated and opposing candidates of the major political parties for the office of Representative in the General Assembly from the Second Representative District in New Castle County at the General Election held November 2, *570 1948. After canvassing the votes cast in the various election districts of the Second Representative District, the Judges of the Superior Court, sitting as the Board of Canvass for New Castle County, issued certificates showing that Robert L. Armstrong had received a plurality of such votes. Robert H. Wahl, the relator, questions the legality of the count in the Third Election District of the Sixth Ward in the Second Representative District of the county, and seeks a writ of mandamus directing the said Judges of the Superior Court, sitting as the Board of Canvass (1) to reconvene the said court and to recanvass the vote for the office of Representative in the General Assembly from the Second Representative District for New Castle County, and particularly in the Third Election District of the Sixth Ward; (2) that, in making such recount, they reject all of the ballots cast for the office of Representative in the General Assembly in the Third Election District of the Sixth Ward in the Second Representative District of the county on the ground that they were tainted with illegality because 101 of the 296 ballots voted in that district were in envelopes not signed by both clerks; and (3) that if it should then appear that Robert H. Wahl had received a plurality of all of the votes cast for the said office of Representative in the General Assembly from the Second Representative District in New Castle County, that the certificates issued showing the election of Robert L. Armstrong should be cancelled and new certificates issued accordingly.

The relator claims that Robert L. Armstrong is not a proper party to this proceeding, and that the order permitting him to intervene as a defendant should be revoked. See Spelling on Extra. Relief (1893) § 1338; Woolley's Del.Pract. § 1658.

[1] Title to the office of Representative in the General Assembly cannot be tried in this proceeding and the *571 writ, if issued, will only be directed to the Judges of the Superior Court, sitting as the Board of Canvass (State ex rel. Walker v. Harrington and Terry, 3 Terry 14, 42 Del. 14, 27 A.2d 67); but that does not determine the question. The right to intervene as a party to an action was unknown at common law, but in modern practice a more liberal rule is often applied, though the person seeking to intervene has no real direct interest in the controversy. Bankers' Mortgage Co. v. Sohland, 3 W.W.Harr. 331, 33 Del. 331, 138 A. 361. Apparently, the same rule has been applied in similar mandamus cases, though the intervening defendant could not be required to perform any of the duties contemplated by the petition. People ex rel. Barbee v. Jarecki, 247 Ill.App. 215.

In State ex rel. Walker v. Harrington and Terry, supra, which was also a mandamus case, the attorneys representing one of the candidates for the office of Comptroller for Kent County, voted for at the election, were permitted to appear as amici curiae, but the case does not indicate that there was any application to intervene as a party to the proceeding.

Moreover, Rule 49 of this court provides that when a petition is filed for a writ of mandamus, the cause '* * * shall be heard according to the practice and procedure of similar causes in the Superior Court of this State.'

Rule 81 of the Superior Court provides that procedure in case of mandamus '* * * shall conform to these rules so far as practicable and to the extent that this will not contravene any applicable statute; otherwise, the procedure in such matters shall remain as heretofore.'

Rule 24 of the Superior Court also provides in part:

'(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: *572 * * * (2) when an applicant's claim or defense **403 and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'

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These rules were promulgated after Rule 49 of this court went into effect, but its language seems to indicate that it was not intended to be confined to existing rules of the Superior Court.

[2] The intervening defendant has some interest in the result of a recanvass of the vote, if made, and should be permitted to participate in the pleadings and other steps in the case. The relator's motion to strike off the intervention order, is, therefore, denied.

John P. Sinclair, a member of the House of Representatives in the 114th General Assembly of the State of Delaware and duly re-elected a member in the 115th General Assembly, was permitted to appear as amicus curiae in order to suggest that the relator's petition should be dismissed because of the lack of jurisdiction of this court to give the relief sought. His contention is based on Section 8, Article II of the Constitution which provides:

'Each House shall be the judge of the elections, returns and qualifications of its own members;'

Section 12, Article IV of the Constitution also provides:

'The Supreme Court shall have jurisdiction as follows: * * * (5) To issue writs of * * * mandamus to the Superior Court * * * or any of the judges of the said courts * * *.'

[3] The relief sought under the latter provision is not in conflict with the constitutional powers given the Legislature by Section 8, Article II to determine the election and qualifications of its own members. ***573**People ex rel. Fuller v. Hilliard et al., 29 Ill. 413; State v. South Kingstown, 18 R.I. 258, 27 A. 599, 22 L.R.A. 65; Ellison v. Barnes, 23 Utah 183, 63 P. 899; 107 A.L.R. 211.

[4] Wahl does not and could not seek an order directing the House of Representatives to recognize him as a duly elected member of that body from the Second Representative District in New Castle County. He only seeks to require the proper performance by the Board of Canvass of a duty imposed by law (so that he may thereby procure evidence of his election to office), and mandamus is his only remedy. He could not procure the same evidence in a contest for the office in the House of Representatives, pursuant to the method provided by Chapter 64 of the Revised Code of 1935. Should he appear before the House armed with a certificate indicating his election, that body would still have the exclusive right to determine whether he was a duly elected member. People ex rel. Drake v. Mahaney, 13 Mich. 481; Petition of Dondero, 94 N.H. 236, 51 A.2d 39; State v. Corley, 6 W.W.Harr. 135, 136, 36 Del. 135, 136, 172 A. 415. But the presentation of the certificate would bring the question before the House and would be pertinent evidence for its consideration in determining his rights.

In People ex rel. Fuller v. Hilliard et al., supra, which involved a similar proceeding, the court said:

'The House of Representatives has no cognizance whatever of this matter. That body can only take cognizance of the case when the certificate is presented, and a seat claimed in virtue of it.

* * *

'Though the House of Representatives is the sole and exclusive judge of the qualifications of its members, this application has no reference whatever to the point of qualifications. Its sole purpose is to procure the requisite evidence, ***574** to present to that body, of a prima facie right to a seat in it, independent wholly of the question of qualification. It is clear, then, the appropriate remedy is not within the House of Representatives. The only remedy the relator has--the only means by which he can obtain evidence of the right claimed, is by this compulsory writ of mandamus.'

Applying these principles, we are unable to agree with Mr. Sinclair's contention.

Other jurisdictional defenses relied on by the intervening defendant are:

****404** (1) That a writ of mandamus will not issue to disturb, correct, or override the determination of a question of fact or of law committed to the discretion of the Superior Court in the exercise of judicial or quasi judicial functions even though the decision of the Superior Court was wrong as to the facts or as to the law; and

(2) That such a writ will not issue when there is an adequate remedy at law; and there is a remedy by a writ of error, by a writ of certiorari, or under the provisions of Article I, Chapter 64 of the Revised

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Code of 1935, relating to contested elections.

[5] All of these defenses are overruled on the authority of the recent decision of this court in State ex rel. Walker v. Harrington and Terry, 3 Terry 14, 42 Del. 14, 27 A.2d 67. There, a number of soldiers in the United States Army, who were registered voters in this State, but stationed in camp in another State, cast their ballots under the absentee ballot law, and without appearing in person, for a nominee for the office of Comptroller for Kent County. The counting of such ballots was objected to before the Superior Court, sitting as the Board of Canvass, on the ground that the Act under which they were voted violated the provisions of the State Constitution. The court doubted its ***575** power to consider and determine that question, and counted the ballots. The nominee for the office on the Democratic ticket having received a plurality of all the votes cast in the county, a certificate was issued accordingly. On the petition of the defeated candidate, this court subsequently issued a writ of mandamus directing the Judges of the said Superior Court to reconvene, to recanvass the vote for the office of County Comptroller, and to omit therefrom the ballots cast by the absent soldiers. See also State ex rel. Walker v. Harrington and Terry, 3 Terry 246, 42 Del. 246, 30 A.2d 688. This direction was based on the conclusion that the then absentee ballot law, providing for the soldiers' vote, violated the State Constitution and that the Superior Court should have rejected that vote. The same jurisdictional defenses raised here were relied on in that case but were denied.

At the General Election held November 2, 1948, the names of three candidates for the office of Representative in the General Assembly from the Second Representative District in New Castle County appeared on the official ballots, two of whom were nominees of the two major political parties. In the Third Election District of the Sixth Ward 296 ballots were voted for the various candidates for that office; 100 of these were in envelopes not signed by either of the clerks who aided in conducting the election, and one was in an envelope signed by only one clerk. After the close of the polls, the election officers, in order to count the ballots, removed them from their envelopes and placed them in piles on a table in the room where the election had been held. The so-called straight tickets, or the ballots voted for all the candidates on the ticket of any one political party, were placed in separate piles and the cut or split tickets were put in another pile. After the ballots had been removed, the envelopes were also placed in a pile on another table. The election officers in counting the ballots rejected ***576** 18 of them on the ground that they were not properly marked by the voters, and put them in four unsigned envelopes taken at random from the pile. All other ballots were counted.

There was a dispute before the Superior Court, sitting as the Board of Canvass, with respect to the result of the vote in the Third Election District of the Sixth Ward for the office of Representative in the General Assembly from the Second Representative District in New Castle County, and on the proper steps being taken a recount was had.

The 101 ballots contained in envelopes not signed by both clerks when voted had not been segregated by the election officers and the court could not identify them. They rejected 97 of such ballots and deducted them pro rata from the total vote received by each candidate for the office. [FN1] Of the 18 ballots which had been rejectedby ****405** the election officers, 9 were counted by the court; but it does not appear whether they had been voted in signed or unsigned envelopes.

> FN1 It is unnecessary to consider why the remaining 4 ballots were not treated in the same way.

The Election Law requires:

(1) That both clerks at any polling place shall 'write their full names in ink in the places designated on the envelopes (in which the ballots are to be enclosed when voted), in their ordinary handwriting, and without any distinguishing mark of any kind.' § 1853, Revised Code 1935;

(2) That no Inspector of Election or other officer acting for him 'shall deposit (in the ballot box) any envelope upon which the names of the Clerks of the Election * * * do not appear.' Section 1854, Rev.Code 1935;

(3) That in counting the votes 'any ballot contained in an envelope which is not endorsed with the names ***577** of the Clerks of the election as provided in this Chapter * * * shall be void and shall not be counted; * * *.' Section 1859, Rev.Code 1935.

But Section 1859 also contains the following

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provision:

'Provided, however, that such ballots and envelopes and all disputed ballots and envelopes shall be preserved by the Inspector and, at the close of the count, placed * * * in the box into which the ballots shall have been put when read.'

[6] The purpose of that provision, so far as ballots contained in unsigned envelopes are concerned, is clearly for identification when they are sent to the Superior Court in order that the official canvass may be made, though the precise method to be used in segregating them is not prescribed by the statute. Originally, there was a direction in a subsequent paragraph of the section that in counting the ballots voted, each ballot should be 'immediately returned to the envelope from which it is (was) taken, and secured therein by a rubber band.' That provision was repealed by Chapter 154, § 2, Volume 46, Laws of Delaware; but its repeal did not affect the general purpose of the proviso of the section.

[7][8] If the 101 ballots in unsigned envelopes were among those voted for Robert L. Armstrong, their rejection in a recount would change the result of the election for the office of Representative in the General Assembly. Wahl, the relator, claims that as these ballots cannot be separated from the legal ballots cast in the Third Election District of the Sixth Ward, the entire vote of that district should be rejected, and a writ of mandamus issued to that effect. This would result in the rejection of 186 valid ballots, through no fault of the voters. Courts are always reluctant to reject the entire vote of an election district in counting the ballots ***578** because of some irregularities committed by election officers unless there is a clear statutory provision requiring it. Winograd v. Coombs, 342 Pa. 268, 20 A.2d 315; Moyer v. Van De Vanter, 12 Wash. 377, 41 P. 60, 29 L.R.A. 670, 50 Am.St.Rep. 900; 18 Amer.Jur. (Elections) § 231; see also Williams v. Sherwood, 51 N.D. 520, 200 N.W. 782. Ordinarily, ignorance, inadvertence, mistake, or even intentional wrong on the part of such officers should not be permitted to disfranchise voters who are innocent of any wrongdoing, if it can be avoided. McCrary on Elections § § 126, 227, 231; Mehling v. Moorehead, 133 Ohio St. 395, 14 N.E.2d 15.

In Hamilton v. Marshall, 41 Wyo. 157, 282 P. 1058, 1060, 66 A.L.R. 1154, the court, quoting from Paine on Elections, said:

'In the total absence of proof tending to show for whom illegal votes, sufficient in number to affect the result, were cast, the duty of the court would seem to be to choose, as wisely as possible, between a disregard of the illegality and a rejection of the entire precinct vote.'

[9] See also Simon Election Case, 353 Pa. 514, 46 A.2d 243. The determination of each case, therefore, depends upon its own facts.

[10][11] The 101 ballots in envelopes not signed by both clerks, when voted, were illegal and should have been rejected by the election officers in making the count. Tuthill v. Rendleman, 387 Ill. 321, 56 N.E.2d 375; Hammond v. Love et al., 187 Md. 138, 49 A.2d 75. As they were not segregated, they could not be identified by the court in canvassing the vote; but that was not due ****406** to any acts of the voters. When illegal ballots have been voted in an election district in such numbers as to affect the result, or at least to make it uncertain, and cannot be identified and separated ***579** from the valid ballots, there are cases where justice requires that the entire vote of that election district be rejected in making the count. Vigil v. Garcia, 36 Colo. 430, 87 P. 543; Neelley v. Farr, 61 Colo. 485, 158 P. 458, Ann.Cas.1918A, 23; In re Bright's Contested Election, 292 Pa. 389, 141 A. 254; 18 Amer.Jur.Supp. (Elections) 37; 155 A.L.R. 682. This is particularly true when fraud is alleged and proved. Id.

The cases cited by the relator are largely of that character, and no case, even remotely resembling the facts of this case, is cited.

[12][13] The statutory provisions requiring the use of envelopes signed by both clerks in voting are among many provisions intended to identify the official ballots and to prevent fraud (Harrington v. Crichton, 53 Mont. 388, 164 P. 537; Slaymaker v. Phillips, 5 Wyo. 453, 40 P. 971, 42 P. 1049, 47 L.R.A. 842); but here fraud is neither alleged nor proved. The allegation in the relator's petition that 101 of the 296 ballots cast in the Third Election District of the Sixth Ward in the Second Representative District in New Castle County were enclosed in envelopes not signed by both clerks does not constitute an allegation of fraud. It is just as consistent with the conclusion that a negligent mistake by the election officers is charged.

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Section 1859 of the Election Law does not determine the question. It merely provides for the rejection of illegal ballots, and what steps shall be taken by the election officers to aid the court in making the official canvass. When that and other sections of the statute were enacted, official ballots and the necessary envelopes could only be procured at the polls. So far as the ballots are concerned that rule has been somewhat changed by subsequent legislation; but there has been no change with respect to the envelopes and the mode of identifying them.

***580** [14] Even in the absence of fraud, there may be cases where the possible injury to the public from the failure of election officers to comply with statutory provisions is so great that the entire vote of an election district will be rejected, without any actual proof of improper results from such failure. That rule was applied in Atty. Gen. ex rel. McCall v. Kirby, 120 Mich. 592, 79 N.W. 1009, and in Tebbe v. Smith, 108 Cal. 101, 41 P. 454, 29 L.R.A. 673, 49 Am.St.Rep. 68. In the Michigan case, the election officers, without any statutory authority, appointed a voter's assistant. In the California case, while the statute provided that the polls should be opened at sunrise, they were not opened by the election officers until 10:00 A.M. But the facts of this case are quite different and do not bring it within that rule. Moreover, the relator's contention in this connection made at the argument was that fraud should be inferred from the statement that nearly one-third of all the ballots cast in the district were illegal. That contention has already been considered.

[15] Wahl and Armstrong were candidates for office on the Democratic and Republican Party tickets respectively, and we will take judicial notice that they were the major political parties in New Castle County at the preceding General Election. Under the statutes, the election officers and clerks in the Third Election District of the Sixth Ward were selected from members of each of these parties. Sections 1765, 1853, 1753, Revised Code 1935; Vol. 45 Laws of Delaware, c. 144, p. 466, § 11 et seq.

No suspicious circumstances connected with the violation of the Election Law appear.

It is not claimed that the ballot box contained more ballots than the registration books indicated were voted; that any election officer or clerk protested against the use of unsigned envelopes and the counting of ballots contained ***581** in them, or demanded that such ballots should be segregated when sent to the Superior Court. Nor does it appear that unofficial envelopes were used by any voters. Under the circumstances, the failure of the intervening defendant to produce any evidence explaining the reason for the irregularities committed ****407** by the election officers and clerks seems unimportant.

Furthermore Section 1858 of the Revised Code of 1935 provides:

'All ballots cast at any election shall be counted for the persons for whom they were intended, so far as such intention can be ascertained therefrom.'

[16] We conclude that all of the ballots from which the intent of the voters could be ascertained should have been counted by the Superior Court. Cf. Swift v. Registrars of Votes of Quincy, 281 Mass. 271, 183 N.E. 730. The application of any other rule would often permit unscrupulous election officers to invalidate elections at will.

[17] As heretofore stated the Board of Canvass applied the proportionate deduction rule. While some courts have adopted that rule we do not regard it as logical or satisfactory under the facts presented.

The prayer of the petitioner is denied.

CAREY and PEARSON, JJ., concur.

TERRY, Judge, dissents:

My difference with the majority relates only to the manner in which they have passed upon the merits of the case.

The pertinent election statutes involved are as follows:

'1853. Sec. 44. Ballots and Envelopes; Opening ***582** Packages; Deposit of Ballots in Booths; Delivery of Twenty-Five Envelopes to Clerk; Signing of Envelopes; Delivery to Elector:--At the opening of the election, after the qualification of the several officers and in the presence of the others, the Inspector or the Chairman of the Board of Inspectors shall open the packages of ballots and envelopes in such a manner as to preserve the seals intact. He shall place in each box provided in each booth at least ten ballots, and at all

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times during the election it shall be his duty to see that at least ten ballots are kept in each box in each booth. He shall then deliver to the Clerk of the Election of the opposite political party from his own twenty-five of the envelopes. The Clerks of the Election shall at once proceed to write their full names in ink in the places designated on the envelopes, in their ordinary handwriting, and without any distinguishing mark of any kind. As each successive elector calls for a ballot and envelope, the Clerks of the Election having the custody of the ballots and envelopes shall deliver to him the first signed of the twenty-five envelopes and one ballot, and the Inspector shall immediately deliver to the said Clerk of the Election another envelope, which the Clerks of Election shall at once sign, as before, and add to the envelopes already signed, so that it shall be delivered for voting after all of those theretofore signed.'

'1854. Sec. 45. What Envelopes Not Deposited:--No Inspector of Election, or other officer authorized by law to hold the election, or Judge acting for the Inspector, shall deposit any envelope upon which the names of the Clerks of the Election, as hereinbefore provided for, do not appear, or any envelope on which appears any distinguishing mark, defacement or mutilation; provided, however, that no mark shall be considered distinguishing, and no envelope shall be considered defaced or mutilated, unless it plainly ***583** appears that it was the intention of the voter to so mark, deface or mutilate his envelope.'

'1859. Sec. 50. Distinguishing Marks; When Ballots Not Counted; Disputed Envelopes and Ballots How Preserved; Unused Envelopes Destroyed; Counted Ballots and Envelopes How Disposed of; Ballots; How Counted and Disposed of:-- In the counting of the votes any ballot contained in an envelope which is not endorsed with the names of the Clerks of the Election, as provided in this Chapter, or any ballot which shall bear such a mark, impression or device that it is apparent that such was placed thereon with the intent of distinguishing such ballot, or any ballot which is contained in any envelope which shall bear any such distinguishing mark, impression or device, shall be void and shall not be counted; and any ballot, or part of a ballot, from which it is impossible to determine the electors choice of candidates shall not be counted as to the candidate or candidates affected thereby; provided, however, that all such ballots and envelopes and all disputed ballots and envelopes shall ****408** be preserved by the Inspector, and, at the close of the count, placed with the seals of the envelope packages in the box into which the ballots shall have been put when read.' 44 Del.Laws, c. 122, § 2.

In the Third Election District of the Second Representative District of New Castle County two hundred ninety-six ballots were voted at the last General Election for various candidates for the Office of Representative in the General Assembly. Of the two hundred ninety-six ballots voted, nine were rejected as being illegal. One hundred one of the remaining two hundred eighty-seven ballots voted and counted were not contained in envelopes signed by the two Election Clerks, which was in direct violation of the provisions of Sections 44, 45 and 50, as indicated.

The Election Officials, prior to counting the ballots, commingled ***584** the one hundred one ballots taken from the unsigned envelopes with the one hundred eighty-six ballots taken from the signed envelopes in such a manner that now it is impossible to separate the ballots taken from the unsigned envelopes from the ballots taken from the signed envelopes. It is conceded that the one hundred one ballots contained in the unsigned envelopes were illegal ballots and should not have been counted by the Election Officials. It is further conceded that if the one hundred one illegal ballots were voted and counted for Armstrong, the Republican candidate, the result of the election for Representative in the Second Representative District would have been different; that is, the relator, Wahl, the Democratic candidate, would have received the majority vote in the entire Representative District and would have been elected to said office.

Since the one hundred one illegal ballots cannot be separated or distinguished from the one hundred eighty-six presumably legal ballots, and inasmuch as the one hundred one illegal ballots are sufficient in number to change the result of the election, should all of the ballots be rejected in the Third District or should all of the two hundred eighty-seven ballots be counted?

The Election Laws of this State, and especially the Sections cited, reflect great study on the part of our lawmaking bodies to safeguard against the evils accompanying uncontrolled elections. The Sections as indicated were enacted to prevent fraud. They form an integral part of a well-designed plan to safeguard the integrity and purity of the ballot from the time the elector receives his ballot down through the voting

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stages until it has been finally counted by the Election Officials; thus, preventing the counting of fraudulent ballots by requiring the Clerks of Election to endorse their names upon the envelopes containing the ballots to the end that they may be identified when taken from the ballot box for counting purposes.

***585** In enacting the foregoing Sections the Legislature took a most drastic step towards placing a restriction upon the freedom of the electorate of this State when it provided that no ballot, however, honestly cast by the voter, shall be counted unless contained in an envelope bearing the signatures of the two Election Clerks. Now, how are the pertinent provisions of these Sections to be construed? Are they directory or mandatory?

It seems to me that it is far more important to the people of this State, and to the stability of our form of government as well, that these provisions should be held to be mandatory than that occasionally in a voting district the votes of innocent electors be not counted; otherwise, the legislative intent in enacting a law to preserve the integrity and purity of the ballot is defeated, and the very means are afforded to protect and cover up corruption and venality.

In the case of Turner v. Teller, Tex.Civ.App., 275 S.W. 115, 116, the Court in dealing with similar provisions stated, 'The requirement that the presiding judges shall write their signatures upon the ballots to be voted is mandatory, but it is made so only because it is expressly provided * * * that ballots not so indorsed shall not be counted.' Likewise, in the case of Ledbetter v. Hall, 62 Mo. 422, the Court held that a statute making it the duty of Judges of Election to cause to be placed on each ballot the number corresponding with the number of the voter offering the same, ****409** and providing that no ballot not so numbered shall be counted, is mandatory and must be enforced. Mr. McCrary in his work on Elections, Paragraph 226, in commenting on the Missouri ruling, states, 'Although this doctrine may sometimes result in very great hardship and injustice by depriving the voters of their rights by reason of the negligence or misconduct of the Officers of Election, it is nevertheless difficult to see how any different construction could have been ***586** placed on such a statute. Statutes which simply direct the Judges of Election to number the ballots without declaring what consequences shall follow if this be not done may well be held to be directory only; but where the statute both gives the directions and declares what the consequences of neglecting their observance shall be, there is no room for construction. Such statutes are intended to prevent fraudulent voting, and, if the Legislature is of the opinion that the general good to be derived from their strict enforcement will more than counterbalance the evils resulting from the occasional throwing out of votes honestly cast, the Courts cannot reconsider the mere question of policy. The legislative will upon such a subject, when clearly expressed, must prevail.' Sego v. Stoddard, 136 Ind. 297, 36 N.E. 204, 22 L.R.A. 468; Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N.E. 232, 8 Am.St.Rep. 349; Major v. Barker, 99 Ky. 305, 35 S.W. 543; Slaymaker v. Phillips, 5 Wyo. 453, 42 P. 1049, 47 L.R.A. 842; Russell v. McDowell, 83 Cal. 70, 23 P. 183; Parvin v. Wimberg, 130 Ind. 561, 30 N.E. 790, 15 L.R.A. 775, 30 Am.St.Rep. 254; Hammond v. Love, 1946, 187 Md. 138, 49 A.2d 75; Kirkpatrick v. Deegans, 53 W.Va. 275, 44 S.E. 465; Orr v. Bailey, 59 Neb. 128, 80 N.W. 495; People v. Rinehardt, 161 Mich. 585, 126 N.W. 704.

The pertinent provisions of Sections 44, 45 and 50 must be held to be mandatory and as such essential to the legality of votes cast at the election in the Third Election District of the Second Representative District at the last General Election.

The intervening defendant, Armstrong, contends that even though the pertinent provisions as written in the foregoing Sections be found to be mandatory, nevertheless, their force and effect as such has been rendered inoperative in this instance by reason of the fact that the Election Officials in counting the ballots in the Third Representative ***587** District did not 'segregate' the ballots and the envelopes not signed by the Clerks of Election, as he asserts they should have done under the provisions of Section 50, in order that they might later be identified by the Canvassing Board. Consequently, he says under the present circumstances the pertinent provisions of the Sections should be construed to be directory only, and that all of the one hundred one illegal votes should be counted. I find the contention of the defendant in this respect to be without merit. This, however, necessitates a recital and construction of the Section in question.

'1859. Sec. 50. Distinguishing Marks; When Ballots Not Counted; Disputed Envelopes and Ballots How Preserved; Unused Envelopes Destroyed; Counted Ballots and Envelopes How Disposed of; Ballots;

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How Counted and Disposed of:-- In the counting of the votes any ballot contained in an envelope which is not endorsed with the names of the Clerks of the Election, as provided in this Chapter, or any ballot which shall bear such a mark, impression or device that it is apparent that such was placed thereon with the intent of distinguishing such ballot, or any ballot which is contained in any envelope which shall bear any such distinguishing mark, impression or device, shall be void and shall not be counted; and any ballot, or part of a ballot, from which it is impossible to determine the electors choice of candidates shall not be counted as to the candidate or candidates affected thereby; *provided, however, that all such ballots and envelopes and all disputed ballots and envelopes shall be preserved by the Inspector, and, at the close of the count, placed with the seals of the envelope packages in the box into which the ballots shall have been put when read.*'

The question is, What meaning should be ascribed to the italicized portion of the Section? The defendant argues ***588** that it is a 'proviso,' which restricts the operation of the mandatory provisions of the Sections to cases only where the ballots and ****410** the envelopes not signed by the Election Clerks have been preserved 'by means of segregation' in order that they might later be identified by the Canvassing Board.

It is quite clear that the words 'provided, however', as employed, are simply used in the conjunctive sense and have no greater significance than the words 'but' or 'and'. It is well established that the word 'provided' does not convert the words following into a 'proviso,' as it may be used in a conjunctive sense and precede an independent clause. Bowers v. Missouri Mutual Assoc., 1933, 333 Mo. 492, 62 S.W.2d 1058; State v. Mooneyham, 1923, 212 Mo.App. 573, 253 S.W. 1098; Carter-Webster & Co. v. U. S., 4 Cir., 1906, 143 F. 256; Radil v. Morris & Co., 1919, 103 Neb. 84, 170 N.W. 363, 7 A.L.R. 539. Whether it is a 'proviso' in effect or merely a conjunctive equivalent to the word 'and' or the word 'but' must in part be determined from the context and from all the pertinent provisions of Sections 44, 45 and 50, respectively, relating to the same subject matter. Davis Finance & Securities Co. v. O'Neal, La.App., 160 So. 463; State v. Mooneyham, 212 Mo.App. 573, 253 S.W. 1098.

When the foregoing Sections are considered as a whole, the words 'provided, however' simply mean that the ballots and envelopes should be 'preserved'. Any other construction would render nugatory the pertinent mandatory provisions of the Sections and defeat the very purpose for which they were enacted. It is inconceivable to me that the Legislature in enacting these mandatory provisions to insure the integrity and purity of the ballot, specifically stating what ballots are void and not to be counted, at the same instant wiped out the effect and purpose of the provisions ***589** by stating that if they were 'not preserved by means of being segregated' they were to be counted. Under such reasoning any fraudulent scheme need only be broadened by commingling illegal ballots with legal ballots, as here, in order to defeat the only purpose for which the mandatory provisions were enacted by the General Assembly.

I recognize the rule of statutory construction that, in order to ascertain legislative intent, words omitted may be read into a statute, but in so doing we cannot demolish the very purpose for which the statute was enacted, nor restrict its application in a manner inconsistent with true legislative intent. To say that each ballot with each envelope not signed by the Election Clerks must be 'segregated', in order that the Board of Canvass may identify the illegal ballots contained in the unsigned envelopes, is but amending in judicial fashion the underlined clause with a further directory provision providing the precise manner in which the envelopes and ballots are to be preserved, and directing that only those that are 'segregated' fall within the mandate of the Sections. We must not forget that the power of statutory amendment reposes entirely within the legislative realm and cannot be usurped by any tribunal under the guise of judicial interpretation.

Even if it were assumed arguendo that the clause in question is a 'proviso', it would not in this case have the effect of nullifying the preceding mandatory language. This is so for the reason that the clause merely directs that the ballots and envelopes should be 'preserved' as distinguished from 'destroyed.' The manner in which the ballots and envelopes shall be preserved is not designated and cannot be judicially read into the clause.

I conclude Section 50 to mean that, if the votes are void by reason of the ballots being in unsigned envelopes, they should not be counted, but that the envelopes and ***590** ballots should be preserved. That is all the language says. It does not require 'segregation' of the ballots and envelopes, although, if

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the Election Officials had voluntarily adopted such a course, it would have been most helpful in the present case. The clause is in no sense a modifying 'proviso' but simply an independent directly clause requiring the ballots to be 'preserved', which was done by the Election Officials; thus, the mandatory provisions directing that certain ballots should not be counted has not been nullified and must be enforced.

Now should all the ballots be rejected?

Of course, the power to reject an entire poll is certainly a dangerous power, and, though it belongs to whatever tribunal has ****411** jurisdiction to pass upon an election, it should be exercised only in extreme cases; that is to say, in part, cases where incompetency, inefficiency and a reckless disregard of essential mandatory requirements of the Election Law, as shown here, prevailed to such an extent that the true state of the vote in the Election District could not possibly be ascertained. Of course, the rule of exclusion as to the entire poll is never applied in cases of neglect on the part of Election Officials unless the violations relate to essential requirements of the law, and not so then if the poll can be purged of the illegality, or, if it cannot be so purged, the illegal votes are not sufficient in number to change the result of the election. This is so for the reason that the legal votes cast in a District should not be rejected because of the misconduct of the Election Officials whenever possible to avoid such rejection. Nevertheless, we cannot lose sight of the fact that, if any persons are to lose their votes by reason of the misconduct or negligence of Election Officials, it should be those who reside in the Election District where the wrongdoing occurs, rather than to have the legal votes in other Districts ***591** overcome by the misconduct or negligence taking place in other Districts over which they have no control.

If the law provided merely that the envelopes should be signed by the Election Clerks and did not provide that ballots contained in unsigned envelopes should not be counted, I would agree with the majority, under the circumstances of the present case, and say that it would be proper to count all of the ballots. I say this for the reason that I would construe the pertinent provisions of Sections 44 and 45 as being directory only and their observance by the Election Clerks not essential in the sense that the violation thereof would necessarily invalidate the one hundred one votes in question. Here we are dealing with the violations of essential mandatory provisions of the foregoing Sections, the result of which has rendered unreliable the true state of the vote in the Third Election District. The number of illegal votes cast in this Election District is sufficient to change the result of the election, and no one can purge the poll of the illegality.

The majority in their endeavor to save one hundred eighty-six legal ballots have found it necessary to count one hundred one illegal ballots, which the Legislature has said are void and cannot be counted, irrespective of the intention of the voters. They say that the provisions of Paragraph 1858 of the Code of 1935 justifies, in part, their position.

'1858: All ballots cast at any election shall be counted for the persons for whom they were intended, so far as such intention can be ascertained therefrom, and in determining the intention the following rules shall be observed.'

Paragraph 1858 continues by setting forth the the manner in which the intention of the voter is to be ascertained in considering each ballot. For instance, 'If the elector ***592** shall place on his ballot a cross mark or 'X' within the space containing a party emblem, he shall be deemed to have voted for all the candidates whose names appear in the column under such mark, unless some name or names shall be erased, or unless in some other column he shall have placed a mark in the square at the left of the name of some other candidate for the same office.'

The fallacy in the majority's approach in this respect becomes apparent when it is realized that only legal ballots can be counted under the provisions of Paragraph 1858, and only then when they can be identified as such. Here the one hundred eighty-six legal ballots cannot be so identified; thus, the provisions of Paragraph 1858 cannot be enforced.

The Boards of Canvass in this State during the last twenty-five years have consistently rejected ballots because of statutory illegalities, regardless of the fact as to whether or not the intention of the voter could be ascertained from the ballot.

In reaching their conclusion the majority of the Court have adopted a policy embodying their concept of fairness in the light of the circumstances presented. But here the Legislature under the foregoing Sections, in order to prevent fraud at elections, has announced a

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policy which must be admitted to be in conflict with the view of the majority of the Court. The Legislature has said that the general good to be derived ****412** from the enforcement of the provisions of the foregoing Sections will more than counterbalance the evils resulting from the occasional throwing out of votes honestly cast. Whenever a conflict in policy be found to exist, such as here, the legislative will upon the subject, when clearly expressed, must prevail.

Mr. Armstrong has intervened for the purpose of ***593** having the entire poll counted, in order that he may have the benefit of the full count. I think before any benefit can accrue to him he must first purge the poll of the illegality; otherwise, the poll must be rejected in its entirety.

It is unfortunate indeed that electors should lose their votes because of the neglicence of Election Officials. But, as has often been said, it would be a greater evil for the Courts to ignore the law itself by permitting Election Officials to ignore essential mandatory requirements designed to safeguard the purity and integrity of the election. If the long established safeguard, as provided for under the foregoing Sections, to preserve the integrity and purity of the ballot has become unnecessary or should be changed, modified or restricted, it is not for this Court to do so.

It is my opinion that the entire vote of the Third Election District should be rejected, and that the writ as prayed for should issue.

5 Terry 566, 44 Del. 566, 64 A.2d 400

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Appellate Court of Illinois, Fifth District.
Louis WHITSELL and Loren Madison,
Petitioners-Appellants,
v.
Harold DAVIS and Carl Macios,
Respondents-Appellees.
**No. 78-74.**

Dec. 18, 1978.

Unsuccessful candidates brought action challenging election results. The Circuit Court, Madison County, Victor Mosele, J., entered judgment for defendants, and petitioners appealed. The Appellate Court, Eberspacher, J., held that: (1) trial court did not abuse its discretion in making pro rata apportionment of six ballots which were found to be missing and which could affect outcome of election for township assessor, since none of missing ballots were found to be lost because of fraud, deceit or other misconduct; (2) evidence sustained finding that election judge did not initial ballots after polls were closed and ballot box was opened; (3) evidence sustained finding that there was no substantial noncompliance with provisions of Election Code concerning the typing, sealing, and wrapping of ballots; (4) evidence sustained finding that election judge had no conflict of interest, and (5) evidence sustained finding that violations of Election Code had no reasonable effect upon outcome of election.

Affirmed.

West Headnotes

**[1] Elections 227(1)**
144k227(1) Most Cited Cases
Inconsequential mistakes and omissions of election officials in performing mandatory duties of a precautionary nature will not invalidate the results of an election. S.H.A. ch. 46, § 1-1 et seq.

**[2] Elections 255**
144k255 Most Cited Cases
Trial court did not abuse its discretion in making pro rata apportionment of six ballots which were found to be missing and which could affect outcome of election for township assessor, since none of missing ballots were found to be lost because of fraud, deceit or other misconduct.

**[3] Elections 305(6)**
144k305(6) Most Cited Cases
On appeal from judgment entered in action challenging result of township election, petitioners who presented no argument and who cited no authority nor any fact in record supporting their contention that trial court erred in holding that alleged violations were only directory rather than mandatory thereby waived such contention.

**[4] Elections 216**
144k216 Most Cited Cases

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**[4] Elections 227(8)**
144k227(8) Most Cited Cases
Election judges must initial ballots in order for those ballots to be counted, and the failure of judges to initial ballots to be cast is a violation of a mandatory section of the Election Code; however, although an uninitialed ballot cannot be counted, the practice of preinitialing ballots does not require reversal of election results. S.H.A. ch. 46, § § 1-1 et seq., 17- 16.

**[5] Elections 295(1)**
144k295(1) Most Cited Cases
Evidence in action challenging election results sustained finding that election judge did not initial ballots after polls were closed and ballot box was opened. S.H.A. ch. 46, § § 1-1 et seq., 17-16.

**[6] Elections 295(1)**
144k295(1) Most Cited Cases
Evidence in action challenging election results sustained finding that there was no substantial noncompliance with provisions of Election Code concerning the typing, sealing and wrapping of ballots. S.H.A. ch. 46, § 1-1 et seq.

**[7] Elections 295(1)**
144k295(1) Most Cited Cases
Evidence in action challenging election results sustained finding that election judge had no conflict of interest. S.H.A. ch. 46, § 13-4(3); ch. 102, § 3.

**[8] Elections 295(1)**
144k295(1) Most Cited Cases
Evidence in action challenging election results sustained finding that violations of Election Code had no reasonable effect upon outcome of election. S.H.A. ch. 46, § 1-1 et seq.
***963 **730 ***589** H. Carl Runge, Jr., Runge & Gumbel, P. C., Collinsville, for petitioners-appellants.

Callis & Hartman, Granite City, for respondents-appellees; David H. Adamson, III, and Lawrence T. Hartman, Granite City, of counsel.

EBERSPACHER, Justice:

This matter was originally brought in the circuit court of Madison County by the petitioners, Louis Whitsell, Loren Madison, Kenneth Geisen, Helen Hawkins and Harlan Pervan, who shall be hereinafter referred to as "Petitioners", to set aside or otherwise affect the result of a ***964** Township election held in Nameoki Township, Madison County, on April 5, 1977. The court below found in favor of the Respondents-Appellees, Harold Davis, Carl Macios, Lee Adams and Norman Hessler, hereinafter referred to as "Respondents" and entered its order denying the relief requested. From the court's order, the petitioners, Whitsell and Madison, have brought this appeal.

This matter was originally filed on April 27, 1977, by the petitioners, contesting the Township election which had been held on April 5, 1977. The Township consists of eleven (11) precincts. The petitioners contest the conduct in six (6) of the precincts, but not in the remaining five (5). They contend that significant irregularities occurred. The respondents deny such to be the case. The matter was tried in the court in a three day trial. At the conclusion of the trial, both parties submitted briefs. The court filed its order on November 15, 1977, denying the relief sought by the petitioners.

Because the court's order fully sets forth the matters in dispute and the findings contained therein are supported by the record, it is set forth below as entered. The six precincts which are in dispute are Nos. 1, 4, 5, 6, 8 and 11. The court in its findings discussed each separately;

"PRECINCT ONE
The tally sheets show that when the defective ballots and ballots cast are added together, the tally sheet shows two additional ballots; however, the Court finds pursuant to the testimony of Town Clerk, and pursuant to the examination of other tally sheets that said defective ballots were counted as ballots cast and no additional ballots exist.

THE COURT FURTHER FINDS no irregularity on the face of the tally sheet; but, on the contrary, finds that the minor changes on the tally sheets reflect the efforts of the election judge to correct their count. The Court further finds that Respondents have shown no reasonable opportunity for anyone to have tampered with the tally sheets.

PRECINCT FOUR
THE COURT FINDS that five ballots are missing; however, the Court finds absolutely no evidence on which to make the decision that the loss of ballots were occasioned by anything other than honest mistake or miscount, and further finds no evidence on which it can make a finding of fraud, deceit or foul

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play.

PRECINCT FIVE

THE COURT FINDS that no additional ballots were shown to exist in Precinct Five and pursuant to the testimony of the Town Clerk finds that the tally sheet is accounted for by the exclusion of defective ballots.

***965** The Court finds that one ballot appears to be missing, but as explained by the attorney for the Petitioners, that no showing other than that of an honest mistake has been shown. The Court further finds no credible testimony to establish any reasonable possibility that the ballots were tampered with by any person. The Court further finds not even scintilla of evidence on which to conclude that there was any fraud or deceit.

PRECINCT SIX

THE COURT FINDS that all ballots in this Precinct are accounted for. The Court further finds that Petitioners have not ****731** *****590** shown any reasonable opportunity that any unauthorized person ever had access to the ballots. The Court finds no evidence to conclude or speculate the existence of any fraud or deceit.

The Court finds that only inadvertent noncompliance has been shown with absolutely no effect upon the legitimacy of the election.

PRECINCT EIGHT

THE COURT FINDS no additional ballots cast in the Precinct, all differences being reconciled by the reasonable explanation of the Town Clerk.

The Court finds no basis to conclude any wrongful conduct by the fact that on one of three tally sheets, an election judge changed from ink to pencil, nor have Petitioners established any statutory violation in that regard.

The Court finds that a guardrail was not constructed; however, the Court finds no way in which that failure affected the election. The Court further has concluded based upon the applicable case law that said provisions are directory.

The Court finds that some ballots were pre-initialed; however, the Court finds that the pre-initialing of ballots is customary and had no effect upon the election. The Court further finds that the pre-initialing of ballots is designed to facilitate voting.

The Court, after viewing the demeanor of the witness called upon behalf of the Petitioners, finds that the ballots marked with either a printed or written 'O.B.' were marked by Olivia Bourbon, an election judge.

The Court finds that Donald Patrick did not leave the polling place. The testimony showed that Patrick left the area of the voting booths to call the Town Clerk with regard to a problem ballot; however, the evidence clearly establishes that at no time did Patrick leave the store functioning as a polling place.

Evidently, Michael Briggs had been told by two voters that he had received their votes. He inquired of Patrick on the evening of ***966** the election. Mr. Patrick certainly lacked definiteness in his testimony. Both ballots lacked an 'x' beside the write-in candidate's name. The demeanor of the witness and cross-examination indicated a definite lack of certainty. The Court does find that the two ballots were at the polling place on the night of the election and were properly preserved.

The Court finds an error in the count on the evening of the election to have been cured by the count of the Election Commissioners.

PRECINCT ELEVEN

THE COURT FINDS that Mrs. Simmons pre-initialed minor groups of ballots to facilitate the ability of voters to cast ballots in accordance with the local custom as evidenced in the entire testimony. The testimony is clear that the ballots were never left unattended by the other judges. The fact that Mrs. Simmons had to go to the bathroom during a twelve-hour period holds no significance to this Court; and the Court notes that Petitioners asked absolutely no questions concerning whether she signed in or not pursuant to the statute.

The testimony clearly shows the ballots were transported by judges to the Town Clerk who carefully secreted the ballots. The Court finds in this Precinct, as in the others, that Petitioners have failed to show that any individual had a reasonable opportunity to tamper with the ballots.

The Court finds the tally sheets and number of ballots cast to be in complete balance.

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The Court finds that Clerene Coggins moved ballots approximately six feet to recount; however, the Court further finds that the ballots were always in view of all election judges and challengers. The Court further finds that the ballots were never moved to a table other than an adjoining 'T' table; nor were they left unattended based upon the clear preponderance of the evidence and after viewing the demeanor of the witnesses.

****732 ***591** The Court finds that no one other than election judges handled the ballots based upon the obvious preponderance of evidence, nature of the testimony, and giving consideration to the demeanor of all witnesses.

The Court finds no conflict of interest by Mrs. Teetor nor has this Court been directed to any subsection of Section 3, Chapter 102, Illinois Revised Statutes, 1975, alleged to have been violated. The Court further finds absolutely nothing to indicate any impropriety by said judge.

The Court finds that pursuant to the testimony of the Town ***967** Clerk he did send information to the election judges. The Court finds no error by the County Board of Supervisors in selecting Mrs. Simmons. The Court, additionally, notes that Petitioner, Louis Whitsell, is a member of that body.

The Court finds all other allegations of the Petition wholly without basis in the evidence and totally ignored by Petitioners in the Memorandum.

THE COURT FURTHER FINDS that the election for Township Supervisor and Assessor of Nameoki Township free of fraud, deceit, or other misconduct affecting the exercise of their franchise by the voters.

The minor and sparse violations of directory statutes as alleged in the argument of Petitioners had no reasonable effect upon the outcome of the election. Although this Court is aware as explained aforesaid that perhaps minor infractions of technical provisions of directory statutes may have occurred, it is clear that these technical violations have had no effect upon the legitimate exercise of the will of the people of Nameoki Township.

The only issue that has created any concern to this Court is the six missing ballots. Obviously, as both Petitioners and Respondent have asserted, the lone missing ballot in Precinct Five is likely to be the result of mathematical error. It is also reasonable that the error of five votes could be attributed to an errant call of 'tally' in counting the ballots. However, this Court will assume that six ballots are missing. Clearly, that vote can have no effect upon the election for Township Supervisor, since if all six votes be given to Petitioner, Louis Whitsell, which is contrary to the law of the State, he would still lose the election by two votes. Thereafter, this Court has totally excluded any consideration of those votes as to Petitioner, Louis Whitsell.

The only issue left to be decided is what should be done as to the six ballots as they affect the election for Township Assessor. This Court has the power to grant and fashion equitable relief in the following ways: (1) it can call a new election; (2) it can ignore In toto the six ballots; (3) it can ignore the results in Precincts Four and Five In toto ; or, (4) this Court can Pro rata the ballots.

First, this Court finds it wholly inappropriate to call a new election. The large expenses of both Petitioners, Respondents, and of election judges would be improper relief. The Court would do a disservice to the 3,300 plus voters exercising their franchise. Additionally, no factual basis exists to believe that any fraud, deceit or mistake affected this election. Finally, those votes would only speculatively affect this election.

***968** Second, this Court finds it is appropriate to ignore the six ballots as to Pro rata those ballots under these circumstances; however, this Court is impressed by the authorities suggested by Respondents concerning the rationale behind the Pro rata rule.

Third, the Petitioners have urged that this Court set aside the total vote in the two precincts. This would be the worst exercise of judicial discretion of which this Court has seen. The argument presupposes an equitable result by ignoring the ballots cast by 400-500 registered voters. It should be noted no fraud, deceit, or any other evidence indicates either the tampering of ballots or the reasonable opportunity of anyone to tamper with the ballots.

Finally, this Court is impressed with the authorities and reasoning cited by Respondents, favoring the Pro rata distribution of ballots under facts similar to those found by ****733 ***592** this Court. Therefore,

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pursuant to said citations, this Court awards three votes to each candidate. This Court finds no effect upon the result of the election, but does find a change in the vote of: Macios, 1492; Madison, 1490.

THEREFORE, IT IS ORDERED:

1) That this Court denies the Petition, and judgment is entered upon behalf of Respondents, Harold Davis and Carl Macios upon all requested relief.

2) That the affirmative defenses of Respondents continued by request of Petitioners, are moot."

On appeal from the order, petitioners first contend that in light of the numerous alleged Election Code violations, the lower court erred in refusing to invalidate the results of the election and in apportioning certain ballots Pro rata. Petitioners alleged that: ballots were left unattended; ballots were handled by pollwatchers; ballots were not properly sealed; ballots were missing; ballots were removed from the ballot box and were initialed after the polls were closed; pre-initialed ballots were left unattended; tally sheets were altered; and that voting returns were larger than the number of voters on the voting lists. In arguing their contention before this Court, petitioners have presumed that each of the allegations are fully supported by the evidence presented below. However, to the contrary, the lower court expressly found most of the allegations to be unsupported by the evidence, which finding is undisputed, and as to the remaining allegations, the court found such to be at most inconsequential mistakes or omissions. With regard to the allegation of missing ballots, the court found a total of six ballots from two precincts to be potentially missing, which number could have no effect on the election for Township Supervisor, but could effect that of ***969** Township Assessor. For this office, the court determined to apportion the ballots Pro rata.

[1] Petitioners correctly state the Election Code was initially enacted to safeguard the right of suffrage of the people of the State of Illinois and to ensure their effective will. (Stradford v. Reinecke, 6 Ill.App.2d 537, 128 N.E.2d 588.) It is equally clear that the inconsequential mistakes and omissions of election officials in performing mandatory duties of a precautionary nature will not invalidate the results of an election. Sibley v. Staiger, 347 Ill. 288, 179 N.E. 877.

[2] The petitioners rely upon Pinkston v. Holland, 133 Ill.App.2d 865, 272 N.E.2d 247; however, the case is distinguishable upon the facts. In Pinkston, a variety of Election Code violations were found. Five more ballots were cast in the Village of Bush than actually were applied for by the voters. Also, six of the ballots cast were not initialed by any election judge. Finally, none of the ballots contained the facsimile signature of the clerk. None of these operative facts appear in the instant case.

The petitioners also rely on Drolet v. Stentz, 83 Ill.App.2d 202, 227 N.E.2d 114. The facts of the instant case are totally incongruous with those contained in Drolet.

In the instant case, only six ballots were found to be missing. None of the missing ballots were found to be lost because of fraud, deceit or other misconduct. All six ballots may well be the result of mathematical or call errors. Therefore, the instant case is distinguishable from the facts in Drolet.

In Leach v. Johnson, 20 Ill.App.3d 713, 313 N.E.2d 636, we establish that in nearly every case it is possible that someone who was not authorized could have access to the ballots. The court explained at p. 640:

> "Whether or not the voting of non-residents in a precinct is sufficient to disenfranchise the whole precinct depends upon a number of factors which again must be Determined by the trial judge." (Emphasis added.)

In the instant case, within its sound discretion, the trial court has refused to disenfranchise two entire precincts over the possibility that there are six missing ballots.

The petitioners also rely upon Gibson v. Kankakee Sch. Dist. 111, Kankakee Cty., 34 Ill.App.3d 948, 341 N.E.2d 447 for the proposition****734 ***593** that it is the obligation of the court to disenfranchise an entire precinct where the character of the irregularities are so serious or numerous that the number of illegal votes can neither be ascertained nor separated from the legal votes. However, that case reversed the decision of the trial court which disenfranchised an entire precinct where clerical irregularities ***970** and a total absence of proof of fraud by election officials and held that such disenfranchisement would be improper. At page 452, the court stated:

"There is a presumption of validity to the acts of

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> election officials. The total vote of a precinct ought not be disenfranchised unless the proof or irregularities is so clear, and their character so serious or numerous that the number of legal votes cannot be ascertained and separated from the illegal ones, in which case disenfranchisement of an entire precinct cannot be avoided."

In the instant case, the trial court found but six missing ballots. A Pro rata apportionment of these ballots is proper when there is a total absence of evidence showing fraud. (Thornton v. Gardner, 30 Ill.2d 234, 195 N.E.2d 723; see also, Crum v. Green, 68 Ill.App.2d 246, 215 N.E.2d 817, wherein the court refused to disturb the trial court's finding that the ballots had been properly preserved.) Accordingly, we find no merit to the first contention raised.

[3] The petitioners next urge that the court erred in holding that "the violations" were only directory rather than mandatory. The violations referred to are not specified. On this issue, petitioners have presented no argument and have cited no authority nor any fact in the record. We are therefore left with nothing to consider on this point and deem it waived.

It is contended next by the petitioners that the trial court erred in holding that affirmative proof of fraud, deceit, or other misconduct is necessary to support a petition contesting election. The petitioners contend that they are not required to rebut any presumption of "inadvertent noncompliance" or "honest mistake", but rather are only required to sustain burden of proving violation of mandatory Election Code provisions and opportunity for access, rather than actual tampering. To this end, the petitioners assert that Ill.Rev.Stat. ch. 46, par. 17-16 has been violated by the pre-initialing of ballots by election judges.

[4] It is clear that election judges must initial ballots in order for those ballots to be counted and that the failure of the judges to initial ballots to be cast is a violation of a mandatory section of the Election Code. An uninitialed ballot cannot be counted. (Morandi v. Heiman, 23 Ill.2d 365, 178 N.E.2d 314; Harvey v. Sullivan, 406 Ill. 472, 94 N.E.2d 424; and Tuthill v. Rendleman, 387 Ill. 321, 56 N.E.2d 375.) However, we do not find, nor do petitioners cite, any case law which supports their contention that this statute prohibits the practice of pre-initialing ballots by election judges; it omits any mention of pre-initialing of ballots. The petitioners cite Anderson v. Schneider, 67 Ill.2d 165, 8 Ill.Dec. 514, 365 N.E.2d 900, as authority for this assertion. We concur with the rule in the cited case but do not find it dispositive. Indeed, as stated, 8 Ill.Dec. at p. 516, 365 N.E.2d at p. 902:

> ***971** * * * conduct of elections must be exercised in a manner consistent with the equal protection and due process clauses of the fourteenth amendment and with the interrelated right to associate for political purposes which is guaranteed by the first amendment."

The testimony was that the action of pre-initialing of ballots was done by local custom to facilitate franchise. We, while not condoning such practices, do not, under the facts of this case as determined from the record, find such conduct to require reversal.

[5] The petitioners contended in the trial court that one election judge in Precinct Eleven initialed ballots after the polls were closed and the ballot box was opened. That election judge denied that such actions occurred. The only witness to so testify was a pollwatcher for the petitioners. That witness was not found to be credible by the ****735 ***594** trial court. The court's finding was not contrary to the manifest weight of the evidence nor have the petitioners so asserted.

[6] The petitioners assert that the ballots in Precincts Six, Eight and Eleven were not tied or taped securely. The only witness to so testify also indicated that the election judges had also failed to sign the ballots. The witness was petitioner, Louis Whitsell, who also testified that in Precinct Nine the ballots were not tied or taped securely. The trial court is the best judge of this witness's credibility. No missing or added votes were shown to exist in these three questioned precincts. Also, the trial court found that no unauthorized person had access to the ballots. Finally, the trial court found that the ballots were properly secured.

The petitioners rely on MacWherter v. Turner, 52 Ill.App.2d 270, 201 N.E.2d 325 for the proposition that there must be substantial compliance with the provisions of the Election Code concerning the typing, sealing, and wrapping of ballots. The issue is whether or not any showing has been made that unauthorized persons had an opportunity to tamper with the ballots. (MacWherter v. Turner, 52 Ill.App.2d 270, 201 N.E.2d 325; Crum v. Green, 68 Ill.App.2d 246, 215 N.E.2d 817; Bethard v. Mink, 10 Ill.App.3d 525, 294 N.E.2d 702.) The petitioners have failed to show any substantial noncompliance by competent evidence to

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the court below.

[7] The fifth issue raised by the petitioners is whether the trial court erred in finding that Election Judge Teetor had no conflict of interest and that her selection was not violative of the Illinois Corrupt Practices Act.

The petitioners assert that one election judge in one precinct violated section 3, chapter 102, Ill.Rev.Stat., 1975, by serving as an election judge though appointed by a political body on which one of the petitioners served. The petitioners then contend the act is a violation of section 13- 4(3), ***972** chapter 46, Ill.Rev.Stat., 1975, which prohibits candidates for office and precinct committeemen from being election judges. Thus, the petitioners would have this court hold that the purpose of the statute is to eliminate all possible conflict of interest. The court below found no conflict of interest. With this finding, we do not disagree.

[8] As their final point, the petitioners contend the trial court erred in finding that the violations of the Election Code had no reasonable effect upon the outcome of the election, especially considering the nearly equal division of the apparent votes cast. There is no basis in the record to support such a conclusion.

For the reasons previously stated, we find no abuse of discretion in the trial court.

The judgment is affirmed.

GEORGE J. MORAN, P. J., and KUNCE, J., concur.

67 Ill.App.3d 962, 385 N.E.2d 729, 24 Ill.Dec. 588

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Court of Appeals of Maryland.
WILKINSON et al.
v.
McGILL et al.
**No. 87.**

Feb. 16, 1949.

Appeal from Circuit Court, Allegany County; William A. Huster, Chief Judge.

Suit by Violet McGill and others against Charles N. Wilkinson and others, constituting the Board of County Commissioners of Allegany County, and William A Strother, Tax Collector of First Tax Collection District of Allegany County, for a declaration that law providing for creation of sanitary district in Allegany County was not lawfully adopted by voters of district in which act was to be applicable, and other relief, wherein other residents of district intervened as defendants, and the commissioners and tax collector filed a cross-bill for declaratory judgment. From an adverse decree, defendants appeal.

Decree reversed and bill and cross-bill dismissed.

West Headnotes

**[1] Statutes 251**
361k251 Most Cited Cases

**[1] Statutes 253**
361k253 Most Cited Cases
Constitutional provision that no law shall take effect until first day of June next after session at which law was passed unless law was declared to be an emergency measure, and prohibiting the enacting as an emergency law any act creating or abolishing an office, or changing salary, term or duty of an officer, or granting any franchise or special privilege, or creating any vested right or interest, is not applicable to public local laws. Const. art. 16, § 1 et seq.

**[2] Statutes 251**
361k251 Most Cited Cases

**[2] Statutes 253**
361k253 Most Cited Cases
Constitutional provision that no law shall take effect until first day of June next after session at which it was passed, unless law is declared to be an emergency measure, and prohibiting the enactment as an emergency law, any act creating or establishing an office is not applicable to local law declared to be an emergency law, providing for creation of a sanitary district in Allegany county to be under supervision of a sanitary commission, and conferring authority on commission to provide water supply, sewerage, and draining system within election district No. 29 of county, so as to prevent its being effective from date of passage. Laws 1947, Ex.Sess., c. 13; Const. art. 16, § 1 et seq.

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**[3] Statutes 107(5)**
361k107(5) Most Cited Cases

**[3] Statutes 120(3)**
361k120(3) Most Cited Cases
Act providing for creation of sanitary district in Allegany County, to be under supervision of a sanitary commission, and conferring authority upon Commission to provide water supply, sewerage and drainage system, within election district No. 29 of county, is not violative of the constitutional provision requiring laws to embrace but one subject which is described in title. Laws 1947, Ex.Sess., c. 13; Const. art. 3, § 29.

**[4] Elections 227(1)**
144k227(1) Most Cited Cases
Appropriate court action may be resorted to for enforcement of duty of election officials to do what the law requires, but when an election has been held, and failure of election officials to observe requirements of law is not shown to have interfered with fair expression of will of voters, the result of election will not be disturbed.

**[5] Elections 227(1)**
144k227(1) Most Cited Cases
The principle that irregularities which do not prevent a full and free expression of opinion of will of electors, and change the result of election, will not invalidate a completed election, does not apply when there is a peremptory requirement designed to safeguard the integrity of elections, the neglect of which presents an apparent opportunity for fraud.

**[6] Health 369**
198Hk369 Most Cited Cases
(Formerly 199k4 Health and Environment)
Failure of election officials to give ten days' notice of change in place of election as required by statute, after place for election as stated in first notice given had been changed, and violation of statute prohibiting holding of election in building used as a bowling alley, did not invalidate election required to make effective the law providing for creation of a sanitary district in Allegany county, where, on date of election, a notice stating where election was being held was posted at place originally announced as location of election, and irregularities were not shown to have affected the ultimate result. Laws 1947, Ex.Sess., c. 13; Code Supp.1947, art. 33, § § 9, 10.

**[7] Elections 291**
144k291 Most Cited Cases
Complainants, desiring to avoid an election because illegal votes are cast have burden of proving for whom the illegal votes were cast.

**[8] Elections 293(3)**
144k293(3) Most Cited Cases
Complainants, desiring to avoid an election because illegal votes are cast, may offer circumstantial evidence to sustain their burden of proving for whom the illegal votes were cast, where direct proof cannot be obtained from the illegal voters.

**[9] Health 369**
198Hk369 Most Cited Cases
(Formerly 199k4 Health and Environment)
Election required to make effective the law providing for creation of sanitary district in Allegany county would not be declared invalid because voters not entitled to vote, voted under a registration which had been held without authority, where contestants failed to show prejudice. Laws 1937, Ex.Sess., c. 13.
***389 **267** David Kauffman, of Cumberland (Harry Kauffman, of Cumberland, on the brief), for appellants.

William A. Gunter, of Cumberland, (D. Lindley Sloan and F. Brooke Whiting, both of Cumberland, on the brief), for appellees.

Before MARBURY, C. J., and DELAPLAINE, COLLINS, GRASON, HENDERSON, and MARKELL, JJ.

MARBURY, Chief Judge.

The General Assembly of Maryland, by Chapter 13 of the Acts of the Special **268** Session of 1947, made provision for the creation of a sanitary district in Allegany County, to be under the supervision of a body to be known as La Vale Sanitary Commission. The Act is long, and there is no occasion in this opinion to discuss its provisions, other than to say that authority is given to the Commission to provide water supply, sewerage and drainage systems within election district No. 29 of the County. It provides for the issuance of bonds and the levying of taxes therefor. The Commission is to consist of three persons residing in election district No. 29, to be appointed by the Board of County Commissioners of Allegany County. Each of these commissioners is to receive a salary. It is also enacted that the provisions of the Act shall not take effect, until it has first been submitted to the qualified voters of the contemplated district, and **390** approved by a majority of those voting. The election is to take place within 90 days after the passage of the

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bill, which was approved November 10, 1947. The Board of Election Supervisors of the county is authorized to determine the time, place or places, and the manner for the submission of the question, and for ascertaining the results. In holding such election or elections, the General Election Law of the State Code Supp.1947, c. 33, § 1 et seq. is to apply whenever applicable.

[1][2] This Act was declared to be an emergency act and was passed by three fifths of all the members elected to each of the two houses and was to take effect from the date of its passage. As Article XVI of the Constitution does not apply to public local laws, Dinneen v. Rider, 152 Md. 343, 136 A. 754, the effective date of the Act, therefore, subject to the referendum provided for in it, was November 10, 1947. The Board of Supervisors of Elections of Allegany County held a special election on January 22, 1948, in which, according to the testimony, 692 registered voters participated. The majority for the bill was 16; 354 voting for it, and 338 against it.

On February 10, 1948, the appellees, consisting of 38 voters, residents and taxpayers of Election District No. 29, suing for themselves as well as for all others who might come in and contribute, filed their bill of complaint in the Circuit Court for Allegany County, alleging, among other things, that the Act was not properly submitted to the qualified voters, because a registration was held by the Board of Election Supervisors on December 20, 1947 at the Court House in Cumberland, without any proper notice, that such registration was conducted by the clerk and not by the Board, that the books were open for only five hours, and as a result, 28 (the evidence shows 26) people registered illegally and that the election was illegally held in a bowling alley, in violation of Section 9 of Chapter 934 of the Acts of 1945. The court was asked to declare that the Act had not been lawfully adopted, that the election was null and void, that the Act was not in effect, and to restrain the County Commissioners from ***391** appointing the Sanitary Commission, and from exercising any authority or power under the Act. The Tax Collector was also made a party defendant. 39 other residents and taxpayers of the district asked leave to intervene as defendants and thereafter filed an answer. The County Commissioners and Tax Collector also filed an answer, and a cross bill in which they asked for a declaratory judgment to the effect that Chapter 13 is constitutionally valid, that the election held was a valid election, or if the latter is not the case, that Chapter 13 should be resubmitted at another and valid election. To this cross bill the defendants filed a demurrer. Testimony was taken and the Chancellor came to the conclusion that the Act was valid and constitutional, but that the election of January 22, 1948, was not valid and therefore, the statute is not in force. The court also sustained the demurrer to the cross bill, because the Board of Election Supervisors of Allegany County, which was authorized to call the election under the Act, was not made a party. The court enjoined the official defendants from exercising any authority and power under the provisions of the Act. From this decree all the defendants, both official and personal, appealed.

****269** [3] The additional contention was made in the bill of complaint and in the lower court that Chapter 13 of the Acts of 1947, Special Session, was unconstitutional and void because it was claimed that its title was imperfect, and did not comply with Section 29 of Article 3 of the Constitution. No appeal was taken by the appellees, because they were successful below on other points, but we have examined this question and have come to the conclusion that the chancellor was correct in his decision that the Act was valid.

The only questions before us on this appeal are those respecting the election, and the supplemental question, to be decided if we hold the election void, as did the lower court, whether a new election can be held. The reasons for the contention that the election is void are two-fold: First, that part of it was held in a bowling alley under ***392** the circumstances hereafter related, and in contravention of the election laws of the State; and second, that there was an illegal registration of 26 people of whom 23 voted; and that as the majority in favor of the Act was only 16, these illegal votes, if cast in favor of the Act, carried the election, whereas, if they had not voted, it is probable that the election would have been decided the other way. These two contentions will be considered in their order.

The testimony showed that the polling place in the 29th Election District of Allegany County had been for a number of years, at the residence of a Mrs. Lancaster. Notices of the election were published in the Cumberland News and in the Cumberland Evening Times by the election supervisors on December 17 and 22 and January 7, 14 and 20. The first notice stated that the polling place of the second precinct in District No. 29 would be the residence of Mrs. Lancaster, but the subsequent notices said that this polling place would be Jack Poisal's Bowling Alley in Allegany Grove. After the first notice was posted, and about three weeks before the election, Mrs. Lancaster called the Board, and said that the election could not be held in her house, as had been heretofore the custom. As a result, the clerk and some of the election officials

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attempted to find a new polling place. The only available place they could find was the bowling alley, in which there was no bowling from midnight until after seven o'clock in the evening. The bowling alley was used for the election, which was held from seven in the morning until seven in the evening on January 22. On that morning, Mrs. Lancaster put a notice on her home which remained there all day, that voting was to be at Poisal's Bowling Alley. It is not shown that any voter was decived by the change thus made, and it is apparent that if anyone went to Mrs. Lancaster's house to vote, the notice posted there would indicate where the voting was being held. The appellees contend, however, that the use made of the bowling alley as a polling place violated two provisions of the General Election Laws of the State. ***393** One of these is Section 9 of Article 33 which provides that 'in no case shall a * * * election be held in any building or part of any building used or occupied as a * * * bowling alley.' The other is Section 10 of Article 33 which provides that the Board of Supervisors shall give ten days notice of the time and place of all elections in each precinct by advertisement and by hand bills. It is obvious such violations did occur, and the question before us is whether they render the election void.

[4] There is a clearly recognized difference between the interpretation given to provisions of the election laws before election and the construction of these same provisions after election. The election officials are required to do what the law tells them to do and this can be enforced by appropriate court action, Munsell v. Hennegan, 182 Md. 15, 27, 31 A.2d 640, 146 A.L.R. 660, but when an election has been held and it is not shown that the failure of the officials to observe the requirements of the law has interfered with the fair expression of the will of the voters, courts have generally held that the result of the election will not be disturbed. The reason for this is that unimportant mistakes made by election officials should not be allowed to thwart the will of the people ****270** freely expressed at the ballot box; or as better expressed by this Court, speaking through Judge Alvey, in the case of State v. County Commissioners of Baltimore County, 29 Md. 516, at page 522 '* * * That it should be in the power and election of subordinate ministerial or executive officers, by refusing to obey the law, to defeat and nullify it, is a proposition too startling to be favorably entertained in a court of justice.'

There have been a number of cases in this Court in which irregularities have been asserted to render elections void and the Court has uniformly adopted the construction above set out where the irregularities did not affect the result. In the case of Smith v. Hackett, 129 Md. 73, 98 A. 140, 142, the polling place for a precinct in Dorchester County was in an adjacent precinct, although ***394** just across the street. The Court said no discretion or authority was vested in the Board of Supervisors to go beyond the outlines of a precinct to secure a polling place. Their duty was to find one within the area and this duty could have been enforced by judicial processes upon a showing that it was about to be disregarded. However, the issue was not raised until after the election, when the voters of the precinct had resorted to the only voting place provided for them, and the question was whether their votes should be rejected because of the failure of duty on the part of the election officials. The Court decided that this would not be done, saying:

'In the absence of any proven injury to any interest involved from the mere fact that the polling room for the precinct was at the location mentioned, we can find in that circumstance no just cause for invalidating the entire vote of the precinct and depriving the candidates for whom it was cast of its legitimate effect. This would be far too serious a result to recognize as a proper and necessary consequence of the particular breach of administrative duty under consideration.'

In the case of Seyboldt v. M. & C. C. Mt. Ranier, 130 Md. 69, 99 A. 960, 962, one of the objections to the validity of an act which had to be approved at an election was that insufficient notice of the election had been given. The Court said there was no non-compliance with any 'mandatory statutory requirement.'

It is not necessary to go beyond our own decisions, but it may be noticed that in a number of other jurisdictions similar conclusions have been reached. See State v. Salt Lake City, 35 Utah 25, 99 P. 255, 18 Ann.Cas. 1130 (defective notice); City of El Dorado v. Jacobs, 174 Ark. 98, 294 S.W. 411 (changed polling place); City of Albuquerque v. Water Supply Co., 24 N.Mex. 368, 174 P. 217, 5 A.L.R. 519 (notice); Taylor v. Taylor, 10 Minn. 107, Gil. 81 (notice); Sykes v. Pandora, etc., District, Tex.Civ.App., 14 S.W.2d 124 (notice); Loop v. McCracken, 151 Wash. 19, 274 P. 793 (general irregularities); Gilligan v. Special Road, etc., District, 74 Fla. 320, 77 So. 84 ***395** (general irregularities); People v. Graham, 267 Ill. 426, 108 N.E. 699, Ann.Cas.1916C, 391 (location of polling place), citing cases from New Jersey, New York, Nebraska, New Hampshire, Texas, Kansas and Mississippi; State v. Hackmann, 304 Mo. 478, 264 S.W. 389; Lamb v. Palmer, 79 Okl. 68, 191 P. 184, Womack v. Nettles, 155 La. 359, 99 So. 290--all as to location of polling places.

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The general subject of the affect of irregularities in an election is discussed in McQuillin's Municipal Corporations, 2nd Ed. Revised, Vol. 5, Par. 2361, where it is said '* * * mere irregularities which do not prevent a full and free expression of opinion of the will of the electors, and change the result, will not invalidate the election. This rule has been applied to irregularities in notices; * * * in the time and place of the election * * *. The reason is that the courts are anxious rather to sustain than to defeat the popular will.'

[5] These principles do not apply to a situation where there is a preemptory requirement designed to safeguard the integrity of elections, the neglect of which presents an apparent opportunity for fraud. An illustration of this is the recent case of **271Hammond v. Love, 187 Md. 138, 49 A.2d 75, in which we held that ballots which were not properly initialed should not be counted.

[6] Our conclusion on this phase of the case is that as to the failure to give the required notice, as to the change in the place of holding the election after the first notice was given, and as to the holding of the election in a bowling alley, none of them are shown to have affected the ultimate result, and, as mere irregularities, they should not be allowed to set aside what the voters have decided.

The second question presented presents more difficulty. A registration was held in the Court House in Cumberland for the purpose of permitting the qualified voters who had recently become residents of Election District No. 29 to change their precinct registration so that they might vote at the special election. This was on December 20, 1947. There was no advertisement of it in the newspapers as required by Section 10 of Article 33 of *396 the Code. The registration was not conducted by the members of the Board, who were not present, but by their clerk, who registered 26 persons. The only notice the public had of this so-called supplemental registration was a newspaper article in the Cumberland News on December 18 which stated that Charles R. Wherritt, Chairman of the Water Committee of the La Vale Civic Association, which was sponsoring the measure to be voted on, said that the Allegany County Board of Election Supervisors had agreed to open the office in the court house basement on Saturday, December 20 from one until six P.M. There was also a similar article in the Cumberland Evening Times on December 18, also quoting Mr. Wherritt. In both articles, Mr. Wherritt is quoted as saying that 'The arrangements were made after a number of La Vale residents had made inquiries regarding voting restrictions.' It is admitted by all parties that there was no authority in the Board or in the clerk to hold such a registration, that the 26 names were illegally placed upon the registration book, and that the 23 of these 26, who cast their ballots at the election voted illegally. It is apparent that since the Act received a majority of only 16, the voting by these 23 people might very materially have affected the result. If 20 of them voted for the Act and 3 against it and these votes were deducted from the recorded totals, the correct result would be 335 against the Act and 334 for it, or a reversal of the result. It is contended by the appellees that the fact that a proponent of the Act had apparently made the arrangements for the registration or, at any rate, was the person through whom the only notice was given to the public, indicates that the registration was arranged for the purpose of helping the friends of the Act, and that there exists a strong presumption of fact that those who registered were its proponents. On the other hand, it is pointed out that anyone reading the newspaper articles and desiring to change his or her precinct registration, could come to the appointed place at the appointed time *397 and have such change made, without regard to his or her position on the adoption of the Act.

It is stated in Dillon on Municipal Corporations, 5th Ed., Vol. 1, Sec. 376, 'Receiving *irregular* or *improper* votes will not alone vitiate an election. It must be shown affirmatively, in order to overturn the declared result, that the wrongful action *changed* it.' In Paine on Elections, Par. 513, page 433, it is stated: 'Where illegal votes have been cast, the true rule is to purge the poll, by first proving for whom they were cast, and thus ascertain the real vote; but if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties.' In McCrary on Elections, 4th Ed., Chapter XIV, Par. 497, p. 366, it is stated:

'It would seem, therefore, that in a case where the number of bad votes proven is sufficient to affect the result, and in the absence of any evidence to enable the court to determine for whom they were cast, the court must decide upon one of the three following alternatives, viz.:

'1. Declare the election void

'2. Divide the illegal votes between the candidates in proportion to the whole vote of each.

**272 '3. Deduct the illegal vote from the candidate having the highest vote.'

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The appellants insist that the burden is upon those attacking an election to show that the successful ticket at the polls received a sufficient number of improper votes to change the election, that this burden is not sustained by merely showing such a possibility, that the appellees in the case before us did not sustain this burden, and did not attempt to show how and in whose favor the illegal votes were cast. They contend, with Dillon, that it is an established principle that the mere casting of illegal votes does not avoid an election, unless it is shown that such votes affected the result. In support of these contentions, there are numerous cases from other jurisdictions such as Ex parte Murphy, 1827, 7 Cow., N.Y., 153; Inhabitants v. Stearns, 1838, 21 Pick., Mass., 148; ***398** People v. Cicott, 1868, 16 Mich. 283, 7 Am.Dec. 141; Judkins v. Hill, 1870, 50 N.H. 140; Brown v. Atlanta, 1921, 152 Ga. 283, 109 S.E. 666; Hardigree v. White, 1938, 275 Ky. 364, 121 S.W.2d 919; Atkinson v. Roosevelt Co., 1924, 71 Mont. 165, 227 P. 811; MacGuidwin v. S. Park Com'rs, 1928, 333 Ill. 58, 164 N.E. 208; Lehlback v. Haynes, 1891, 54 N.J.L. 77, 23 A. 422; In re Incorporation of Town of Big Cabin, 1928, 132 Okl. 200, 270 P. 75; Gross v. Ball, 1935, 258 Ky. 730, 81 S.W.2d 409; Morrison v. Buttran, 1926, 154 Tenn. 679, 290 S.W. 399; Petition of Clee, 1938, 119 N.J.L. 310, 196 A. 476; Goar v. Brown, 1921, 82 Okl. 227, 200 P. 156; Pippin v. Holland, Tex.Civ.App.1940, 146 S.W.2d 266; Tazwell v. Davis, 1913, 64 Or. 325, 130 P. 400.

There have, however, been decisions to the contrary in cases in which it has been impossible to ascertain how the illegal voters voted, or where, under the circumstances, the interests of the public would be best served by striking down the election and having a new one. Thus in South Carolina, it was held in an early case in 1795, where the illegal votes were taken from the highest candidate, that voters should not be sworn and if, after the deduction, there was doubt, a new election should be ordered. Johnston v. Corporation of Charleston, 1 Bay 441. In California, nine absentee ballots were improperly counted. The court threw the election out, saying that: 'Assuming * * * that the nine absent voters personally appeared in court and testified they voted for the plaintiff, the very necessity of such evidence destroys the secrecy of ballot.' Scott v. Kenyon, Cal.App., 93 P.2d 160, 162, affirmed 16 Cal.2d 197, 105 P.2d 291. The Nebraska court, however, held that since no effort was made to bring any of the illegal voters into court to testify for whom they voted, the election should be upheld, stating 'Litigants and courts are not helpless when such information is essential to the administration of justice.' Mehrens v. Election Canvassing Board, 134 Neb. 607, 278 N.W. 252, 254. In Mississippi, it was held that while a qualified voter could not be interrogated about ***399** his ballot, 'this exemption does not belong to an illegal voter.' Trahan v. Simmons, 191 Miss. 353, 2 So.2d 575. In another Mississippi case, the court said that it was not troubled by the inability of the complainant to compel an illegal voter to disclose for whom he voted, because, if the appellant in that case was unable to ascertain this 'that is just his hard luck for which the appellee is in no way to blame.' Simmons v. Crisler, 197 Miss. 547, 20 So.2d 85, 88. In a Texas case, Roberts v. Hall, Tex.Civ.App., 167 S.W.2d 621, the court said that the burden was on the contestant to show either that a different result should have been reached by counting or not counting certain specified votes, or that the irregularities were such as to render it impossible to determine the true will of the majority of the voters. In Skain v. Milward, 138 Ky. 200, 127 S.W. 773, it is stated that an illegal voter may be required to say how he voted, and without this it cannot be shown that contestants were prejudiced. In the Michigan case of People ex rel. Saunders v. Hanna, 98 Mich. 515, 57 N.W. 738, 82 inmates of the Soldiers Home voted illegally at the election. There was a majority of three votes and the court said: '* * * as it is impossible to ascertain which candidate received the greater number of votes, the vote of the precinct ****273** must be excluded,' referring to Attorney General v. McQuade, 94 Mich. 439, 53 N.W. 944.

In some cases it has been held that the illegal votes, in the absence of proof for whom they were cast, should be deducted from the contestant, unless he proves he could not show for whom such votes were cast, in which case they should be deducted ratably. The leading authority for this rule is Briggs v. Ghrist, 28 S.D. 562, 134 N.W. 321. Others are Nepier v. Cornett, Ky., 68 S.W. 1076, and Cameron v. Babcock, 63 S.D. 554, 262 N.W. 80, 101 A.L.R. 650. This last is a three to two decision, and there is a dissenting opinion which cites another Kentucky case, Childress v. Pinson, Ky., 100 S.W. 278, where the Napier-Cornett case rule was reversed. In a well reasoned Idaho case, ***400**Jaycox v. Varnum, 39 Idaho 78, 226 P. 285, a number of illegal voters were put upon the stand, and, after deducting those of these who voted for the defendant, and disregarding others of whom no proof was offered, the complainant had 792 votes for clerk of the court and the respondent had 795. The court quoted the discussion from Paine on Elections, pages 433 and 434 and cited cases for apportionment from Michigan, Illinois, Montana, Tennessee and California. It agreed with Paine that apportionment was arbitrary and decided nothing. Cases where the entire vote of the precinct was thrown out were cited from Colorado, Michigan, Kentucky and South

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Carolina but these were said to involve situations where all of the ballots were tained. The only case where the entire vote was thrown out on a mere irregularity was said to be People v. Hanna, 98 Mich. 515, 57 N.W. 738. The Idaho court said that no sound argument could be made to take all the illegal votes from one candidate and that left two alternatives; one was to set the election aside and the other was to decide for respondent on the ground the contestant had not made out his case. The latter conclusion was adopted in that case.

McCrary on Elections, Paragraph 497, previously quoted in part, states that where no great public inconvenience would result from declaring the election void, that course should be adopted, but where it is essential that a party to the contest be confirmed in office to prevent public inconvenience, the apportionment method should be adopted, but the illegal votes should not be deducted from the candidate having the highest vote. He, however, distinguishes between cases where proof is within the reach of the party whose duty it is produce it. If such party neglects to show for whom the illegal votes were cast, he will be held answerable for his own neglect. In paragraph 492, he states that a person who votes without being qualified is an intruder, and can be compelled to make the disclosure how he voted, but an illegal voter may decline to testify on the ground that his answer might incriminate him. In such case, ***401** the contents of the ballot may be shown by other testimony or by circumstantial evidence, such as that the voter was an active member of a particular political party, or obtained his ballot from a person who was actively supporting a party ticket. In paragraph 495, he discussed the deduction of the illegal votes from the total amount, and shows that in the application of this rule, they would be deducted proportionally from both candidates and, while he says that this is the safest rule that can be adopted, it is manifest that it may sometimes work a great hardship. He concludes, in paragraph 496, by saying that in any body or tribunal having power to order a new election, it will generally be regarded as safer and more conducive to the ends of justice to order such new election.

The appellees in the case before us made no effort to call as witnesses the 23 illegal voters, nor did they explain their failure to do so.

We have no direct precedent for the present situation in this state, but there is one case which has some features in common with the case before us. That is Graf v. Hiser, 144 Md. 418, 125 A. 151. In that case, the legislature had created a special taxing district in Prince George's County, subject to the approval of the qualified voters of the county residing within the limits of the district as defined in the Act. The referendum was to be held on a specified date and was to be conducted ****274** and the result declared by a committee of five named persons. The committee set up a notice in which they defined the qualifications of those who would be allowed to vote as 'resident taxpayers' which was a different test of eligibility from that provided in the statute. The election was participated in only by those qualifying under the improper test. The record shows that 120 people voted at the election. The evidence offered was that one person voted in the election who was not a qualified voter, one registered voter was prevented from voting by the qualifications prescribed, and three qualified voters did vote, but before they were allowed to cast their ballots, were asked ***402** if they were taxpayers. A witness testified without objection that he thought the result would have been different had the registered voters been permitted to vote without respect to their qualifications as taxpayers, and he further said, also without objection, that he thought the registered voters opposed exceeded the number in favor of the bill. This Court said that the deviation from the terms of the statute was of such consequence as to fully justify the view that the election ought to be treated as a nullity, and that the court action should be treated as a suit by taxpayers to prevent expenditures under what was alleged to be an inoperative law, and not as an election contest. The exercise of any powers, proposed to be conferred by the statute, was enjoined.

That case is distinguishable from the case before us in this respect. There the issue was the prevention of legal voters from voting, rather than the counting of illegal votes. In the Graf-Hiser case, the complainants could not well prove how the legal voters would have voted and the opinion testimony, above referred to, admitted without objection, could have influenced the court in its decision of the case.

[7][8][9] The question is by no means free from difficulty, but we think the weight of authority and the better reasoning uphold the view that complainants, desiring to avoid an election because illegal votes are cast, have upon them the burden of proving for whom these votes are cast. They cannot thrust that burden upon the Court by arguing that there is a probability that such votes were cast for the side having the majority. They must prove, or at least attempt to prove, how the illegal voters voted. If direct proof cannot be obtained from the illegal voters themselves, other evidence of a circumstantial nature may be offered. In any event, there must be an effort to produce this proof. If an effort is made, which proves

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futile, and there is no way of producing proper evidence, it may be that the safest procedure is to throw out the election, but we have not that situation before us. As we have already said, the appellees in this case made no effort, ***403** either to prove how the illegal voters cast their ballots, nor to offer any explanation of their failure to do so. They did not state that such evidence was impossible for them to obtain. Under these circumstances, we must conclude that they have failed to meet the burden imposed upon them, and that the election must stand. As a result, the Act is now in force, and the chancellor was in error in enjoining its operation.

In view of our conclusion it becomes unnecessary for us to pass upon the cross bill of the appellants, although we think the demurrer to it was properly sustained because the Board of Supervisors of Election was not a party to the case. There is, however, no necessity for any determination of the power of the Supervisors to order another election, since we uphold the one already held.

For the reasons stated, the decree will be reversed and the bill of complaint and the cross bill both dismissed, each side to pay its own costs.

Decree reversed, bill and cross bill dismissed, each side to pay its own costs.

192 Md. 387, 64 A.2d 266

END OF DOCUMENT

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

CERTIFICATE OF SERVICE

The undersigned is a citizen of the United States and resident of the State of Washington, is over the age of eighteen and is not a party to the within action.

The following documents were caused to be served:



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

1. Letter to Judge Bridges Regarding Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes;

2. Note for Motion;

3. Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes;

4. Declaration of William C. Rava in Support of Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes;

5. (Proposed) Order Granting Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes; and

3. Certificate of Service.

These documents were served in the manner described below.

| | | |
|---|---|---|
| Thomas F. Ahearne<br>Foster Pepper & Shefelman PLLC<br>1111 Third Avenue, Suite 3400<br>Seattle, WA 98101-3299<br>Email: ahearne@foster.com<br>*Attorneys for Respondent Secretary of State Sam Reed* | ☒<br>☐<br>☐<br>☐<br><br>☐ | E-Service Via E-Filing.com<br>Via Electronic Mail<br>Via Overnight Mail<br>Via U.S. Mail, 1st Class, Postage Prepaid<br>Via Facsimile |
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I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed in Seattle, Washington on April 13, 2005.

By _____
Sherri Wyatt



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