of police power is substantially in excess of the reasonable expense of issuing a license and of regulating the occupation to which it pertains or is virtually prohibitory, the ordinance imposing the tax is void. 25 Cyc. 610.

[7] It is the natural and constitutional right of every citizen to engage in any lawful business he may choose, subject only to such reasonable regulation as may apply alike to all persons engaged in the same kind of business, and an ordinance or statute that unduly discriminates or prohibits a citizen from the exercise of such right because he may not be a taxpayer or own or control a building for the purpose is void. The equal right to honestly earn a livelihood is first and paramount and cannot be denied by statute. As supporting our conclusions, see Smith v. Farr, 46 Colo. 379, 104 Pac. 401; Leonard v. Reed, 46 Colo. 311, 104 Pac. 410, 133 Am. St. Rep. 77; Wilcox v. People, 46 Colo. 382, 104 Pac. 408.

For these reasons we must hold the ordinance to be unfair, unreasonable, discriminatory, and prohibitive, and therefore in violation of the Constitution and void.

The judgment is reversed.

WILEY v. McDOWELL.

(Supreme Court of Colorado. June 2, 1913.)

1. ELECTIONS (§ 180*)—BALLOTS—INTENTION OF VOTERS.

The intention of the voter must be ascertained according to the statutory rules prescribing the manner in which voters may mark ballots for the candidates intended to be voted for.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151–155, 157; Dec. Dig. § 180.*]

2. ELECTIONS (§ 180*)—BALLOTS—INTENTION OF VOTERS—EVIDENCE.

Under Rev. St. 1908, § 2236, authorizing any voter desiring to vote a straight ticket to write within the blank space thereinbefore provided for the name of the party, ballots containing complete Democratic, Republican, and Progressive tickets and containing Roosevelt and Bull Moose tickets with no candidates for county officers cannot be counted for the county Republican and Progressive candidates when merely marked in the space by the words "Bull Moose" or "Roosevelt"; the Progressive party indorsing the Republican party candidates for county officers.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151–155, 157; Dec. Dig. § 180.*]

3. ELECTIONS (§ 291*)—CONTESTS—COUNTING OF BALLOTS—BURDEN OF PROOF.

One instituting an election contest has the burden of proving that the ballots have not been tampered with before the court may order a recount of the ballots.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. § 291.*]

In Banc. Error to Gunnison County Court; George Hetherington, Judge.

Election contest by Elmer Wiley against E. H. McDowell. There was a judgment for the latter, and the former brings error. Reversed and remanded, with instructions.

Sapp & Nash and J. M. McDougal, all of Gunnison, for plaintiff in error. E. M. Nourse and Crump & Allen, all of Gunnison, for defendant in error.

HILL, J. At the last general election the parties to this action were rival candidates for the office of county commissioner for Gunnison county. The plaintiff in error was the candidate upon the Democratic ticket. The defendant in error was the candidate upon the Republican and Progressive tickets. The canvassing board found that the defendant in error had received the highest number of votes, and issued to him the certificate of election. The plaintiff in error instituted this contest, alleging that a certain number of ballots sufficient to change the result (giving the number, precincts, etc., in detail) in which the voter wrote either the word "Roosevelt" or "Bull Moose" in the space intended to be filled out in order to vote a straight party ticket, and in which no cross or other mark was made opposite the name of the defendant in error, were counted and returned for the defendant in error; that the defendant in error was not upon the Bull Moose or Roosevelt tickets; that neither of said parties placed in nomination, or had, any candidates in Gunnison county for the office of county commissioner. These facts were established. The court in its findings so declared, but was of opinion, although the defendant in error was not upon the Bull Moose or Roosevelt tickets, but was only upon the Republican and Progressive tickets, that these ballots should be counted for him and he so ordered, making his findings and reasons therefor, as follows: "That, considering the form of the ballots and the general and prevalent opinion among electors that the Progressive, Bull Moose, and Roosevelt parties and tickets were identical, it therefore was clearly the intention of the electors voting the straight Bull Moose and Roosevelt tickets to vote the Progressive county ticket, unless otherwise marked, and, said ballots not being so marked, it was clearly the intention of the 14 voters casting them to have intended to vote for contestee, and therefore said 14 Bull Moose and Roosevelt ballots should be counted for said contestee McDowell, giving him a majority of eight votes." In this respect the trial court was in error.

[1, 2] Elections are regulated by statutes. General Section 2236, Revised Statutes, 1908, in part reads: "Any voter desiring to vote a straight ticket may write within the blank space above provided for, the name of the party whose ticket he may wish to vote, and any ballot so cast shall be counted for all the nominees upon said ticket, except when the voter has marked opposite the name or names of any individual candidate of some

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

other party, which individual marks opposite such individual candidate shall count for them, and shall not be counted for the candidates for the same office upon the ticket whose party name the voter has so filled in the blank at the head of the ticket." In Nicholls v. Barrick, 27 Colo. at page 442, 62 Pac. at page 205, this court said: "The intention of the voter, as expressed upon the face of his ballot, has always been regarded as the cardinal principle controlling the count. Under a system providing for balloting like the Australian, it is necessary that certain rules be prescribed to prevent confusion and secure uniformity. By this means the intention of the voter is to be ascertained." These principles have repeatedly been recognized and followed in this jurisdiction. Young v. Simpson, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254; Heiskell v. Landrum, 23 Colo. 65, 46 Pac. 120; Rhode v. Steinmetz, 25 Colo. 308, 55 Pac. 814. It appears to be the universal rule in all states which have adopted the so-called Australian system, as said by the Supreme Court of Iowa in Whittam v. Zahorik, 91 Iowa, 23, 59 N. W. 57, 51 Am. St. Rep. 317, whether a ballot should be counted does not depend solely upon the power to ascertain and declare the choice of the voter, but also upon the expression of that choice in the manner provided by the statute. To put it in another way, as was said in Vallier v. Brakke, 7 S. D. at page 354, 64 N. W. at page 184: "The statute having prescribed the manner in which the elector may designate by marks upon his ballot the candidate for whom he intends to vote, and declared the effect of such marks, neither the judges of election nor the courts are authorized to go beyond those marks in order to ascertain the voter's intention." It was alleged, and sought to be shown that the Progressive, Bull Moose, and Roosevelt tickets were the same and represented the same party, and that the candidates on each of said tickets for state officers were the same persons, and a vote cast for any one was a vote for the same party as either of the others; that the words "Progressive," "Bull Moose," and "Roosevelt" each meant and were understood by the voters to mean the same party; that while in Gunnison county the Progressive was the only one which filed a separate and distinct petition indorsing the Republican county ticket and candidates, thereby placing in nomination as their candidates the same as those already upon the Republican ticket, that it was the same in fact as if separate petitions had been secured and filed representing each of said names, for which reason that the electors who wrote either the word "Roosevelt" or "Bull Moose" in the space in the ballot to be filled out in order to vote a straight ticket intended thereby to vote for the county candidates on the Republican and Progressive tickets, and did so vote. We cannot accept this conclusion. In McCrary on Elections (3d Ed.) § 507, it is said: "While it is true that evidence aliunde may be received to explain an imperfect or ambiguous ballot, it does not by any means follow that such evidence may be received to give to a ballot a meaning or effect hostile to what it expresses on its face. The intention of the voter cannot be proven to contradict the ballot, or when it is opposed to the paper ballot which he has deposited in the ballot box." In People v. Seaman, 5 Denio (N. Y.), at page 412, in commenting upon this subject, the court said: "The intention of the elector cannot be thus inquired into when it is opposed or hostile to the paper ballot which he has deposited in the ballot box. We might with the same propriety permit it to be proved that he intended to vote for one man when his ballot was cast for another; a species of proof not to be tolerated."

To adopt the theory of the defendant in error would be to hold that, although an elector had properly voted a particular ticket in the manner and form provided for by statute, he intended thereby, not only to do that, but also to vote for a candidate whose name was not upon that ticket, but which was upon another ticket, for the reason that he understood that the three tickets and parties were one and the same. This would be to ignore the provisions of the statute in their requirements as to how an elector shall vote in order to have his ticket counted, and also to say regardless of all such requirements that in a contest an elector or others would be permitted to say that they presumed certain people were upon certain tickets when they were not, and that on account of such presumptions their ballots should be counted for them for the reason that they intended to vote for them, even though they did not. The fallacy of this argument and the danger which it might lead to is apparent from this record. The only witnesses called to prove that the voters in Gunnison county understood and believed that the Progressive, Bull Moose, and Roosevelt tickets were one and the same, and that it was not necessary to place county candidates upon but one of these tickets in order to have them cover all three, were a Mr. Whipp and a Dr. Sanford. Their testimony was substantially as follows: Mr. Whipp was asked: "Q. I will ask you to state if it was generally known throughout the length and breadth of the state of Colorado that they were identical, through your reading of newspapers and other discussions publicly made in regard to these parties. A. If there was any distinction, I never discovered it." The witness also said that he was a Republican judge in precinct No. 1 and acted as a Progressive; that they had some straight ballots in that precinct marked "Roosevelt" or "Bull Moose," but that they did not count them for the Progressive county ticket. Dr. Sanford was asked, "Q. I will ask you to state to the

court if you know what relation the organization or party, so-called Bull Moose and Roosevelt parties, bore to the Progressive party—what relation did they bear to each other? A. They were identical, sir. Q. I will ask you to state whether it was a matter of general knowledge and generally known to the people throughout this county and state that persons voting for the Bull Moose or what is known or called the Bull Moose or Roosevelt parties thereby voted for the candidates of the Progressive party? A. As secretary of the Progressive party formation in Gunnison county I sent out literature all over of every sort concerning it to inform people as to that very question, and I tried to reach everybody with it, and from that I should judge that most everybody did know that they were identical in their formation. Not having had a sufficient number to insert the three names in this county by petition, we contented ourselves with one, Progressive, and we had such a short time to do it or we would have certainly made petitions for the other two names as well as the Progressive. Q. I will ask you whether or not it was not generally known and accepted and a matter of general knowledge that they were identical, these parties, throughout the county of Gunnison? A. Yes, sir." Upon cross-examination the witness admitted that there was no county Bull Moose or Roosevelt ticket; also, that he sent out literature advising the members of the Progressive party, or rather the three parties, to vote the Progressive ticket and not to vote the Bull Moose or the Roosevelt ticket. It will thus be observed that preceding the time of the election Dr. Sanford was advising his people to vote the Progressive ticket, and not the Roosevelt or Bull Moose ticket. The reason was that they had no county Bull Moose or Roosevelt ticket, and hence that, if they did not vote this ticket alone, they would not be voting for anybody upon the county ticket. This was correct. While Mr. Whipp says he understood that they were one and the same, yet as a sworn judge of election he did not thus count them, but, as he states, counted the tickets the way they read; that is, where an elector had voted a Roosevelt or Bull Moose ticket, his vote was not counted for the county candidates for the reason that these parties had no candidates upon the ticket for county offices. It will be observed that his understanding as a sworn judge of election was not in harmony with his understanding as a witness which, if relevant, might have had a tendency to sustain this contention. The ballots disclose that the defendant in error was only upon the Republican and Progressive tickets. Any elector by glancing at the names could have readily ascertained this fact, so that the claim that the intention of an elector who voted the Bull Moose or Roosevelt ticket was to vote for the defendant in error is not only in conflict with the provisions of the statute, but is a contention which cannot be gathered from the ballot, nor otherwise than from the individual statement of each voter, which, to sustain it, would have to be that he intended to do what he in no manner made an effort to do. This would be violative of every legal test as well as in conflict with all precedent.

[3] By assignment of cross-errors the defendant in error contends that the court erred in opening any of the ballot boxes and ordering a recount of the votes. It being charged in the answer that the boxes had been tampered with, and had not been preserved by the county clerk in the manner provided by law, the contestor assumed the burden of proving that they had not been tampered with or molested, and that they were in the same condition as when received by the clerk. The court found that the ballot boxes had not been tampered with or molested in an illegal manner, or that the ballots therein or any of them had been substituted or altered, and ordered a recount of the ballots in certain precincts. Under the issues as made by the pleadings the contestor was entitled to a recount of these ballots as a matter of course. Clanton v. Ryan, 14 Colo. 419, 24 Pac. 258; Kindel v. Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.

Counsel have cited many authorities concerning the manner in which these boxes should be preserved while in the custody of the clerk. It is unnecessary to review them in detail, but is sufficient to say that there is evidence to the effect that the statutes in this respect were substantially complied with, with probably the exception of Pitkin precinct No. 7, where, after the ballots were counted by the judges of election, it appears that they were not put back into the official ballot box, but were placed in a pasteboard box and with the pollbook tied up, and thus returned to the county clerk with the official box, where, at the time of the canvass, this paper box was opened by the clerk and the poll book removed therefrom and the box with the ballots therein was again closed, and tied with a string. The condition of this box becomes immaterial, for the reason that the plaintiff in error lost two votes by the recount of this precinct, so that his total from it given him at the trial was two less than had been awarded him by the judges of election. It is also proper to note that the evidence is practically conclusive of the fact that the ruling of the trial court was correct in holding that these ballots had not been tampered with. The vote was close. The contention hinged around a few certain ballots in which had been written the word "Roosevelt" or "Bull Moose." There was no contention concerning crosses being added or erased, or that the ballots had been otherwise disfigured as in Rhode v. Steinmetz, 25 Colo. 308, 55 Pac. 814, nor that the words

"Bull Moose" or "Roosevelt" had in any manner been substituted for any other name. The evidence discloses that there was no intentional fraud upon the part of any one, but that the real contention was the manner in which these Roosevelt and Bull Moose ballots should be counted.

For the reasons stated, the judgment is reversed and the cause remanded, with instructions to enter a decree in harmony with the prayer of the plaintiff in error.

Reversed.

BAUM et al. v. CONCORD LAND & IMPROVEMENT CO.

(Court of Appeals of Colorado. July 14, 1913.)

1. SALES (§ 7*)—SPECIFIC PERFORMANCE (§ 73*)—SCOPE OF REMEDY—NATURE OF CONTRACT.

Defendant alone signed an instrument describing certain real property; reciting that the title stood in its name; specifying the lowest price per acre; terms of sale; the lowest amount that would be accepted to bind the bargain; and that defendant agreed to furnish an abstract and make a warranty deed to plaintiffs, or to whom they might direct. The contract also declared that defendant placed the land in plaintiffs' hands to negotiate a sale so as to net defendant the price stated, for which defendant agreed to allow all above such net price as a commission when a sale was effected, the property to be left in plaintiffs' hands and the contract to remain in full force until plaintiffs should receive notice that the property was withdrawn from the market, and that on receipt of such notice the contract to become null and void, and both parties released; plaintiffs pledging themselves to use their best efforts to dispose of the land. *Held*, that the contract was more in the nature of an employment of plaintiffs as brokers, and was not one for the sale of land such as would sustain a suit for specific perfromance.

Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 16, 17; Dec. Dig. § 7;* Specific Performance, Cent. Dig. §§ 206–208; Dec. Dig. § 73.*]

2. SPECIFIC PERFORMANCE (§ 49*)—CONTRACT—CONSIDERATION.

A contract for the sale of land, in order to sustain a bill for specific performance, must be based on a consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151; Dec. Dig. § 49.*]

3. SPECIFIC PERFORMANCE (§ 121*)—CONTRACT FOR SALE OF LAND—ACCEPTANCE OF OPTION.

In an action for specific performance of an alleged contract for the sale of land, based on an option, evidence *held* insufficient to show an acceptance of the option, either in its original condition, or as modified before it was withdrawn, as provided therein.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

Appeal from District Court, Conejos County; Charles C. Holbrook, Judge.

Suit by Charles C. Baum and others against the Concord Land & Improvement Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Corlett & Corlett, of Monte Vista, for appellants. Jesse Stephenson, of Monte Vista, for appellee.

MORGAN, J. This is an appeal from a judgment against the plaintiffs, in an action for the specific performance of a contract. The judgment should be affirmed.

[1] The plaintiffs sued for the specific performance of a contract made in September, 1909, in substance, as follows: Monte Vista, Colorado, ——— 19 —. Section 17, Tp. 38, R. 9, Conejos county. Title stands in name of Concord Land & Improvement Company. Number of acres, 640. Lowest net price, $25 (per acre). Terms of sale, one-half cash, balance one to two years. Lowest amount to bind the bargain, $500. That defendant agrees to furnish abstract and make a warranty deed to plaintiffs or to whom they may direct; that defendant places the land in plaintiffs' hands, they to negotiate a sale so as to net defendant the price stated above, for which defendant agrees to allow all above said net price as a commission when a sale is effected; property to be left in plaintiffs' hands and contract to remain in full force until plaintiffs should receive notice that the property is withdrawn from the market, and upon receipt of such notice by plaintiffs, the contract to become null and void and both parties released from further obligations. Plaintiffs pledge themselves to use their best efforts, at their own expense, to dispose of the land. Signed by defendant only. The complaint also contains allegations of a subsequent parol modification, hereinafter referred to.

This contract is more in the nature of an employment of the plaintiffs, as agents, to sell the land for a commission than a contract for the sale thereof. There is nothing in the contract that would tend to make it a contract of sale, except that defendant agrees to make a warranty deed to plaintiffs, or to whom they may direct. This provision is in harmony with a contract of employment, and does not convert it into a contract for the sale of land, and the alleged modifications do not materially assist in such conversion.

It is not such a contract for the sale of land as would admit of a suit for specific performance thereof. "The specific performance of a contract is its actual execution according to its stipulations and terms, and is contrasted with damages or compensation for the nonexecution of the contract. Such actual execution is enforced, under the equitable jurisdiction vested in the courts, by directing the party in default to do the very thing which he contracts to do." Fry on Specific Performance, § 3. Courts of equity have been slow to enforce specific performance, in face of the right to sue at common law for damages for the breach of a contract.

This contract is without date or consider-

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