For the foregoing reasons the judgment of the district court must be reversed, and the cause remanded for a new trial.

Reversed and remanded.

STEELE, C. J., and GABBERT, J., concur.

(39 Colo. 258)

LEHMAN et al. v. PETTINGELL, County Clerk, et al.

(Supreme Court of Colorado. March 4, 1907.)

1. MANDAMUS — ELECTIONS — CANVASS—COMPELLING CANVASS.

The board of canvassers of a county may be compelled by mandamus to count the returns in all the precincts of the county, and issue the certificates in accordance therewith, where but one set of returns is made from each precinct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 154, 155.]

2. SAME.

The board of canvassers of a county adjourning without completing its work may be compelled by mandamus to reconvene to make a canvass of the returns from all the precincts of the county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 154.]

3. ELECTIONS—RETURNS—IRREGULARITIES.

The judges of election of a precinct did not receive in time for use on election day the poll books required by law. The clerks and judges kept a list of the voters, and made a tally of the votes on sample ballots, and they certified the result of the election, though the oaths were not taken in the manner and form prescribed by law. The returns were delivered by one of the judges to the county clerk within a few days after the election. The judges in good faith undertook to certify the true result of the election. *Held*, that the irregularities in the returns did not invalidate them, and the board of canvassers must canvass them and issue certificates in accordance with the result.

4. MANDAMUS — COMPELLING CANVASS OF VOTES AT ELECTION—PARTIES—STATUTES.

Under Code Civ. Proc. § 10 (Mills' Ann. Code), providing that all persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, a candidate for sheriff, and a candidate for treasurer of a county, may join in a petition for mandamus to compel the board of county canvassers to canvass the returns of the precincts of the county.

Error to Grand County Court; J. W. Swisher, Judge.

Mandamus by Henry Lehman and another against J. N. Pettingell, county clerk, and others, to compel defendants to canvass the returns of an election. There was a judgment for defendants, and plaintiffs bring error. Reversed.

Henry J. Hersey and Arthur C. Labrie, for plaintiffs in error. John T. Bottom and D. P. Howard, for defendants in error.

STEELE, C. J. The defendants constituted the board of canvassers of Grand county, and, after the election in the year 1906, sat as such board of canvassers, and made a partial canvass of the returns of the judges of election in Grand county, and caused certificates of election to be issued. The plaintiffs were the candidates for sheriff and county treasurer, respectively. An alternative writ of mandamus was issued, which sets out certain facts with reference to the conduct of the canvassing board in failing to canvass the returns from precinct No. 5 of said county. We shall not undertake to set forth in detail the contents of the writ, but the important facts stated therein are that the judges of election did not receive in time for use on election day the poll books required by law to be used at the election, and that the clerks and judges kept a list of the voters, and made a tally of the votes on sample ballots, and that they did certify to the result of the election, although the oaths do not appear to have been taken in the manner prescribed by law, nor in the form required by statute; that the returns were delivered by one of the judges of election to the county clerk within a few days after the election; that one of the members of the canvassing board proceeded to the precinct for the purpose of having the returns corrected so as to meet the requirements of the statute; that thereafter one of the judges of election, who had not signed the corrected returns as prepared by the member of the board, because of his absence from the precinct at the time after the election when the corrected returns were signed by the other judges, proceeded to the county seat, and there offered to sign the returns, but that the county clerk, for the alleged reason that the canvassing board had adjourned, refused to allow the said judge to sign the said amended returns. The writ of mandamus commands the defendants to reconvene and canvass the returns from said precinct, and to issue certificates of election in accordance with the canvass. It also appears from the writ that, if the said returns from said Fifth precinct are canvassed, the result of the election as certified by the canvassing board will be changed, and the canvass will show that the said Henry Lehman and James C. Mugrage were elected to the offices of sheriff and treasurer, respectively. The answer of the defendants denies generally the statements of the alternative writ, and, for a further answer and affirmative defense, they allege that the said returns are not signed by the registrars who made the registration, and they set forth many instances in which the judges and clerks have failed to comply with the statute in respect to the conduct of the election and the certification of the returns. They also allege that the returns show 65 votes as having been cast at said election, and that the voters in said precinct do not exceed 32; that it appears from the registration list, as filed by the said judges and clerks of election that a large number of persons appear on the certificate of registration who reside in some other precinct than that of said precinct No. 5; that a large number of persons are certified to as having voted at said election who were not naturalized citizens of the United States.

A demurrer to the answer was overruled. The court proceeded to hear testimony on the part of the defendants, stating that he did not desire to hear testimony on the part of the plaintiffs. At the close of the testimony, the court denied the petition, and dismissed the writ with costs. The case is brought here by plaintiffs upon writ of error. The court appears to have based his judgment dismissing the writ upon the ground that the canvassing board having adjourned could not be required by law to reconvene for the purpose of making another canvass; that the board, after it had made a canvass and certified the result, had no power to reconvene, and that courts cannot compel them to do what they are powerless to do themselves. It is conceded that two of the persons who had been appointed as registrars of election by the board of county commissioners signed the returns from this precinct. There do not appear to have been any other returns received from said precinct, and the board of canvassers refused to count and canvass the returns from precinct No. 5 solely because the certificates and oaths are not in the form prescribed by statute, and because the returns are not upon the proper blanks required by statute to be used for such purpose.

The only question, then, for our determination is whether a board of canvassers has any discretion to refuse or reject returns because of irregularities, when there is but one set of returns made, and the result of the election can be determined from an inspection of such returns. This question, in so far as the power of the board of canvassers to consider any other matter than that contained in the returns, has been decided by this court in the case of Kindel v. Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234. In that case the court, in passing upon the eligibility of the county clerk and recorder to sit as a member of the canvassing board in canvassing the returns of an election at which he was a candidate for re-election, said: "In the case before us, the power exercised by the canvassing board, of which contestee was one member is purely ministerial, or, as has been otherwise expressed, mathematical. The only power conferred, and the only duty required, of the canvassing board in relation to the canvass, is to count the votes based upon the returns as made by the election judges, and to give certificates to those receiving a majority of the votes thus ascertained. The canvassing board cannot go beyond or behind the returns, or reject votes, or otherwise inquire into the validity or conduct of the election. Upon the proposition that such duties are, in no sense, judicial, the authorities are uniform." Under this authority, the duties of the board of canvassers are held to be purely ministerial, and their only duty is to count the votes as certified by the judges from the respective precincts, and to issue certificates to those who appear from the returns of the judges to have received the greatest number of votes cast at the election. And it was the duty of this board to have canvassed and certified the returns from all of the precincts of this county and to have issued certificates in accordance with the canvass. In a case where there are two sets of returns presented to the canvassing board, each purporting to be based upon a count of votes by judges and clerks of election, it then becomes the duty of the board to select which in their judgment are the genuine returns, and to make a canvass; and in so doing they are vested with certain discretionary power. But, where but one set of returns is made, they have no discretion, their duties are purely ministerial, and they may be compelled to act by mandamus upon proper petition and showing. The fact that the board may have adjourned without completing its work we do not regard as material. The board can be compelled by mandamus to reconvene to make a canvass of the returns from all the precincts whenever it appears by proper petition that they have failed to do so. If returns are in such condition that the result of the election cannot be determined, the board cannot be compelled to canvass such returns; but in this case it appears very clearly that the judges have shown the number of votes received for each candidate upon the ticket, and, although the returns are not in the form required by law, still it can be determined at a glance what the result of the vote was in this particular precinct. Nor do we think that the irregularities shown to exist in these returns constituted a sufficient reason for the refusal of the board to make a canvass of them. The rule is that irregularities by the judges of election in the certification of their returns do not invalidate the returns, unless they are in such a state as to render it impossible to ascertain from them the vote cast, and for whom cast, but that such returns must be canvassed and certified by the canvassing board. McCrary on Elections, §§ 412, 413. Any other rule would enable canvassing boards, through design or incompetency to temporarily, at least, defeat the will of the people, and to compel persons who had received a majority of the legal votes to institute contest proceedings, entailing great expense and delay upon the person elected. If, as alleged by the respondents in the answer, a large number of persons voted at said election who were not legal voters, the statute provides a means for excluding their votes, but the canvassing board has no authority so to do, and such votes can only be excluded in a contest proceeding. It is said that if we allow these returns to be canvassed that it will open the door for a great fraud, and that any person may file with the county clerk certificates of election certifying to almost anything. It is not charged in this case that the judges of election committed fraud in the certification of the returns, or that persons other than the judges of election cer-

tified these returns, and it does appear that two of the persons who had been appointed as registrars of election, whose duty it was to serve as judges of election, signed these returns, and it further appears to us that these judges have in good faith undertaken to certify the true result of the election in the precinct, and, in our opinion, it was the duty of the board to canvass the returns of the judges, and to issue certificates in accordance with the result.

It is stated that the writ should have been dismissed because there was a misjoinder of parties plaintiff, in that said action cannot be properly maintained by said plaintiffs jointly, and that there is a nonjoinder of parties plaintiff, in that said cause should have been brought in the name of the people of the state of Colorado, upon the relation of said plaintiffs. The authorities do not sustain counsels' contention that the action must be brought in the name of the people of the state. Stoddard v. Benton, 6 Colo. 508. The two candidates who are vitally interested in the result of the election, and whose rights were affected by the action of the canvassing board, join in an action to compel a proper canvass to be made. Their interests are identical. They ask for the same relief. The remedy afforded each is the same, and, under section 10 of the Code of Civil Procedure, providing that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, the plaintiffs were properly joined.

For the reasons given, the judgment of the county court is reversed.

CAMPBELL and MAXWELL, JJ., concur.

BOARD OF COM'RS OF MONTEZUMA COUNTY v. WHEELER.

(Supreme Court of Colorado. March 4, 1907.)

1. COUNTIES—OFFICERS—ACTION FOR SALARY—COMPLAINT—SUFFICIENCY.

Where a complaint, in an action by a superintendent of irrigation against a county to recover for services, alleged that he was the superintendent of irrigation of a certain water division, which division embraced certain counties therein named, it was sufficient, and it was not necessary to allege that the counties so named were all the counties in the division.

2. SAME—EVIDENCE—SUFFICIENCY.

Where, in an action by a superintendent of irrigation to recover for services rendered, he testified that there were three counties, including M. county, in the water division where water had been adjudicated, and where he did the work, and that he made no bill against the counties in which there had been no adjudication of water rights, there was sufficient evidence, in the absence of proof to the contrary, to support the finding that M. county was liable for its pro rata share of his fees as such superintendent.

3. APPEAL—PRESUMPTIONS.

Where, in an action by a superintendent of irrigation to recover for services rendered, there was no proof that the water was used upon any land in any of the other counties in the water division than certain counties named, the court on appeal, in the absence of such proof, could not assume that the water was so used.

4. OFFICERS—TITLE TO OFFICE—COLLATERAL INQUIRY—ACTION FOR SALARY.

Mills' Ann. St. § 2447, provides that the Governor shall not appoint a superintendent of irrigation in any district until the board of county commissioners of some one or more of the counties whose territory or a part thereof is included in such district shall adopt a resolution requesting such appointment. A superintendent of irrigation for a certain district was appointed by the Governor, and, having filed his oath of office and bond, entered upon the discharge of his duties. *Held*, that the question as to whether or not he was rightfully appointed, there being no resolution as provided for by section 2447, could not be determined in an action brought by him for his salary.

5. COUNTIES—CLAIMS AGAINST—INTEREST.

Mills' Ann. St. § 2252, provides that creditors shall be allowed to receive interest when there is no agreement as to the rate thereof on money due on account from the date when the same became due at a certain rate. Section 2254 provides that county orders and warrants and other like evidences or certificates of indebtedness shall bear a certain rate of interest. *Held*, in an action by a superintendent of irrigation against a county for services rendered, that he was not entitled to recover interest on the amount of his claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 335.]

Appeal from District Court, Montezuma County; James L. Russell, Judge.

Action by Henry C. Wheeler against the board of commissioners of Montezuma county. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

S. W. Carpenter, for appellant. Reese McCloskey, for appellee.

BAILEY, J. This appeal is from a judgment in an action brought by appellee, Wheeler, to recover from appellant $265, and interest at the rate of 8 per cent. per annum from the 1st day of January, 1900, being an alleged pro rata portion of the fees and expenses claimed by appellant for his services as superintendent of irrigation in water division No. 4. Defendant filed a general demurrer to the complaint, which was overruled. Defendant then filed its answer, containing a general denial and a separate defense. Plaintiff moved to strike the second defense, for the reason that the same did not state facts sufficient to constitute a defense to plaintiff's cause of action; the effect of this motion being that of a general demurrer. This motion was sustained. The case went to trial on the complaint and general denial. Judgment was rendered for plaintiff in the sum of $316 and costs. Defendant appeals.

The matters relied upon for the reversal of the judgment are, first, the insufficiency of the complaint and of the evidence either to state a cause of action or support the findings and judgment; second, the action of the court in sustaining plaintiff's motion to strike