certain cases be used to designate "a spacious and elegant apartment for the reception of company, or for works of art; * * * to halls for public entertainments or amusements; also to apartments for specific public uses, as the saloon of a steam-boat," (Webst. Dict.;) but the meaning of the term or word as used by the legislature is well understood in this state. Its meaning is made plain enough by reference to the provisions in the body of the act: "It shall be unlawful for any person or persons, firm or corporation, engaged in the *business* of *selling any kind or kinds of spirituous or malt liquors by the glass or drink*, or engaged in carrying on or conducting any kind or character of gambling or games of chance, to open such place of business for the sale of such liquors, or for the prosecution of such games, at an earlier hour than 6 o'clock in the morning of each or any day, and no such person or persons, firm or corporation, shall sell or give away any such liquors, or continue or allow the continuance of any such games, in or about their respective places of business after the hour of 12 o'clock P. M. of each or any day, and all such places of business, excepting hotels, shall be closed between the hours of midnight and the hour of 6 o'clock the next morning of each and every day."

It is set forth in the complaint upon which petitioner was arrested that he was "engaged in the business of selling spirituous liquors by the drink," and that he did, at his place of business known as "Ozark Saloon," unlawfully sell spirituous liquors after the hour of 12 o'clock P. M. of the day therein named. Any one reading the provisions of the act will see at a glance that the business in which petitioner is engaged is one of the character intended to be reached by the legislature. The provisions of the act we have italicized show just what kind of saloons must be kept closed. It is therefore apparent that the word "saloon" in the title of this act is not misleading. The truth is that the character of the place to be closed, whether a saloon or gaming house, is to be determined by the kind of business transacted therein. In this respect we are of opinion that the act is not, and was not intended to be, any broader than the title.

The other objections urged by petitioner are wholly untenable. The act is not local or special, in the sense of the constitutional restriction upon this subject. It applies to all saloons and gaming houses throughout the state which come within the class mentioned in the act, and as to such classes and places of business it is of uniform operation throughout the state. Petitioner is remanded into custody.

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(12 Colo. 256)

## KELLOGG v. HICKMAN.

(*Supreme Court of Colorado.* Feb. 15, 1889.)

ELECTIONS AND VOTERS.

1. Gen. St. Colo. § 1199, provides that when two or more tickets shall be found folded together on counting votes at an election, they shall be rejected. Section 1281 provides that ballots shall be written or printed on paper of a certain quality and width without any other distinguishing mark or device, save the heading, and that it "shall be unlawful to print for distribution at the polls, or to distribute to any voter," any ballot not conforming to said regulations, but that corrections or insertions of names may be made in writing. Section 1282 provides that a ballot, with a designated heading, containing a name other than the name on the regular ballot having such heading, shall be rejected. *Held*, that ballots not conforming to the requirements of section 1281, as to the paper used, should be counted, as the language of the statute only makes it illegal to print or distribute such ballots, and not to vote them, and that construction should be adopted which is most favorable to the validity of an attempted exercise of the elective franchise. HELM, C. J., dissenting.

2. Gen. St. Colo. § 1200, provides that when the votes cast at an election shall have been recorded or counted, the ballots, together with one of the tally-lists, shall be returned to the ballot-box, which shall then be locked, and the seal marked with the private mark of each judge, each judge retaining a key. At an election, after the votes were counted and tallied, the judges separated without signing the lists. On the following day a messenger, with the box and lists, overtook one of the judges 20 miles from the election place, where he signed the lists, and delivered his key to the messenger. The latter returned the box and lists to the other judges, who, after signing the lists, placed one in the box, and again locked and sealed it. No fraud was intended or perpetrated. *Held*, that the irregularity did not vitiate the returns.

3. Evidence that a voter arrived at S., the place of his residence, on the 6th day of the month, bought a lot, and contracted for the building of a store-house on the 7th; that the house was built soon after; that about seven weeks afterwards he bought land for a home, and brought his family, who had been visiting friends, and resided thereon; that when he left his former home he had no other, and came direct to S., where he had friends, with whom he had corresponded with a view of locating there; and that he intended to locate there when he left, though he would have gone elsewhere if he had not been pleased with the country, —shows the residence of the voter to have been in Colorado on the 8th day of the month in which he arrived there, within Gen. St. Colo. § 1150, requiring a voter to have resided in the state for six months before the election at which he votes.

4. Another voter, an unmarried man, who sold out his business, and left his former home, arriving in Colorado on the 3d of May, with intent to remain, if he found a business to suit him; examined different locations, and selected one on the 15th of June, being all that time at different places in Colorado, where all the property he owned was after May 3d, excepting some debts due him at his old home; he registering at first as from his former home and afterwards as from a place in Colorado, —was a legal voter on the 8th day of November.

5. Where the evidence as to the residence of a voter shows that he was located on a pre-emption claim May 3d; that he boarded with a relative while building his house; that he had left his home in Missouri some time before, that his family arrived in Colorado in May, the exact date being uncertain; and that they continued to reside on the claim from that time,—it is error to hold his length of residence insufficient.

6. Under the statute mentioned a residence of but 10 days in the precinct is necessary to constitute a person a legal voter, and therefore the fact that such voter had resided in the precinct in which he registers less than six months will not of itself overthrow the presumption in favor of the legality of his vote.

Commissioners' decision. Appeal from Bent county court.

Henry Kellogg appeals from the decision of the county court declaring his competitor

T. J. Hickman, elected county treasurer of said county.

*J. C. Coad, Jas. M. John, E. O. Wolcott,* and *J. F. Vaile,* for appellant. *Patterson & Thomas, Way & Page,* and *J. F. Bostwick,* for appellee.

STALLCUP, C. The appellant was declared elected to the office of county treasurer of said county of Bent, at the election held November 8, 1887, by a majority of eight votes, over his opponent, the said appellee. The contestor alleged that illegal votes had been received and counted against him; also that votes had been illegally received and counted against him, to his detriment. And the contestee alleged that illegal votes had been received and counted against him. The case was tried by the county judge of the said county under the provisions of the act approved April 10, 1885. From the votes received and counted for appellant, who was the contestee, deductions were made by the said county judge as follows: From the vote of Sheridan Lake precinct, 48 votes, on account of color and width of ballot, 10 of the same being held illegal on the additional ground of insufficient residence of the voters in the state; from the vote of Wilde precinct, 30 votes, on account of irregularities of the judges of election there, 9 of the same being held illegal, on the additional ground of insufficient residence of the voters in the state and precinct; and from other precincts, three votes on the ground of insufficient residence of the voters,—in all 81 votes, deducted from those counted for appellant; and from the votes received and counted for appellee, 8 votes were deducted, on the ground of insufficient residence and other disqualifications of the voters. Whereupon judgment was given for the said appellee from which the case comes here on appeal. It is contended here for appellant that the court erred in all of the said deductions from the count for appellant.

1. Of the 48 votes of Sheridan Lake precinct, it appears that from a mistake in the directions the regular party ticket, by which appellant was named for the office of county treasurer, failed to reach the voting place of that precinct. Whereupon the tickets for said party were there printed on pale yellow paper, 3¼ inches wide, containing, along with the other candidates of said party, the name of appellant for said office of county treasurer, this paper being the nearest to the kind prescribed by the statute there obtainable upon which to print the tickets. Forty-eight of these tickets were accordingly voted, received, and counted at this precinct. The good faith of the transaction is not questioned. Section 1199 of our General Statutes provides that when it shall be found, on counting votes, that two or more tickets have been deceitfully folded together, such tickets shall be rejected. Section 1281 provides as follows: "All ballots shall be written on plain white paper, or printed with black ink, with a space of not less than one-fifth of an inch between each name, on plain, white news printing paper, not more than two and one-half inches, nor less than two and three-eighths inches, wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the tickets; and it shall be unlawful for any person to print for distribution at the polls, or distribute to any elector or voter, any ballot printed or written contrary to the provisions hereof; but this section shall not be considered to prohibit the erasure, correction, or insertion of any name by pencil or with ink upon the face of the printed ballot." And section 1282 provides as follows: "When a ballot, with a certain designated heading, contains printed thereon, in place of another, a name not found on the regular ballot having such heading, such name shall be regarded by the judges as having been placed thereon for the purpose of fraud, and such ballot shall not be counted for the name so found." By the statute it is unlawful to print or distribute tickets other than the kind prescribed in said section 1281. It is also declared that in the case described in said sections 1199 and 1282, the judges of election shall not count the votes. No other cases are mentioned in which the judges of election are expressly authorized not to count the votes received. There is no claim that any fraud was intended or perpetrated in the premises.

I see no warrant in the statute for deducting these votes from the count. The courts are without authority to declare such penalty against the voter until the legislature shall have declared that the act of voting such ballot shall be unlawful, and that such ballot, if voted by the elector, and received by the judges, shall not be counted, and, in the absence of legislation to this effect, the courts may not declare as much. The right to vote under our constitution is a vested constitutional right, with no condition imposed as to the manner of exercising the right, except that the vote be by ballot. That a right so vested and exercised—a vote so offered and received—may be defeated by force of legislative enactment at all, may be doubted. See Daggett v. Hudson, 54 Amer. Rep. 832, and note. However, conceding that an enactment expressly declaring against voting, against counting, or knowingly receiving, ballots other than those prescribed may be sustained, still it seems clear that the exercise of such right by the elector may not be nullified by force of a strained and doubtful construction of an enactment containing no such expressions. Such expressions are found in the enactments on this subject in California, Mississippi, and Texas, and the exclusion of the prohibited ballots in those states, therefore, rests upon such direct expressions. See Reynolds v. Snow, 67 Cal. 492, 8 Pac. Rep. 27; Steele v. Calhoun, 61 Miss. 556; Owens v. State, 64 Tex. 509. The California statute provides that no ticket shall be used at an election, or circulated on the day of elec-

tion, unless it is of a particular description prescribed, and it further provides that when a ballot, contrary to such description, shall be found in any ballot-box, it must be with all its contents rejected. The enactment of 1880 of the state of Mississippi is like ours in this regard, except that it provides that a ticket different from that prescribed shall not be received nor counted. And the enactment of 1879, of the state of Texas, is also similar to our statute in this regard, with the exception that it provides that any ticket not in conformity with the act shall not be counted. I find no case, and I think none can be found, where the deduction of such votes from the count is allowed in the absence of legislative expression against counting or receiving the same. It will be seen that the enactment under consideration does not in terms prohibit the elector from voting a ticket printed on paper different from that prescribed; nor does it declare against the counting or receiving of any such ticket. The parties voting at an election are considered by some courts as parties to a contest of this kind. Hopkins v. Olin, 23 Wis. 319; People v. Pease, 27 N. Y. 45. However this may be, it will be conceded that the rights of the electors voting are necessarily involved in contests of this kind; that their rights in the premises may not be ignored; that, to warrant the courts in depriving them of their votes as a result or penalty for having voted ballots printed upon paper different from that prescribed, there must be legislative expression to that effect. It is contended that it was the intention of the legislature, by the enactment under consideration, to deprive them of their votes when so cast, and that such intention is apparent from the act, notwithstanding the want of expression in this regard, and that such intention should govern, in order to give effect to this provision of the act. It was stated in the oral argument that this section 1281 was taken from the Ohio act upon the same subject. Upon examination of that act, I find that it declares that it shall be unlawful to publish, distribute, or vote a ticket different from the ticket prescribed. The prohibition against the voter, being omitted in the act here, is significant in that it tends to show that the legislature here did not intend to defeat the vote of an honest voter honestly voted, even if his ticket was of different paper from that prescribed, but did intend the provision in this regard for his protection in the premises; that is to say, the legislative intention to be gathered from the language used seems to be that no ballot except the kind prescribed should be printed or furnished to the voter, to the end that his ballot might be secret, and that he might be clear of restraint or imposition of any kind in the exercise of his right of suffrage. Upon a fair consideration of the statute it is not apparent that the legislative intent was to nullify such votes. See Gilleland v. Schuyler, 9 Kan. 587; McCrary, Elect. (3d Ed.) §§ 190–193. Inasmuch as section 1281 is an almost literal rescript of the Ohio statute, it has been suggested that there has been error in transcribing. The Ohio statute declares that "it shall be unlawful for any person to * * * distribute to any elector, or vote, any ballot printed or written contrary to the provisions hereof." Section 2948. Section 1281 provides that "it shall be unlawful for any person to * * * distribute to any elector or voter any ballot printed or written contrary to the kind prescribed." An examination of the enrolled act shows no error by the printer or publisher. The printing and punctuation are correct. No one can say that section 1281 is not as complete and grammatical as the Ohio act. If the change was unintentional, it is certainly not apparent on its face. It appears to be the deliberate act of the general assembly, and it would be a most dangerous precedent for the courts to assume to change the express terms or language of a perfectly constructed statute, as changing a noun to a verb, and altering the punctuation, in order to correct the supposed errors of the lawmaking power. Such corrections must be made by legislative, and not by judicial, authority. Bishop, on Statutory Crimes, § 199, says: "The circumstances will be rare in which any court will so extend an enactment by construction as to involve penal consequences not within the express words." To attempt to correct section 1281, or give it the construction proposed, would be to declare the voting, as well as the distribution of such ballots, to be unlawful, and would at least involve the penal consequences of disfranchisement to the voter, and the loss of lawful votes to the candidate. The courts are inclined to restrict the exceptions which expressly exclude the ballot, rather than to extend them, and to admit the ballot if the spirit and intention of the law is not violated, although a literal construction would vitiate it. State v. Phillips, 63 Tex. 393; Druliner v. State, 29 Ind. 308; Stanley v. Manly, 35 Ind. 275; Kirk v. Rhoads, 46 Cal. 399. Courts should not extend an enactment by construction beyond the expression of the act, so as to deprive an elector of his right of suffrage. When such consequences are involved, the courts go not beyond the expression of the act. To deprive legal voters of their votes, after they have been in good faith by ballot cast and counted, without express statutory mandate therefor, would be an advance beyond all precedent, and, as I think, in violation of correct principles. 2 Bouv. Law Dict. 318.

2. As to the votes of Wilde precinct. There were 30 of them, and all for appellant. The judges had duly counted and tallied the votes, and had put the ballots into the ballot-box, and sealed up the box, but had failed to sign the tally-lists or poll-books until the next day after the election, when one of the judges had departed; whereupon a messenger was sent with the said tally-lists or poll-books after said judge, who was overtaken

by said messenger, out on the prairie, 20 miles distant from the voting place, where he signed the said tally-lists, and gave them, with his key to the ballot-box, to said messenger, who returned them to the other two judges, who, at the house of one of them, signed the said tally-lists, opened the said ballot-box, and put one of the said lists therein, and locked and sealed the said box, and regularly forwarded the same. It is clearly shown by the evidence that no fraud was perpetrated, that no changes were made, nor injury of any kind inflicted, and there is no evidence to show that any fraud or wrong was intended in the premises. Section 1200, Gen. St., provides that when all the votes shall have been recorded and counted, the ballots, together with one of the tally-lists, shall be returned to the ballot-box, and the opening in the glass part thereof shall be carefully sealed, and each of the judges shall place his private mark on said seal. The wooden cover shall then be locked, and each of the judges shall preserve one of the keys thereof. I think it contrary to right and reason, as well as to the authorities, to deduct these votes from the count by reason of such irregularities on the part of the judges on the day after the election, and barren, as they were, of harm to any one, and that the court erred therein. McCrary, Elect. (3d Ed.) §§ 187–194; Preston v. Culbertson, 58 Cal. 198; Gilleland v Schuyler, supra.

3. Referring, now to the votes deducted from the count for appellant, on the ground of insufficient residence in the state.

*First.* H. A. Jones. This voter testified at the trial, and stated that he arrived from Iowa at Sheridan Lake, on the 6th day of May, 1887, bought a lot in Sheridan Lake on the evening of May 7th, and agreed with the town company to erect a building for a hardware store on another lot, to be donated to him, and to do the same within 30 days; that he put up the hardware store, and in the meantime bought a relinquishment to a claim in the precinct, with a house on it, and when his family came, on June 26th, he moved out to the claim, and was still living there at the time of the election and at the time of the trial. When he arrived at Sheridan Lake it was his intention to make that place his home. After leaving Iowa, he had no home for his family until he bought the relinquishment. His wife was visiting in Kansas. He had leased his house in Iowa. He left Colorado in May, for his family, and returned in June. In the cross-examination the following appears: "*Question.* Now, Mr. Jones, when you started from Iowa to come west, you was not sure where you would locate? *Answer* In one sense of the word I was. I had friends in Sheridan Lake with whom I corresponded, and I expected to locate. *Q.* You came out there, then, to see your friends, or to see the country? *A.* I came there with the intention of seeing my friends and the country. Yes, sir; I expected to see them. *Q.* You would not have located there it it had not suited you, would you? *A.* No, sir; I do not think I would. *Q.* If you had not liked the country you would have gone where? *A.* To Iowa, I suppose. *Q.* To stay, would you? *A.* No, sir; I do not think I should. I would have looked elsewhere, I think." And there is nothing in the evidence contrary to the testimony of this voter. By section 1150 of our General Statutes, as to residence, it is provided that a voter shall have resided 6 months in the state, 90 days in the county, and 10 days in the precinct where he votes. Did the 6-months residence of Jones in the state of Colorado commence as early as the 8th day of May? The domicile or residence, in a legal sense, is determined by the intention of the party. He cannot have two domiciles at the same time. When he acquires the new home, he loses the old one; but to effect this change there must be both act and intention. McCrary, Elect. § 62. There must be the act of severance from the old place, with the intention of uniting with the new place. The intention should be gathered from the acts of the party. The acts of Jones were as follows: (1) From his prior home, in Iowa, he wrote to his friends at Sheridan Lake, Colo., with reference to locating there. (2) He leased his house in Iowa, terminating his residence there, and left his wife visiting in Kansas, while he proceeded to Sheridan Lake, in Colorado, arriving there on the 6th day of May. (3) On the 7th day of May he bought a lot at Sheridan Lake; also agreed with the town company to erect on another lot there a building, and put a hardware store thereon, the same to be done within 30 days, upon which the said lot was to be donated to him by the said town company. (4) The erection of a hardware store. (5) The buying of the relinquishment of a claim near by for a home. (6) Going for his family, returning, and continuing to live there with his family. That Jones had terminated his residence in Iowa, and commenced his residence in Colorado, on the 7th day of May, and that such was his intention, is clearly established from the acts enumerated. The fact that he answered, in the cross-examination, that he would not have stayed in Colorado if he had not liked it, is of no significance, for it is apparent from his acts that before the 8th day of May he had thought well enough of Colorado to conclude to cast his lot with her people; and all his acts thenceforward verify the fact that such was his intention. It follows that Jones commenced his residence in the state of Colorado on May 7th, and that he was a legal voter at the said election, and that the court erred in deducting his vote from the count.

*Second.* W. A. Laffaty. This voter testified that he resided at Sheridan Lake; was cashier of the Citizens' Bank there; came to Colorado on May 3, 1887; before coming to Colorado resided in Illinois, where he was handling a stock of general merchandise; sold out the said business, and left Illinois

April 29th, and came direct to Colorado. His intention was to become a citizen of Colorado, and had never changed such intention. On May 3d he was at the railroad house in La Junta, Bent county, Colo., and consulted with Killgore & Seeley there; was looking up a place of business; went from there to Lamar, Bent county, and went to Sheridan Lake June 15th, and lived there ever since; had no family. When he first went to La Junta, he registered from Illinois; when he went to Lamar, he registered from La Junta; and when he went to Sheridan Lake, did not register at all. On cross-examination, he stated that since May 3d he had no interest in real or personal property outside of Colorado, except notes and accounts at Alexis, Ill.; that he came to Colorado to engage in business; was not certain he would engage in business until he had made up his mind to go into the banking business; did not know that he would have stayed in Colorado if he had found no business that suited him; if he had found business in some other state that suited him better, would have gone there; commenced to build his banking-house July 15th; had been waiting some time for lumber to do the work with. Before deciding to go into the banking business at Sheridan Lake, had not decided what business he would go into, nor in what town. On redirect examination, he stated that after his arrival at La Junta, May 3d, he did not give the matter of going into any other state or territory any thought or consideration; had no fears or doubts at any time after he first came to La Junta as to being able to find a permanent location in Colorado. Between the time of going to La Junta and the time of locating at Sheridan Lake, he resided in Colorado, at the following places: Cheyenne Wells, Kit Carson, Manitou, Denver, and Pueblo; and there is nothing in the evidence contrary to this testimony. Did this voter's residence in Colorado commence as early as May 8th? The act of changing from Illinois to Colorado was consummated May 3d. That such was the intention is verified by every act thenceforward. This voter had no family. His first residence or domicile in Colorado was at La Junta. While there he had no other. So, too, with the other places he resided at previous to his permanent location at Sheridan Lake, in June or July. The domicile or residence in the state may commence before a definite county or precinct is fixed for a permanent residence. Jac. Dom. §§ 133, 134. As to the six-months residence required by statute, if the purpose of remaining in the state be clearly proved, a particular home is not necessary. Whart. Confl. Laws, § 58; Story, Confl. Laws, § 46. It follows that the said Laffaty commenced his residence in Colorado May 3d, and was a legal voter at the said election in November, and that the court erred in deducting his vote from the count.

*Third.* A. D. Bortle. From the evidence it appears that this voter was located on a pre-emption claim in the precinct where he voted on the 2d or 3d day of May, 1887. That he and his family lived there, and continued to live there, at the time of the trial. That he boarded with the witness and with a brother-in-law there, while building his house on his claim; went to meet his family, who had been on their way out to Colorado, and were then at Leoti, Kan.; was gone for his family four or five days. That he and his family moved into the house on the claim during the month of May. That the former home of Bortle was in Missouri. From the testimony of one witness it appears that Bortle's family arrived as early as the 6th day of May; that they stopped at his house on arrival in the precinct. There is nothing in conflict with, nor contrary to, this evidence, except a slight difference as to the date of the arrival of the family. Bortle was not called to testify, though shown to be within reach of the process of the court. I see nothing to cast a doubt against the sufficiency of Bortle's residence to constitute him a legal voter at the said election. The court erred in deducting his vote from the count.

*Fourth.* Frank J. Barnes. It appears that this voter was registered as residing on section 22, township 26. A witness testified that he did not live on said section as early as the 8th day of May, 1887. Another witness testified that he knew said Barnes, and saw him in the precinct in September, and that he resided there; and this is all that is shown of him by the evidence.

*Fifth.* John W. Gwin. It appears that this voter was registered as residing on section 31, township 37; and a witness testified that there was no one living there as early as May 8th. Another witness testified that he knew the said Gwin, and that he resided in the precinct; and this is all that is disclosed of him by the evidence.

*Sixth.* Emmet W. Smith. It appears that this voter was registered as residing on section 33, township 37, and a witness testified that Smith was not living there as early as May 8th. Another witness testified that he knew said Smith, and that he resided in the said precinct; and this is all that is disclosed of him by the evidence.

*Seventh.* J. Elzen. There was an ineffectual attempt to show that this voter did not live on the claim shown by his registration to be his place of residence.

As to the last four of these seven voters, the evidence concerning them seems to have been given upon the impression that a residence of six months in the precinct was necessary. The registration occurring but a short time previous to the election, the precinct in which the voter then resided would, of course, appear as his place of residence, such registration showing simply where he resided when registered. There is nothing in the evidence, touching these four voters, to show that they had not been *bona fide* residents of the state for six months previous

to the said election, as well as residents of the county and precinct, the requisite time. It is certainly clear that the presumption in favor of the legality of their votes in this regard is in no way, nor to any extent, overcome by the evidence.

*Eighth.* O. H. Perry. From the testimony given by this voter it appears that he arrived from Chicago, Ill., at the precinct of Arlington Springs in said county of Bent, on the 9th day of May; that he had been elected president of a company there, and came to attend to the business: that he broke up housekeeping when he left Illinois, and had made his home in the precinct from the time of his arrival. His wife was visiting in Rochester, N. Y. He came to the state to make some money in the real estate business; voted at the said election, but did not know for whom he voted. His politics were the same as the politics of the appellant. On the morning of the election he was presented with the tickets of both parties, and put them in his pocket. On his party ticket which he intended to vote, he scratched the name of the candidate for justice of the peace. He took the ticket from his pocket, and voted it, but afterwards found the said scratched ticket in his pocket, and thus discovered that he had not voted the ticket he intended to. What ticket he did vote, or for whom he voted, he knew not. There was no evidence to the contrary. The tickets of this precinct were lost or destroyed, so that it was impossible to ascertain how this voter had voted, by the identification of his ticket from the number on the ticket, and the number to his name on the poll-lists. The court held the vote illegal, and accordingly deducted one vote from the count for appellant. In so deducting one vote from the count for appellant the court erred, for the reason that there was no evidence to show that the vote had been cast or counted for appellant. See McCrary, Elect. (3d Ed.) § 460.

As to the remainder of the 22 votes of this class deducted from the count for appellant, I think the evidence sufficient to sustain the findings of the court, against a large portion of them, on the question of residence. As to the eight votes deducted from the count for appellee, no question was made as to the court's findings thereon in the argument. However, I think the evidence clearly sufficient to sustain the findings of the court thereon as to all except one, viz., L. H. Herne, of which there may be room for doubt. The evidence does not make it clear as to the time this voter terminated his residence in Kansas. It appears from his testimony that he was a man with a family, residing in Abilene, Kan., and was interested in a drug-store there, that he came to Colorado, May 1st, and looked around a couple of weeks for a location. About the middle of May he went back to Kansas to close out his interest in the drug-store there. He did so then, and broke up housekeeping there, when the drug-store was sold. He returned to Colorado, and his wife went visiting until he could send for her. It does not appear that the act of terminating his residence in Kansas had occurred until after the 8th day of May. He could not have his residence in Colorado while he had one in Kansas. The residence there must terminate before the residence here can commence. The evidence tends to show that he did not terminate his residence there until he sold his drug-store interest there, which was after May 8th. So it does not appear that the court's finding is against the evidence touching this voter.

It follows that appellant had a legal majority of at least two votes; that the said errors of the court below were prejudicial to the appellant; and that the judgment should be reversed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is reversed.

HELM, C. J., (*dissenting.*) I feel reluctantly constrained to dissent from the views expressed and the conclusion reached by a majority of the court. In so doing I adopt the following opinion, which is almost *verbatim* the one prepared by Commissioner DE FRANCE, concurred in by Commissioner RISING, and reported in this case to the court. I believe it to be the sounder exposition of the statute under consideration. The manner of voting at elections in this state is by ballot, and the law-making power has at least attempted to prescribe what kind of a ballot should be used, so far as its material and color, and also its width, if printed, are concerned. Section 1181 requires it to be a "paper ticket," but the color of the paper and the width of the ballot are matters that were left to the choice of the electors, or of the respective political parties that usually have the ballots prepared and printed for distribution and use upon election day. With no further provision as to the ballot in this respect than that it should be a "paper ticket," the door was left open for such practice, not to say abuse, as had a tendency to defeat the primary object of the ballot system, namely, its secrecy. The law thus stood until 1883, when section 1281, in connection with other provisions, was enacted. The purpose of such enactment is not to be doubted. It was to afford the voter a better security for the secrecy of his ballot than then existed. The 48 ballots in question in this case were printed ballots, printed on yellow paper. The provisions of this section prohibit the use of any other than plain white news printing paper for printed ballots. The width of the ballot is provided for, allowing some latitude therein. The law prescribes what a lawful ballot shall be, and its essential purpose is to prohibit the use of a ballot which, from its color, width, or any device or mark thereon, may be readily distinguished, by its back, or in