a review of the evidence to determine its sufficiency. Defendant's case has been in charge of at least four different counsel during its progress through the three courts; each one appearing at different stages therein. This may account in some measure for the unsatisfactory and incomplete state of the bill and the record proper. We do not say that, if the questions raised were properly before us, the case should be reversed. It is enough to say that the judgment must be, and is, affirmed, because defendant is not in a position here to be heard upon her objections.

Judgment affirmed.

MUSSER and WHITE, JJ., concur.

PEOPLE v. TURPIN et al.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. ELECTIONS (§ 73*) — QUALIFICATIONS OF VOTERS—CHANGE OF RESIDENCE.

Voters at an election to consolidate school districts came to the state in August, 1908, and bought a farm in one of the districts with the intention of making it their home, but the farm being occupied they returned to their former home in another state until March, 1909, when they removed to the farm purchased and resided there, voting at said election in November, 1909. *Held*, that they were not qualified voters, not having resided within the state for one year.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. § 73.*]

2. ELECTIONS (§ 73*) — QUALIFICATIONS OF VOTERS—RESIDENCE.

To effect a change of residence from one state to another qualifying one as a voter, there must be an actual removal, an actual change of domicile, and a bona fide intention of abandoning the former place of residence and establishing a new one, and the acts of the parties must correspond with such purpose. This intention to make the state they removed to the place of their permanent residence is to be gathered from their acts, declarations, and other circumstances.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. § 73.*]

3. ELECTIONS (§ 73*) — QUALIFICATIONS OF VOTERS—RESIDENCE.

To constitute a change of residence qualifying one to vote the abandonment of the old residence must be actual, and the mere intention to change the domicile, unaccompanied by an actual removal, avails nothing.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. § 73.*]

4. ELECTIONS (§ 293*)—CONTESTS—EVIDENCE —COMPELLING VOTERS TO TESTIFY.

In the contest of an election not held under a system in which the ballots could be identified, certain persons who voted having been declared unqualified, they could be compelled to testify as to how they voted, and other evidence could be taken for the same purpose, as the secrecy of the ballot applies only to qualified voters.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 291–293; Dec. Dig. § 293.*]

5. APPEAL AND ERROR (§ 843*) — REVIEW — QUESTIONS NOT NECESSARY.

On appeal from a decision sustaining the validity of an election, the appellate court having decided against the qualifications of two persons who voted, and this necessitating a reversal, it would not consider other questions pertaining to the regularity of the election, qualification of voters and constitutional questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. § 843.*]

En banc. Error to District Court, Mesa County; Sprigg Shackleford, Judge.

Proceedings by the People by R. M. Logan, District Attorney, against R. E. Turpin, as president and others as officers of a school district. From a judgment in favor of defendants, plaintiff brings error. Reversed.

R. M. Logan, Dist. Atty., Wheeler & Weiser, and R. D. Thompson, for the People. Straud M. Logan and N. C. Miller (Henry J. Hersey, of counsel), for defendants in error.

HILL, J. This action was brought under section 289 of Mills' Annotated Code to determine the right of the defendants in error to hold certain offices, the existence of which depends upon the validity of an election for the consolidation of certain school districts in Mesa County. Elections were held in three school districts under an act of the Legislature approved May 5, 1909 (Laws 1909, c. 204), entitled, "For the consolidation of adjoining school districts," etc. This proceeding pertains, in part, to the election upon this question in district No. 32, known as "Pomona School District in Mesa County" in which the judges of election canvassed the votes and declared that 62 had been cast for, and that 60 had been cast against such consolidation. After the results of these elections were announced (all of which were for consolidation), the defendants in error, at their union meeting (called as provided for by the act) were elected as the president, secretary and treasurer of the consolidated district to be known as "District No. 38," and they entered upon their duties as such.

The prayer of the complaint is that judgment be entered decreeing that the defendants and each of them are unlawfully and illegally usurping the office of school directors of said consolidated school district No. 38, and that they and each of them be ousted therefrom and ordered to desist from further attempting to exercise such offices; that the organization of the so-called consolidated school district be declared illegal; that the defendants be enjoined from further acting as a school board for said so-called school district No. 38, etc. Among other reasons alleged why this prayer should be granted is the claim that at said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

election in district No. 32 there were 5 illegal votes or ballots cast, received and counted for consolidation, which were included in the 62 votes declared by the judges to have been cast in favor of consolidation; that a majority of said qualified electors of said school district did not cast their ballots for consolidation; that it did not carry at said election by a majority of the votes cast, etc.; that on account thereof said consolidated school district No. 38 had not been organized and created according to law, etc. The answer denied in detail the allegations concerning the illegal votes. Trial was to the court. At the conclusion of plaintiff's testimony, a motion for a nonsuit was granted and the case dismissed. Numerous errors have been assigned. We will only consider those pertaining to the validity of the votes cast by a Mr. and Mrs. Wooliston, as the court's ruling thereon will necessitate a reversal of the judgment.

This election was held upon November 16, 1909. The substance of the Woolistons' testimony given at the trial (upon May 5, 1910) is to the effect that they moved from Phillips, Neb., to a fruit farm in this school district between the 7th and 10th of March, 1909, when they shipped their household goods and other effects from Nebraska to Grand Junction and at once moved them out to this place. Until they moved their effects direct to Grand Junction in March, 1909, they had not lived at any other place in this state, but had lived at Phillips, Neb.

Upon cross-examination it was shown that they first came to Colorado in August, 1908, stopped in Denver a few days; from there went to Colorado Springs; thence to Grand Junction, where they stayed four or five days, during which period they bought this farm. It being occupied, they did not get possession of it at that time, and after their four or five days' sojourn at Grand Junction, they returned to their home in Nebraska where they continued to reside between six and seven months. In cross-examination it was shown that prior to coming here in August, 1908, they had decided to locate in Colorado in the future and came here in August, 1908, for the purpose of looking up a location; with that object in view they, at that time, purchased this farm in the Pomona district for the purpose of making it their future home; but they both testified that after this purchase they went back to Nebraska and lived there until they came here in March, 1909; that at the time of the purchase of the farm they left no personal effects in Colorado. Mr. Wooliston was asked, "Did you live in Phillips, Neb., until you moved direct to Grand Junction in March, 1909?" He answered, "Yes, sir; I did." Referring to this question he was further asked, "Had you lived in Colorado previous to coming here at that time—had you resided in Colorado previous to moving here in March?" His answer was, "No, sir; I had lived in Nebraska, but I had intended to buy here. I had come out here and bought a place in August before." Upon cross-examination he stated he bought this place to make it his home, and that when he bought it he did elect to make that his home; that at that time he had no home except his rented home in Nebraska. Upon redirect examination he stated that he first made his home here about the 7th of March; that he did not become a resident here until 1909, but that he had the place and was intending to come here; that between the date of the purchase in August, 1908, and March, 1909, he resided back in Nebraska, and that he did not reside here until he moved here in March, 1909. He further stated that after his purchase here, his purpose in returning to Nebraska was to prepare to return to Colorado.

Upon the question of intention, in response to the question, "Had you been advised by any one that you was a qualified voter at that election?" Mrs. Wooliston answered, "I was given the impression by people whom I thought knew. I had never read up on the state law of Colorado, but it was my impression that had we had the intention of residing in the state for a year, that we were entitled to vote at a school election at any rate." From this undisputed testimony, we conclude that Mr. and Mrs. Wooliston, who were husband and wife, did not become residents of this state until they moved here (in March, 1909) for the purpose of making this their permanent home, for which reasons at the time of the election they had not resided within the state a year, as required by our Constitution. In the case of Jain v. Bossen, 27 Colo. 427, 62 Pac. 195, this court said: "The requirements of the law on the qualification of electors are mandatory, and must be strictly observed."

All the authorities point to the fact that, to effect a change of residence from one state to another, there must be an actual removal, an actual change of domicile, and a bona fide intention of abandoning the former place of residence, and establishing a new one and the acts of the parties must correspond with such purpose. This intention of the parties to, at that time, make the state they removed to the place of their permanent residence is to be gathered from their acts, declarations, and from a variety of other circumstances. If a citizen of one state, in good faith, gives up his residence there, goes to another state, and takes up a permanent residence therein, he at once loses his former residence and acquires a residence in the new domicile, but it must appear that he has left the former state with the intention of then giving up his residence there.

In the case of Sharp v. McIntire, 23 Colo. 99, 46 Pac. 115, referring to the construction to be given the residence qualification provided by our Constitution, as it then read,

this court said: "We think the residence therein contemplated is synonymous with 'home' or 'domicile,' and means an actual settlement within the state, and its adoption as a fixed and permanent habitation; and requires not only a personal presence for the requisite time, but a concurrence therewith of an intention to make the place of inhabitancy the true home; and that one who has made a home or domicile in some other state or territory where his family reside cannot, by a sojourn here on business or pleasure, however long, without abandoning such former domicile, acquire a residence in the constitutional and statutory sense."

It is earnestly urged by the defendants in error that the facts pertaining to the voters Jones and Laffaty in the case of Kellogg v. Hickman, 12 Colo. 256, 21 Pac. 325, are similar to those here, and hence that case is decisive of this one. We cannot agree with this contention. Pertaining to the voter Jones, the court said: "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. * * * 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." Referring to the voter Laffaty, the court said: "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." Referring to which it was further stated: "The domicile or residence in the state may commence before a definite county or precinct is fixed for a permanent residence. * * * 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."

In the case under consideration the particular home to be secured in the future was decided upon; it was purchased in August, 1908, but it was understood that possession could not be secured at that time. It is true, these people intended to make it their home in the future, to establish their residence there at a later period. The fact was then settled in their minds as to where their home in Colorado would be when it became established, to wit, when they gave up their home in Nebraska and located here. This could not be done so long as they were maintaining a home in Nebraska, which they had not yet abandoned. Neither the intent nor the act of doing so was perfected because the intent in this case referred to a future date, and the physical act itself was not accomplished until some future date, so that the facts urged in the case of Kellogg v. Hickman, supra, are not applicable here. This is further demonstrated by the questions asked both Mr. and Mrs. Wooliston as to when they did establish their residence in Colorado, and as to when they moved here, to both of which they frankly answered, in March, 1909.

The facts pertaining to the voter Herne in the case of Kellogg v. Hickman, supra, are more in harmony with the facts here. In speaking of this the court said: "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."

It stands undisputed that at the time the Woolistons first came to Colorado they had not abandoned their residence in Nebraska and after staying here but a few days while making the purchase of the farm, they again returned to the state of Nebraska where they continued to occupy their home there for a period of about seven months, at the expiration of which time they abandoned it, shipped their goods to Colorado, and came themselves, which was in March, 1909, when they moved out upon this property, at which time, and not before, both the act and intent were consummated by which they became residents of the precinct as well as of the state. When one has a residence either of origin or of choice he must abandon it before he can acquire another, and to effect this there must be both act and intention. There must be the act of severance from the old place with the intention of uniting with the new place, and these must concur. 10 Am. & Eng. Enc. of Law (2d Ed.) p. 599. The abandonment of the old residence must be actual. The mere intention to change the domicile, unaccompanied by an actual removal, avails nothing. State v. Hallett, 8 Ala. 159; Smith v. Croom, 7 Fla. 81.

A very recent case where the facts were similar to those under consideration is that of Welsh v. Shumway, 232 Ill. 54, 83 N. E. 549, where numerous cases are cited, all of which are in harmony with our conclusions here.

The case of State v. Hallett, supra, is directly in point. At page 161 of 8 Ala., in

speaking to this point, the court said: "Here the facts were that the defendant, being domiciled in Georgia, came to this state with the design of settling here, and manifested his intention of making this state his permanent residence, by leasing a piece of land, procuring materials for the erection of a foundry, and going to Georgia to bring his family. These acts all mark, unequivocally, his intention to change his residence from Georgia to this state. These facts, however, are not sufficient to cause a loss of the domicile he previously had. If, on his return to Georgia, he had died before being able to carry his purpose into effect, it can admit of no doubt, the courts of Georgia, and not of this state, would have been entitled to distribute his estate."

The above conclusions are applicable here. In case Mr. Wooliston, after returning to his home in Nebreska had changed his mind and decided that he would not return to Colorado, would any one have questioned his right to vote there? Likewise, had he died before returning, the courts of Nebraska, and not of this state, would have been entitled to distribute his personal estate. The evidence having established that Mr. and Mrs. Wooliston were not entitled to vote, it follows that the trial court misconceived the legal effect of their testimony and erred in not requiring them to answer how they voted. By our present system of voting at general elections under what is commonly called the Australian ballot system, in cases of this kind the ballots cast by these voters could have been secured, identified, and rejected; but as our school laws do not so provide, and the evidence showing that no record was kept by which any ballots cast at this election could be identified, the testimony of the voter was then competent. The law protecting the secrecy of the ballot is only intended for lawful voters, and does not apply to or protect illegal voters, who, when that fact is shown, can be forced to testify as to how they voted. Article 7, § 9, Const. Colo.; Black v. Pate, 130 Ala. 514, 30 South. 434. Montgomery v. Dormer, 181 Mo. 5, 79 S. W. 913; Van Winkle v. Crabtree, 34 Or. 462, 55 Pac. 831, 56 Pac. 74; Vallier v. Brakke, 7 S. D. 343, 64 N. W. 180; State ex rel. v. Kraft, 18 Or. 550, 23 Pac. 663; Lane v. Bailey, 29 Mont. 548, 75 Pac. 191.

It is true, if it is not shown that the vote was illegal, the voter cannot be compelled to answer how he voted; but if illegal, in addition to compelling him to answer, other evidence may be received and considered on the subject. Black v. Pate, 130 Ala. 514, 30 South. 434; Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240; Welsh v. Shumway, 232 Ill. 85, 83 N. E. 549; Sorenson v. Sorenson, 189 Ill. 179, 59 N. E. 555; People ex rel. v. Pease, 27 N. Y. 45, 84 Am. Dec. 242; People ex rel. v. Teague, 106 N. C. 576, 11 S. E. 330.

Other errors are assigned, some pertain to the validity of other votes, others urge constitutional questions, while others pertain to the regularity of this election in other respects, etc.; but inasmuch as the ruling upon the two votes heretofore considered compels a reversal of the judgment, and, if they were cast as counsel claim they were, and the way the record as a whole appears to indicate, it makes unnecessary the consideration of any of the other questions urged.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed.

CLARK et al. v. HUFF.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. TAXATION (§ 761*)—TAX SALE—SALE OF NONCONTIGUOUS TRACTS EN MASSE.

A tax deed recited that the following described property—describing a number of noncontiguous tracts—was subject to taxation for the year 1892, and that the county treasurer did expose to public sale in substantial compliance with the statute the property above described, and Y. having offered a certain sum, being the whole amount of tax, interest, etc., then due on said property for the whole of each tract or parcel, of the above described property, which was the least quantity bid for, and payment having been made, the property was stricken off to him. *Held*, that the deed showed a sale en masse for a gross sum of noncontiguous tracts separately assessed, and was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1510–1513; Dec. Dig. § 761.*]

2. TAXATION (§ 804*)—ACTION BY PURCHASER—LIMITATIONS.

A tax deed, void on its face, is not entitled to the limitation of five years under the statute relating to the recording of tax deeds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 804.*]

3. QUIETING TITLE (§ 10*)—PLAINTIFF'S TITLE—EVIDENCE TO SUSTAIN ACTION.

Where, in an action to quiet title, plaintiff's title is put in issue by the answer, he must prove title in himself.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

4. QUIETING TITLE (§ 47*)—PLAINTIFF'S TITLE—NONSUIT.

If plaintiff, in action to quiet title, does not prove title in himself, motion for nonsuit should prevail.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 47.*]

5. QUIETING TITLE (§ 37*)—ANSWER PLEADING TITLE.

In an action to quiet title, an answer that defendants were the owners in fee simple by title from the United States was a sufficient plea of the nature of their interest to put plaintiff to proof of his title; it not being necessary to plead the evidence.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 78; Dec. Dig. § 37.*]

6. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF—POSSESSION.

Where, in an action to quiet title, the answer is sufficient to put plaintiff to proof of his title, he must prove possession, coupled with title, and proof of possession alone, unless ad-