

1963

La Mar Peay v. Board of Education of Provo City School District et al : Petition for Rehearing of Amicus Curiae

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

LA MAR PEAY,

Plaintiff and Appellant

vs.

THE BOARD OF EDUCATION OF THE
PROVO CITY SCHOOL DISTRICT, A
BODY CORPORATE AND POLITIC,
AND MERRILL CHRISTOPHERSON,
RAY MURDOCK, SHIRLEY PAXMAN,
WILFORD E. SMITH, AND LA MAR
EMPEY, MEMBERS OF SAID BOARD

Defendants and Respondents

Case No.

9722

FILED

MAR 4 - 1983

PETITION FOR REHEARING OF AMICUS CURIAE

Utah Supreme Court, Utah

Appeal From Judgment of the Fourth District Court
for Utah County

HONORABLE R. L. TUCKETT, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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CHRISTOPHERSON, RAY MUR-
DOCK, SHIRLEY PAXMAN, WIL-
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BOARD,

Defendants and Respondents

Case No.
9722

PETITION FOR REHEARING OF AMICUS CURIAE

PETITION FOR REHEARING OF AMICUS CURIAE

The Board of Education of Salt Lake City, the Board of Education of Ogden City, the Board of Education of Murray City, and the Board of Education of Granite School District, all public corporations, pursuant to orders of the court allowing said Boards

of Education to join as amicus curiae, respectfully petition the court for rehearing in the above entitled cause. Petitioners rely upon the following points as error in the decision of the court:

POINT 1

The term "electors" as used in Utah Code Annotated (1953) Section 53-7-24, as amended, respecting leeway elections, does not limit the individuals entitled to vote to those who have paid a property tax in the year next preceding such election.

A. The term "elector" as used in Section 53-7-24 defines the qualification of voters and there is no uncertainty or ambiguity as to its meaning. The meaning of the word "electors" is not modified by reference to other statutory provisions which set forth the "*manner*" of holding elections or the "*procedure*" to be followed in conducting such elections. All "electors" may therefore vote.

B. To construe the term "electors" as set forth in the leeway election statute to mean "tax paying electors" is a strained construction and would be in violation of our State Constitution.

POINT 2

In the event that this court should decide that the term "electors," as set forth in Section 53-7-24, mean

those electors who have paid a property tax in the year preceding the election, the election nevertheless may not be invalidated unless the plaintiff has shown that sufficient improper votes were cast to change the result of the election.

POINT 3

The form of the notice of election and of the proposition voted upon were sufficient.

Dated this 1st day of March, 1963.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

This court based its decision of December 31, 1962, on two points: First, that the voters at the leeway election should have been limited to those who had paid a property tax in the preceding year, and, second, that the notice was insufficient. Our position on these two matters is covered in Points 1 and 3. Point 2 was not referred to in the court's opinion. Petitioners herein are other school districts which have held successful leeway elections. Whether or not this court reaches a different ultimate result with respect to the Provo School District election, we request that this court reconsider its opinion with reference to each of the points set forth herein for the reason that the situation may be, and presumably is, different with respect to each of the school districts appearing in this petition. The leeway election held by each of such districts may be valid even though the election in the Provo District is still declared invalid by reason of only one matter covered by the three points stated.

An early consideration of the petition for rehearing and decision thereon is requested for the reason that school districts heretofore holding leeway elections may desire to resubmit the leeway question, or

may be confronted with the necessity of budgeting for the year 1963-64 without the benefit of the right to maintain a school program in excess of the cost otherwise allowed. By law, the tentative budget for each school district must be submitted on or before June 1, (U.C.A. (1953), Sec. 53-20-1.) If another lee-way election is to be held prior to the preparation of the tentative budget, it is almost a necessity that there be a decision to do so by a board of education by April 20, 1963. An earlier decision by this court on this petition for rehearing would be very helpful. We call attention to these facts for information, with no intent to impose on the court.

This being a Petition for Rehearing, it is not felt that the facts and the ruling of the trial court require restatement.

Italics throughout this petition and brief are the petitioners' unless otherwise indicated.

POINT 1

THE TERM "ELECTORS" AS USED IN UTAH CODE ANNOTATED (1953), SECTION 53-7-24, AS AMENDED, RESPECTING LEE-WAY ELECTIONS DOES NOT LIMIT THE VOTERS TO THOSE WHO HAVE PAID A PROPERTY TAX IN THE YEAR NEXT PRECEDING SUCH ELECTION.

The following is a brief statement of this court's conclusion in its opinion of December 31, 1962 with respect to Point No. 1. Section 53-7-24, U.C.A. (1953), as amended, provides that a school district may maintain a school program in excess of the costs of a program already authorized "with the consent of a majority of the electors of the district voting at an election or elections held for that purpose *in the manner set forth in section 53-2-12* (53-7-12) Utah Code Annotated 1953. . . ." The court then in accordance with the foregoing statute referred to section 53-7-12 which in turn says that the board in holding that election "shall follow *the procedure* in elections for the issuance of bonds *so far as applicable*." This court then made reference to elections for the issuance of bonds, quoting particularly from Section 53-10-11 with respect to "qualification of voters" and held that such section restricts the persons eligible to vote at a leeway election to those who have paid a property tax in the year next preceding such election. Upon this proposition it held that since the voters had not been restricted to "tax paying electors" the election was invalid.

POINT 1. A

THE TERM "ELECTOR" AS USED IN SECTION 53-7-24 DEFINES THE QUALIFICATION OF VOTERS AND THERE IS NO UNCERTAINTY OR AMBIGUITY AS TO ITS

MEANING. THE MEANING OF THE WORD "ELECTORS" IS NOT MODIFIED BY REFERENCE TO OTHER STATUTORY PROVISIONS WHICH SET FORTH THE "MANNER" OF HOLDING ELECTIONS OR THE "PROCEDURE" TO BE FOLLOWED IN CONDUCTING SUCH ELECTIONS. ALL "ELECTORS" MAY THEREFORE VOTE.

Section 53-7-24, U.C.A. (1953), as amended, so far as it refers to electors who can vote provides:

"With the consent of a majority of the electors of the district voting at an election or elections held for that purpose *in the manner* set forth in section 53-2-12 (53-7-12), Utah Code Annotated 1953, any district may maintain a school program in excess of the cost of the program referred to in sections 53-7-22 and 53-7-23 above."

In addition to the foregoing language from the first paragraph, there is the following language from the second paragraph of Section 53-7-24:

"Consideration of such additional program and of modification, increases or decreases thereof by such elections may be initiated by a petition signed by *electors* of the district equal to 10% of the number of electors who voted at a preceding election on said question or by action of the board of education."

It is reasonable to presume that the word

“electors” has the same meaning in both of the above quoted sentences from Section 53-7-24. The second sentence is by no possibility tied to any other election statutes for a definition of electors. The sentence has to do with a percentage of the number of electors. They certainly do not have to be “tax paying electors.”

Furthermore, the term “electors” must include all registered voters unless it is specifically provided that the electors shall be restricted. Some statutory and constitutional provisions should be helpful on this matter. Chapter 2 of Title 20, U.C.A. (1953), is a complete procedure for determining what is necessary for registration and thus to qualify a person as an “elector.” That chapter does not restrict the right to vote by any property qualification nor does it restrict it to those who have paid taxes. Section 20-2-29, the final section of that chapter, states:

“No person shall hereafter be permitted to vote at any general, special, municipal or *school election*, or at any primary election for the nomination of officers to be voted for at municipal elections in cities of the first and the second class, without having first been registered within the time and in the manner and form required by the provisions of this chapter.”

An elector is one who has met all the qualifications as set forth in said Chapter 2 of Title 20. When these requirements are met, the right to vote is established.

This matter is further clarified by the Constitution of the State of Utah. See Article IV entitled "Elections and Right of Suffrage."

Section 1 provides:

"The rights of citizens of the State of Utah *to vote* and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."

Section 2 provides:

"Every citizen of the United States, of the age of twenty-one years and upwards, who shall have been a citizen for ninety days, and shall have resided in the State or Territory one year, in the county four months, and in the precinct sixty days next preceding any election, *shall be entitled to vote* at such election except as herein otherwise provided."

Sections 3 and 4 deal with immunity from arrest and immunity from militia duty on election day. Section 5 provides that "electors" shall be citizens of the United States and Section 6 disqualifies insane

persons and certain criminals. Section 7 of Article IV then states:

“Except in elections levying a special tax or creating indebtedness, no property qualification shall be required for any person to vote or hold office.”

Assuming, without admitting, that Section 7 of Article IV of the Constitution permitted the legislature to restrict the votes in a leeway election to those who have paid a property tax in the preceding year, the legislature did not see fit to do so. (That said Section 7 does not permit the legislature to restrict votes in a leeway election will be discussed in sub-heading B. of Point 1.)

The following authorities indicate that where there is reference to the “manner” of holding an election or the “procedure” for holding an election, there is no reference to the subject of the qualification of the voter.

The case of *People v. Guden*, 75 N.Y.S. 347 (1902), dealt with a constitutional provision which read:

“Justices of the peace and district court justices may be elected . . . in such *manner* and with such powers and for such terms respectively as are or shall be prescribed by law;”

The court said:

“The ‘*manner*’ of election’ does not go to the question of what body of electors shall elect.”

In the case of *State vs. Zimmerman*, 187 Wis. 180; 204 N.W. 803 (1925), the question was whether the form of the ballot was intended to be included in the statutory words “that it shall be submitted in the *manner* provided by law.” The court held that the word “manner” had nothing to do with the form of the ballot. Certainly if “manner” does not include the form of the ballot, it does not include the qualification of voters.

The court said:

“... the Legislature prescribes that the question to be voted upon shall be presented in accordance with the act or resolution directing its submission, etc. Chapter 289 of the Laws of 1923 does not prescribe the form of the submission, but provides that it shall be submitted in the manner provided by law, etc. The manner of the submission is set forth in detail in said subdivision 8. This raises another question of construction, and involves the meaning of that portion of section 1 of article 12, in which the term ‘*manner*’ is used. In *Littell v. State*, 133 Ind. 580, 33 N.E. 418, it is said: ‘“*Manner*” signifies “mode of action, way of performing or affecting anything, method, style.”’

“In *Bankers’ Life Ins. Co. v. Robins*, 59 Neb. 174, 80 N.W. 486, it is said: ‘The manner of doing a thing has reference to the way of doing—to the method of procedure. * * *’

“In *People v. English*, 139 Ill. 622, 29 N.E. 678, 15 L.R.A. 133, the word ‘manner’ as used in section 5, art. 8 of the Illinois Constitution, indicates merely that the Legislature may provide by law the usual, ordinary, or necessary details required for the holding of the election.”

The court later said:

“Where a thing is required to be done in the manner prescribed by a certain section of an act, and if such section referred to includes the element of time and the element of form, then the term as used must be construed to mean both time and form. In legal parlance, in describing a certain procedure, the expression is often used, ‘in manner and form, etc.’, thus distinguishing and differentiating the two terms.”

In the case of *Livesly v. Litchfield*, 47 Ore. 248, 83 Pac. 142 (1905), the State Constitution gave the legislature the power to create municipal corporations by special laws and to prescribe by law the “manner” of the election or appointment of the officers thereof. The legislature created the City of Salem, Oregon, and included in its charter a provision prohibiting any person from voting at a Salem City election who

had not paid or was not exempt from the payment of a road poll tax for the year in which he should vote. The court held that when the Constitution gave the legislature the power to prescribe the "manner" of an election it did not give the legislature power to prescribe the eligibility of voters.

The court said:

"The authority given by section 7 of article 6 to prescribe 'the time and manner' in which municipal officers may be elected or appointed does not, we think, include the power to determine what shall constitute a legal voter."

The court then quoted from the case of *Coffin v. Elec. Commissioners*, 97 Mich. 188, 56 N.W. 567, 21 L.R.A. 662:

"The authority to direct the time and manner in which judicial officers shall be elected, and the other officers elected or appointed, does not involve the power to determine who shall constitute the electorate. The word 'manner,' it is true, is one of large signification, but it is clear that it cannot exceed the subject to which it belongs. It relates to the word 'elected.' The Constitution had already provided for electors, and when it provides that an officer shall be elected it certainly contemplates an election by the electorate which it has constituted. No other election is known to the Constitution, and, when it provides that the Legislature may direct the manner in

the Constitution providing that 'there may be a county superintendent of schools in each county, whose qualifications, powers, duties, compensation, and time and *manner of election*, and term of office shall be prescribed by law' (Const. art. 8, § 5), the court said that the word 'manner' as used in the constitutional provision 'indicates merely that the Legislature may provide by law, the usual, ordinary, or necessary details required for the holding of the election,' and not that it may determine the qualifications of voters. The term 'manner of election' has been given the same interpretation by other courts. Board of Education Commissioners v. Knight, 187 Ind. 108, 117 N.E. 565, 650; Livesley v. Litchfield, 47 Ore. 248, 83 Pac. 142, 114 Am. St. Rep. 920; People v. Guden, 75, N.Y. Supp. 347; State v. Adams, 2 Stew. (Ala.) 231."

As can be seen from the foregoing, there is ample authority from many states that the use of the word "manner" in providing how an election shall be held does not refer to the qualification of voters. There is also the language of Section 53-7-12, which says that the school board "shall follow the *procedure* in elections for the issuance of bonds so far as applicable." "Procedure" even more clearly excludes the question of qualification of voters. In our search for authorities on the meaning of these words there appears to be no case holding that "manner" of holding an election includes the qualification of electors.

POINT 1. B

TO CONSTRUE THE TERM "ELECTORS" AS SET FORTH IN THE LEEWAY ELECTION STATUTE TO MEAN "TAX PAYING ELECTORS" IS A STRAINED CONSTRUCTION AND WOULD BE IN VIOLATION OF OUR STATE CONSTITUTION.

Appellant in his brief relied particularly upon Section 53-10-11, Utah Code Annotated (1953), a part of the chapter dealing with bond elections, which section very clearly restricts the voting to those registered voters who have paid a property tax within the district in the year next preceding such election. Appellant then quotes from Sections 1, 2, 5 and 16 of Chapter 10, each of which sections specifically states that only such qualified electors as shall have paid a property tax shall be eligible to vote. The legislature, in providing for elections for the creation of an indebtedness, including the issuance of bonds, made it abundantly clear that the voters must be "tax paying electors." The emphasis placed upon the qualification of voters in an election creating an indebtedness is a clear indication that if the legislature had intended to limit the voting on a leeway election to "tax paying electors" it would have said so. The fact that there are "more than five references made to the requirement of property tax payments"

in the chapter on creating indebtedness, and that there is no such restriction in the leeway statute, is rather clear evidence that so much restriction was intended.

This court took the view in its opinion of December 31, 1962, that the reference to “tax paying electors” in Chapter 10, Title 53, demonstrated a legislative policy “in the closely analogous situations involving the incurring of indebtedness by school districts.” It is true that an affirmative vote in a leeway election does increase the tax burden, but it does not incur indebtedness; and it does not follow that the legislature intended to or must limit the voters in a leeway election to tax paying electors. There are many ways in which taxes are increased or decreased without a vote limited to “tax paying” electors. The legislature which controls the limit of indebtedness or the limit of taxes by counties, cities, other municipalities, and school districts, is elected by all of the registered voters or electors, as are county commissions, city commissions, and school boards. Yet these bodies control the amount of taxes.

As will appear from the reference to constitutional provisions covering qualification of voters and the right to vote quoted under subheading A., (page 9 and 10 of this brief), our Constitution has carefully guarded the right to vote. The legislature in Chapter

10 of Title 53 has carefully followed its prerogative to limit the electors to "tax paying" electors where an indebtedness will be incurred. No such clear intent can be found in the leeway election law, and we believe it to be a strained construction to apply the limitations on the right to vote, contained in Chapter 10 of Title 53, to leeway elections. We, therefore, strongly urge, as a matter of statutory construction, that there was no intention on the part of the legislature to place any limitation on the right to vote under Section 53-7-24.

Aside from the question of intent, it would be unconstitutional for the legislature to limit the right to vote at a leeway election to "tax paying electors." Article IV, Section 7 of our State Constitution provides:

"Except in elections *levying a special tax* or *creating indebtedness*, no property qualification shall be required for any person to vote or hold office."

See also Article I, Section 4 of our Constitution, the last sentence of which provides:

"No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution."

It is, of course, under the authority of these sections that the legislature had the authority in

Chapter 10, Title 53 to restrict the voting to those who had paid a property tax. The entire Chapter 10, by its heading, has only to do with "creating indebtedness." Since the leeway election does not create an indebtedness, the authority to restrict the voters is not based on the same reason or policy.

Then, it must be asked, is a leeway election an election "levying a special tax." Clearly it is not. A special tax is one levied for the purpose of benefiting property or special property. Taxes which are levied for carrying out the functions of the state are all general taxes. We refer to the case of *Madsen v. Bonneville Irr. Dist.*, 65 Utah 571, 239 Pac. 781 (1925) for the definition of a special tax. The tax involved in that case was a tax for the support of an irrigation district. The distinction between a general and a special tax is clearly set forth in head-note 6 of the case, as follows:

"MUNICIPAL CORPORATIONS 405—'SPECIAL TAX' DISTINGUISHED FROM 'GENERAL TAX.' A 'general tax' is considered a contribution for support of state, whereas a 'special tax' or local assessment is considered as compensation for special benefits to party paying."

That this is the general rule see 51 Am. Jur., Taxation, Sec. 27, p. 54

“As General or Special.—Taxes, particularly property taxes, are occasionally classified as general or special. This classification is made most commonly with respect to the distinction between the imposition known as a ‘special assessment’ and the customary annual tax imposed upon all property within the taxing district to provide revenue for the usual and ordinary day-to-day expenses of the government, the term ‘special tax’ sometimes being used as synonymous with the term ‘special assessment.’ With respect to general taxes, the government renders no return of special benefit to any property, but only secures to the citizen the general benefit which results from protection to his person and property and the promotion of various schemes which have for their object the welfare of all; on the other hand, special assessments or *special taxes* proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement.”

We submit, therefore, that our legislature has carefully followed the Constitution by limiting voters under Chapter 10 of Title 53 to tax paying electors because that is an election creating an indebtedness. It carefully did not limit the voters in a leeway election because it is not an election creating an indebtedness or levying a “special tax.” For this court to interpret electors to mean property taxpaying electors would be to put an interpretation on the statute that would put it in conflict with the constitu-

tion. This court has said, "It is elementary doctrine universally applied in this country that, if an act is open to two interpretations or constructions, one of which creates a conflict with some constitutional provision, while the other makes the act harmonious with the constitution, it is the duty of the courts to adopt the latter interpretation and construction." *Leatham v. Reger*, 54 Utah 491, 182 Pac. 187 (1919), see also *The Best Foods v. Christensen*, 75 Utah 392, 285 Pac. 1001 (1930), *Garfield Smelting Co. v. Industrial Commission of Utah*, 53 Utah 133, 178 Pac. 57 (1918)

Furthermore, the leeway election does not itself levy a tax, but only permits the board of education to maintain a certain school program in excess of a cost otherwise provided by statute. The election is not actually an election levying a tax. If the election carries, it is only permissive and the board of education then elects whether or not to increase the budget. In any event, the resulting tax is a general tax, not a special tax and no property qualification may be imposed.

POINT 2

IN THE EVENT THAT THIS COURT SHOULD DECIDE THAT THE TERM "ELECTORS," AS SET FORTH IN SECTION 53-7-24, MEANS THOSE ELECTORS WHO HAVE PAID A PROPERTY TAX IN THE YEAR PRECEDING THE ELECTION, THE ELECTION MAY NEVERTHELESS NOT BE INVALIDATED UNLESS THE PLAINTIFF HAS SHOWN THAT SUFFICIENT IMPROPER VOTES WERE CAST TO CHANGE THE RESULT OF THE ELECTION.

Point No. 2 is academic in this case should the court agree with our position on Point No. 1 that all registered voters may vote at a leeway election. While we sincerely believe such to be the law, we further believe that in the event that the court does not deem this to be the law, the mere fact that instructions were given that all electors might vote is insufficient to invalidate an election. We rely both upon our statute with respect to this matter and the general common law. Section 20-15-1 Utah Code Annotated (1953), provides:

"The election . . . to determine any proposition submitted to a vote of the people, may be contested: . . . (4) When illegal votes have been received, or legal votes have been rejected, at the polls sufficient to change the result."

The net result of advertising an election as permitting all electors to vote and instructing the judges that all electors may vote in the event that this court decides that electors means tax paying electors is that some votes, but not all votes, would be invalid. This question was not discussed in the opinion of the court on the Provo election. However, this proposition may be very simply applied. By way of illustration, the Board of Education of Salt Lake City held a leeway election in 1962 which was combined with a bond election. All electors were permitted to vote at the leeway election, but only those who had paid a property tax were permitted to vote on the bond election. The names of all persons voting on each question are a matter of record and have been preserved. There was a total of 10,600 votes on the bond election and a total of 10,815 votes on the leeway election. There were, therefore, only 215 more votes cast on the leeway election than on the bond election. The leeway election carried 8,413 in favor and 2,402 against. The bond election carried 8,421 in favor and 2,179 against. Prima facie, and assuming that only tax payers should have voted, there were only 215 illegal votes cast while the proposition carried by a majority of 6,011.

The foregoing figures assume that all those voting on the bond election also voted on the leeway election. With such a similarly overwhelming vote, it

would seem that this is a safe assumption to make. However, should one not care to indulge in the presumption, the records are available to show the names of all of the persons who were issued ballots and who voted in each election. It could, therefore, be demonstrated whether or not there were more than 215 supposedly ineligible votes cast in the leeway election.

The following cases support the general rule that an election should not be declared invalid unless it appears that there were enough illegal votes cast to change the result of the election.

The case of *Buckhouse v. Joint School Dist. No. 28*, 85 Mont. 141, 277 Pac. 961 (1929) dealt with a situation in which an election involving a school levy was attacked on the basis that those who voted in favor of the levy did not appear on the assessment roles and did not pay taxes on real estate for that year. The court in reply to this contention said:

“In the view we take of the case it is unnecessary to determine whether the 1927 or 1928 assessment role was the proper guide in determining the qualifications of the voters.”

The court took the position that this was so because:

“As before stated, there is no evidence in this case showing how the illegal votes were cast and no evidence showing that it was impossible to make this proof. The rule applicable here

was applied by this court in the case of *Atkinson v. Roosevelt County*, supra, where it is said: 'The burden not only rested upon the plaintiff to prove illegal votes cast, but to show how they were cast, for if the latter showing is not made by the evidence, how is the court to know what deductions to make from the votes cast? . . . It was incumbent on the plaintiff to show by a preponderance of the evidence the number of illegal votes received by Wolf Point in each precinct in which illegal voting was charged, and that number must be sufficient, if rejected, to change the result. Where the ballots cast by illegal voters are capable of identification or where satisfactory proof is given as to how the votes were cast, proper deductions should be made by the court so as to determine the correct result. But where votes are shown to have been cast illegally in a given precinct, neither the entire election nor that of a precinct should be annulled, if it may be by the court avoided under the facts. Each case, however, must be determined upon its own peculiar facts. The election must be sustained unless votes cast for a candidate are found to be illegal in number sufficient to change the final result.' "

In the Buckhouse case the judgment in favor of the defendant school district and the county officials was upheld.

The following statement is taken from the case of *Reitveld v. Northern Wyoming Community Col. Dist.*, Wyoming, 344 P. 2d 986 (1959):

“. . . an election is not to be set aside for mere informalities or irregularities unless they are shown to have affected the result of the election.”

They also had said:

“Every reasonable presumption will be indulged in favor of the validity of an election which has been held, and the one asserting that the election is irregular must bear the burden of showing that it is otherwise.”

Furthermore, a completed election cannot be invalidated without showing that sufficient improper votes were cast to change the result and that the improper votes cast, if rejected, would, in fact, have changed the result.

The general statement of position is contained in 29 C.J.S., Elections, Section 274, Page 394,

“Where an election is contested on the ground of illegal voting, the contestant has the burden of showing that sufficient illegal votes were cast to change the result, and of showing for whom or for what they were cast.”

In 1928 the Oklahoma courts in the case of *In re Incorporation of Town of Big Cabin*, 132 Okla. 200, 270 Pac. 75 (1928) stated:

“And where the [in]validity (sic) of elections is alleged on account of illegal voting, those

seeking to set aside the result, as declared by the election officials, have the burden of proof, not only that illegal votes were cast in sufficient number to change the result, but must show by whom and for whom or for what issue such votes were cast.”

In 1949 the Maryland court in the case of *Wilkinson v. McGill*, 192 Maryland 387, 64 A. 2d 266 (1949) stated:

“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 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, 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.”

In 1961, the Nebraska court in *Arends v. Whitten*, 172 Neb. 297, 109 N.W. 2d 363 (1961) stated:

“The answer of school district No. 39 was exactly the same as that of school district No. 88, except that it contained an additional allegation that certain persons voted at the said purported election who did not meet the qualifications required of an elector to vote at a school election. While evidence was introduced on this point, there is no specific assignment of error. In any event, we quote the following from *Mehrens v. Election Canvassing Board*, 134 Neb. 151, 278 N.W. 252: ‘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.’ This is a sufficient answer, because no attempt was made to show how the alleged unqualified voters actually voted.”

See also the cases of *Wadsworth v. Neher*, 138 Okl. 4, 280 Pac. 263 (1929); *Rosenbrock v. School District No. 3*, 344 Mich. 335, 74 N.W. 2d 32 (1955); *Thompson v. Cihak*, 254 Mich. 641, 236 N.W. 893 (1931); *Miller v. Miller*, 266 Mich. 127, 253 N.W. 241 (1934).

POINT 3

THE FORM OF NOTICE OF ELECTION AND PROPOSITION VOTED UPON WERE SUFFICIENT.

The notice of the election in the Provo School District was as follows:

“Shall the Board of Education of Provo City, State of Utah, be authorized to maintain a ‘voted leeway’ program as provided in Section 11, Chapter 104, Laws of Utah, 1961, not to exceed ten percent (10%) of the *minimum basic program* provided by law.”

The argument of the appellant on this point stressed particularly the form of the notice provided for in Section 53-10-3 Utah Code Annotated (1953), quoting subdivisions 1 through 4. Appellant emphasizes subparagraph (4) of Section 53-10-3 as a statutory provision not complied with in the notice. (See page 15 of appellant’s brief.) The brief there emphasizes by italics that the Notice should contain:

“(4) The amount of indebtedness which the board proposes to incur or create and for what purpose.”

Of course, there is no indebtedness created by a leeway election and there was, therefore, no necessity for complying with said subdivision (4)

of paragraph 53-10-3. Appellant goes on to say on page 16 that “the notice skillfully avoids any mention of a tax levy necessary to support the program.” There is no necessity for mentioning a tax levy when voting on the proposition set forth in the leeway election statute.

This court without following the argument of appellant with respect to the invalidity of the notice stated that it was invalid because there was a reference to the “minimum basic program” instead of the “basic” school program as defined by Section 53-7-16 (b). The notice did, however, expressly refer to “a ‘voted leeway’ program as provided in Section 11, Chapter 104, the Laws of Utah, 1961.”

It seems to us that a reference to the statute providing for the leeway program and actually giving the specific section is a sufficient notice.

In the case of *Kent v. School Dist. No. 28*, 106 Okla. 30, 233 Pac. 431 (1925) the opinion said:

“It is next contended that there was no statutory notice of the calling of the election as required by law. It is not claimed that notice was not given, but that the notice did not strictly conform to the requirements of the statute in defining the qualifications of the electors entitled to vote at such election. The

notice which was posted was introduced in evidence by plaintiffs and shows it to be the official form furnished for that purpose by the state superintendent. No effort was made and no tender of proof was offered to show that any person qualified to vote at the election failed to do so by (sic) reason of being misled or misinformed as to his rights to vote by the language of the notice. In *McCarty et al. v. Cain et al.*, 27 Okl. 82, 110 P. 653, this court announced the rule that:

‘Where a special election is assailed on the ground of lack of compliance with all of the statutory requirements in reference to notice, but there is no averment or showing that the electors did not have actual notice or knowledge of the election and failed to participate therein by reason thereof, the same will not be held void on this account.’

“This rule has been approved and followed in *Ratliff et al v. State ex rel*, 70 Okl. 152, 191 P. 1038; *Lowe v. Consolidated District No. 97*, 79 Okl. 115, 191 P.737; *State ex rel v. Sullivan et al.*, 80 Okl. 81, 194 P. 446; *Smith et al. v. State ex rel.*, 84 Okl. 283, 203 P. 1046. No distinction in principle exists between the instant case and those above cited. In the instant case the reason for the rule, in view of the objections to the notice, is somewhat strengthened by the legal presumption that all voters know the law, including that fixing the qualifications of voters in school district elections.”



It is hard to imagine that the electorate was influenced by the form of the notice. Usually the effect of an affirmative vote on an election is well publicized and voters are more influenced by the publicity and explanation of those who are for or against the program than by the form of the notice or ballot. We, of course, do not mean that the ballot may take any form. For those who wished to determine of their own knowledge what they were voting for, there was a reference to the precise section of the statute wherein the leeway election is provided for, and that section answers any question in the mind of an informed voter. It informs him of the precise question voted upon.

CONCLUSION

We respectfully request this court to grant a rehearing in this case. Whether or not the ultimate decision of this court is to reverse or sustain the trial court, we request a clarification of the opinion of December 31, 1962, on all of the points herein stated.

Respectfully submitted,

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