

A CONCURRING OPINION.

Associate Justice Harwood Delivers It in the Box Elder Case.

He Defines Questions of Practice and What Are Election Returns.

He Considers With Ex-Chief Justice Blake as to the Issuance of the Mandate Writ.

In the supreme court yesterday Associate Justice Harwood handed down an opinion concurring in the decision of the court in the Choteau county canvassing board case.

The opinion relates to the question of practice in issuing alternative writs upon the order of one justice and upon the question of what constitutes election returns.

The determination of this proceeding by an order for the issuance of a peremptory writ of mandate, was considered by all the members of this court, but upon a question of practice raised, there appears to be some difference of view.

At the commencement of the proceeding, on the affidavit of the relator, an order was made by the chief justice of this court, at chambers, in vacation, for the issuance of the alternative writ of mandate, returnable to the court, for hearing and determination by the court at a time designated.

The writ of mandamus, as defined by the statute of this state, is a mandate by a court of competent jurisdiction, "to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded, by such inferior tribunal, corporation, board or person."

The statute provides that the proceeding for mandamus shall be commenced "upon affidavit, on the application of the party beneficially interested," and prescribes two methods of bringing on the hearing of the application before the court.

One method prescribed is by the applicant giving at least ten days notice to the party about to be complained of, and applying for the writ will be made to the court, at the time and place stated in the notice.

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The most important point which arose in this proceeding, in my opinion, was the question as to what documents the county canvassing board must examine in constituting the election returns from the several precincts.

An important part of such returns is one of the two poll books kept by the clerks of election, wherein they enter the names of each elector as he appears, and his vote is admitted by the judges also showing the result of the canvases of the votes of each precinct by the judges and clerks thereof at the close of the election.

Under seal of his office, two classes of certificates of registration are provided for in the registration act. One class comprises certificates issued to qualified electors, who on account of a vacancy in the office of the registry agent of the district where they reside, are authorized to qualify before the registry agent of another registration district of the county, and receive from the latter agent a certificate of registration, and upon the production and surrender of such certificate, the elector holding the same is admitted in his own precinct.

The other class of certificates is called in the registration act "State Registry Certificates," and comprise those issued to an elector, after such elector has been registered in the district where he resides, and his name is entered on the check list of the elector holding the same is admitted in his own precinct.

Now, in relation to the returns of election, (in addition to one of the poll books of the precinct to be returned to the county canvassing board, as provided by the general election law,) the registration act provides as follows: "The copy of the official register, together with the check lists and election precincts as herein provided, shall be carefully preserved and duly certified to by the registry agent and delivered, together with the affidavits of objection, to one of the judges of election, in each election precinct, at a time not later than the day next

preceding that on which such election is to be held, and such check lists shall be carefully preserved, and any surrendered certificates which may occur in the hands of such registry agents pursuant to this act, and after election they shall be transmitted by the judges of election to the clerk of the board of county commissioners in connection and as a part of the election returns, as provided by law." (Section 10, registration act.)

It seems plain from the provision that the legislature in requiring the registration of all qualified electors, and that the votes should be received except on evidence of previous registration, shown by the check lists, or certificates of registration surrendered by the electors, and in further expression by providing that the check lists and certificates of registration which come into the hands of the judges from the registry agent shall be transmitted by the judges of election to the clerk of the board of county commissioners, in connection with and as part of the election returns, as provided by law, intended to place before the canvassing board, in the returns, the documentary evidence, showing the registration of the electors appearing from the poll book to have been allowed to vote at such precincts.

The statute of this state provides that in counting a statute, where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." (Section 550, code civil procedure.) Another rule laid down by our statute is that "in the construction of a statute the intention of the legislature, and in the construction of the instrument, the intention of the parties is to be pursued if possible." (Section 551, code civil procedure.)

It being clear that the legislature, by providing that check lists and certificates of registration mentioned should constitute the evidence of registration, in which the votes are received, as returned by the poll book, should be subject to examination by the canvassing board, as part of the returns, the majority of this court hold that such manifest intention should have effect. This was an important point in the case. The canvassing board alleged in its answer, as cause for rejecting the returns from said precinct, in effect, that the names of sixteen persons were not registered; and that "it is apparent from the returns that said persons were not entitled to vote at all at said election." If this was true, more than one-third of the forty-six votes returned by the poll book from said precinct were from persons who were not registered voters, and the returns would be void.

On demurrer to the answer it was contended that the canvassing board had no right to look at all the evidence of registration on which votes were received, as part of the returns, to see whether the list of the electors recorded in the poll book as having been registered, and the returns were made in accordance with a majority of the court, and the respondents were thus allowed to substantiate by proof the allegation of their answer, as to the pointing out of names between the registration lists and the vote returned by the poll book. But on the hearing of the canvassing board utterly failed to establish such allegation. On bringing in the check lists and certificates of registration surrendered to the judges of election, it was found that these documents showed the registration of a greater number of electors than was returned in the poll book as having voted at that precinct. There was no such discrepancy in the registration list falling short of the voting list by sixteen names, as alleged, or by any number whatever. The only support offered for that allegation was the pointing out of some differences in the spelling of names, as written by the registry agent, and by the clerks of election, or a difference occurring by way of changing initial letters for the Christmas season in one case, and writing it at length in the other, or the dropping of an initial, as "Henry Brough" in the registration list, and "Henry B. Brough" as recorded by the clerks of election in the poll book. However slight was such difference, it was seized upon as ground for alleging that the elector as to whom it occurred, was not registered. The majority of this court, and the question as to what constitutes election returns under the revisions of the statute.

The calendar in department No. 2 will be called on Jan. 14.

W. E. Phillips filed suit yesterday against Joel T. Smith to recover \$200 on two promissory notes and for \$70 attorney fee.

A suit was filed by Marion Sullivan against Will H. Clarke and J. H. McLaughlin to recover \$4,272 on a promissory note given by Clarke to McLaughlin and by him assigned to the plaintiff.

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Barrels in every line during the present week at the Bee Hive.

Trail Creek and Pennsylvania hard coal, and also wood for sale by the Montana Lumber and Manufacturing company.

COUNTY TAXES LIGHTER.

The Misleading Statements of R. Lockey Corrected by Hon. E. D. Edgerton.

Facts and Figures Showing Clearly an Economical Administration of Affairs.

Speculative Outside Property and Mr. Lockey's Opportunity—The Payment of Teachers' Salaries.

The attention of County Commissioner Edgerton was yesterday called to a communication from R. Lockey, published in the Independent of last Sunday. In his communication Mr. Lockey attacked the county commissioners for their management of county affairs, insinuating that it was just the reverse of economical. With a smile Mr. Edgerton said he had read the card, adding: "I will say that I would prefer to pay no attention to that portion referring to the commissioners, but I feel that it is only just to the property owners and residents of Helena that statements which are untrue regarding the subject of taxation should not go forth to the world at large uncontradicted. A comparison with the previous year and the rates of other counties is favorable rather than otherwise," he continued.

"Mr. Lockey is mistaken when he says that taxes of Lewis and Clarke county were increased last year. The fact is they were just one-half mill less beside the two mills for jail or any general tax, so far as any levy is concerned that could be controlled by the commissioners, than in 1891.

"The levy for the state, school, poor, roads, etc., were all the same as the previous year, except the item of county or general county expenses, and that in 1891 was one and one-half mills, and this year it was only one mill; and while referring to that, it may be well to say it covers about the only items of expenditures which are within the control of, or adjustment, to any considerable extent, of the commissioners. In other counties of the state this item ranges from three and one-half to twelve and one-half mills. Where Mr. Lockey has made his error is in regard to the special levy for school purposes in the first district, and just a word on that subject may be in order. Exclusive of a school tax of one-half mill, the school trustees asked the commissioners to levy three and one-half mills. This was refused, and only a levy of two and a half mills made. At the spring election of 1892, held April 3, the question was submitted to the voters as to whether an extra mill should be levied to furnish additional school facilities. The vote on that question was four-fifths in favor of this extra expenditure, so that it was the 'qualified voters' that increased the tax, and not the extra mill should be levied, and not the commissioners, the levy by the commissioners being the same in 1892 as it was in 1891—two and a half mills. Exclusive of a special tax for district No. 1, this one mill 'for additional school facilities' has only application to the city of Helena and not the county generally. In 1891 and 1892 such a levy was levied by the school trustees, under section 1905, to levy an extra mill on this district, for the purpose of 'paying interest on the school bonds and maintaining a sinking fund, so that, taking for the two extra mills which only applied to this district, for 1892 the general levy of the commissioners for this year would be six and a half mills. (This does not include a levy on outside property of two mills for general purposes, which last year it was seven mills, exclusive of jail. Last year the reduction in valuation was nearly \$5,000,000, or about 16 per cent.

"Without wishing to express any opinion regarding the management of school affairs in general, it would seem as though possibly there might be some more just criticism than that of having allowed the teachers and children a holiday. I certainly do not wish to be understood as offering any apology for the aid I have extended to school matters, nor, as a taxpayer, do I in any way regret the money expended in that direction.

"As to the subject of our debt, it certainly is somewhat astonishing, but the position which I took with regard to paying off the jail debt, instead of issuing bonds and calling upon posterity to help pay principal and interest, is clearly and honestly adopted. I believe in the principle of paying as we go, and I think if that principle was adopted a little more generally, instead of calling on the people generally to vote for a bond issue, useful expenditures would be avoided. However, in this connection, it might be well to note that of the \$90,000 paid for interest, only \$11,400 of it is for county purposes, \$24,000 for schools, and \$58,000 for city.

"The only undebated position taken by Mr. Lockey," concluded Mr. Edgerton, "is that unimproved outside property is taxed. The only answer that can be made to this proposition is the fact that at present, there is no law that exempts speculators from taxation, and taxes are one of the burdens of real estate speculations; but Mr. Lockey being in the legislature, it affords him a fine opportunity to remedy this defect, if it is in his opinion, unreasonable that outside property should be forced to contribute toward the support of the government, while it is not taxable at special rates, and may be well to note that the levy in this county, even while we were building our jail, with the two mill extra for that purpose, was lower than any county in the state, and the same is true of the present year."

One of the school trustees, referring yesterday to Mr. Lockey's statement that he was "informed" that the trustees had made the teachers' "present" of \$1,000 or \$1,200, said it would be well for this gentleman to look into the matter before he made such a misleading statement. "No present was made," continued the trustee; "the teachers were employed at so much per month; the trustees decided to close the schools for one week for the Christmas holidays; the teachers were there and ready and willing to work right along; it was not the fault nor desire of the teachers that they be laid off for a week under the circumstances; they were paid during the holiday recess, so were the Anneconda teachers, and if Mr. Lockey will take the trouble to inquire he will find that in every city in the east of any size the teachers are paid full salaries for the month in which the Christmas holidays come, whether they continue for one or two weeks. Perhaps Mr. Lockey really objects to a Christmas holiday recess. There is one way the trustees could have legally avoided the payment of the teachers for the whole month of December. They could have discharged them all on Dec. 23 and then employed those who remained Jan. 2. The trustees made neither present gift, nor donation—they simply paid the teachers of Helena what was their just due, as did St. Peter's parish school and the Methodist university."

Walter H. Little.

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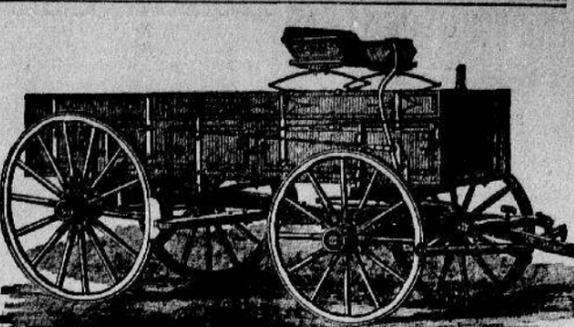
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