should be so modified as to bear interest from its date at the rate of 10 per cent. per annum; and it is so ordered.

BERRY and SWEET, JJ., concur.

(14 Colo. 44)

SCHWARZ *et al. v.* COUNTY COURT, GARFIELD COUNTY, *et al.*

(*Supreme Court of Colorado.* Jan. 11, 1890.)

ELECTION CONTESTS—PLEADING—AMENDMENT—CERTIORARI.

1. In an election contest based on illegal votes, a petition which fails to give a list of the persons alleged to have illegally voted is insufficient, within Laws Colo. 1885, p. 197, § 15, providing that, "when the reception of illegal or the rejection of legal votes is alleged as a cause of the contest, a list of the number of persons who so voted, or whose votes were rejected, and the precinct or ward where they voted, or offered to vote, shall be set forth in the statement of contestor, and shall likewise be set forth in the answer of contestee, if any such cause is alleged in his answer by way of counter-statement."

2. The omission to insert the list of illegal voters in a petition for contest, on that ground, cannot be justified by subsequently alleging that the information necessary to prepare the list was in the hands of contestees, by whose fraud and violence contestors were prevented from obtaining it, such allegation not having been made in the petition itself.

3. Where it does not appear that any attempt has been made to comply with the statutory requirement by furnishing the list, and no excuse is offered for failing to do so, amendment of the petition for that purpose, at a late day in the proceedings, is unwarrantable, in the absence of a statute directly authorizing amendment.

4. In Colorado, *certiorari* will not lie to review the action of an inferior tribunal in proceedings which are merely preliminary.

Certiorari to county court, Garfield county.

M. J. Bartley and *Joseph W. Taylor*, for petitioners. *C. W. Darrow, J. W. Dollison*, and *E. H. Watson*, for respondents.

HAYT, J. This controversy arose out of an election for municipal officers of the town of Glenwood Springs, held in April, 1889. The cases were recently before this court upon an appeal from a judgment rendered by the district court of Garfield county, to which court the cases had been removed from the county court by writ of *certiorari*. The district court, being of the opinion that county courts in the state had no jurisdiction of contests growing out of municipal elections, perpetually prohibited the county court of Garfield county from further proceeding with these contests. Upon appeal, this court held that such jurisdiction was conferred upon the county courts of this state by statute, and accordingly reversed the judgment of the district court. 22 Pac. Rep. 783. It was then urged that the county courts in this state had no power to entertain jurisdiction of any contest for municipal offices. Such general power is now conceded, but it is claimed that the county court of Garfield county is without jurisdiction in these particular cases on account of the insufficiency of the statements upon which the proceedings are based. It will thus be seen that the question now presented for our determination is entirely different from the one decided upon appeal. These cases, which have been consolidated by stipulation of counsel, affect all the municipal officers of said town declared by the canvassing board to have been elected, viz., one mayor and six trustees. The contests are founded upon the claim that at said election a large number of illegal votes were cast for the parties to whom certificates of election were issued, and that such illegal votes were sufficient to change the result of the election. The particular defect relied upon to defeat the jurisdiction of the county court consists in the omission from the statements of the names of the persons whom it is claimed cast the illegal votes. That court having decided against contestee's pleas to its jurisdiction, and being about to proceed with the trial of the contests upon their merits, we are asked to interfere by *certiorari*.

The three principal questions presented for our determination may be stated as follows: (1) The reception of illegal votes being relied upon as a cause of contest, should the names of the persons who so voted be given in the petition? (2) If such names are omitted, is such omission fatal to the maintenance of the contests? (3) The court being about to proceed upon a petition thus defective, can such contemplated action be prohibited upon *certiorari*?

A reference to the statute under which these contests were instituted is the only answer necessary to the first of these propositions. In section 15 of the act it is provided: "When the reception of illegal or the rejection of legal votes is alleged as a cause of the contest, a list of the number of persons who so voted, or whose votes were rejected, and the precinct or ward where they voted, or offered to vote, shall be set forth in the statement of contestor, and shall likewise be set forth in the answer of contestee, if any such cause is alleged in his answer by way of counter-statement." Sess. Laws 1885, p. 197. Although a slight ambiguity exists, the evident purpose of this statute is to require each party is to give the other notice of the names of such persons as he claims illegally voted for his competitor, and of those whose votes for himself were illegally rejected. Norwood v. Kenfield, 30 Cal. 393; Griffin v. Wall, 32 Ala. 149.

The command of the act cannot be ignored; and if, as now contended by council, the omission to comply therewith arose from the fact that they were prevented from securing the information necessary to the making of such lists, by the fraud and violence of contestees and those under their control, or if, by any other unlawful act of contestees, contestors were prevented from obtaining the information necessary to prepare such lists, such facts should at least have been alleged in excuse in the first instance, in order that contestors may take advantage thereof. How far the court might be permitted to excuse

the failure, had this been done, we need not determine, as in none of the statements before us was there any attempt either to comply with the statute or to offer any excuse for non-compliance. The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature; and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. The act under which these contests were instituted not having been complied with in the particular mentioned, the statements filed as the basis of the proceedings are radically defective. Sedg. St. & Const. Law, 299; Dorsey v. Barry, 24 Cal. 449; Casgrave v Howland, Id. 457; Norwood v. Kenfield, supra; Loomis v. Jackson, 6 W Va. 613; Buckley v. Lowry, 2 Mich. 418.

The act is not only special in character, but it furnishes a complete system of procedure within itself. It requires that such contests shall be tried and determined by the county judge of the county in which the contests arise. It provides for a written statement as the basis of the proceedings, and designates what it shall contain, and the officer with whom it shall be filed. It designates the officer by whom the summons shall be issued, and provides the time and manner of making up the issues. Provision is also made for fixing the time of trial, and for the form of judgment to be entered, etc. As we have seen, the jurisdiction of the court, under such a statute, depends entirely upon the terms of the act, and consequently, before contestors can invoke such jurisdiction, facts must be stated by them which bring the cases within the purview of the act. In these statements, while the board of registration is charged with fraudulently permitting the names of those not entitled to vote to be registered, the *gravamen* of complaint in each case is that sufficient illegal votes were received and counted for the contestee to change the result of the election; and, unless this can be maintained as a cause of contest, contestors must fail; and yet no attempt has been made to comply with that portion of the act requiring a list of the number of persons who so voted, with the precinct or ward where such votes were cast, to be set forth in the statement. It is reasonable to conclude that the legislature in enacting this requirement had in view the fact that by previous legislation the utmost care had been exercised to provide for the casting of the ballots and the integrity of the count; and it is certainly not unreasonable to require those who desire to contest the right of a person to an office to which he has been declared duly elected by the tribunal provided by law to determine that question, to state with reasonable certainty and precision the cause upon which they rely to overthrow such result. We cannot say that the provision of the statute of 1885, under consideration, is unreasonable, and, if it were, relief must be looked for from the legislature, and not from the courts. The court below should have sustained the pleas to its jurisdiction based upon the failure to include in the statements the lists required by the statute. Faribault v. Hulett, 10 Minn. 38, (Gil. 15;) High, Extr. Rem. § 781; Keller v. Chapman, 34 Cal. 635; Garretson v. County of Santa Barbara, 61 Cal. 54; Quimbo Appo v. People, 20 N. Y. 531.

It is claimed that the defects in the statements may yet be supplied by amendment, although there is no provision of the act directly authorizing amendments. Even if the power exists in the court to permit amendments after the time for filing the statement has expired,—a point we do not decide,—still these statements contain nothing that can be taken as an attempt to comply with the statutory requirement in reference to giving a "list;" and, since no excuse is offered for the failure in this particular, we think it would be unwarrantable at this late day, when the terms of office for which some of the contestees were declared elected have nearly expired, to permit amendments so radical in character as those that would be necessary to supply the defects in these statements. During all the time these cases have been pending, contestors have insisted upon standing by the sufficiency of the pleadings filed as the basis of these proceedings, making no application to amend that can be considered by the court. Under these circumstances, we are of opinion that leave to amend should not be granted.

As this is the second time these cases have been before this court, and the foregoing questions have been argued at length by counsel, we have felt constrained to fully decide them. The writ of *certiorari* must, however, be quashed, for the reason that application therefor was prematurely made; the order sought to be reviewed being merely preliminary, and in no sense a final order or determination. While it is not necessary to wait until a judgment or order entered without jurisdiction is carried into effect, still it is only the final determination of an inferior tribunal that can be reviewed upon *certiorari*; the writ being never used to review merely preliminary proceedings, like those presented upon this application. Hayne, New Trial & App. 917; People v. County Judge, 40 Cal. 479; Lynde v. Noble, 20 Johns. 79; Haines v. Backus, 4 Wend. 213; Railroad Co. v Whipple, 22 Ill. 105; People v. District Court, 6 Colo. 534. The writ of *certiorari* heretofore issued herein is accordingly quashed.

ELLIOTT, J. I concur in the construction given to the election contest statute by the foregoing opinion. In my judgment, however, so much of the rule or order of this court granting the writ as commanded the county court to desist from further proceedings in said election contest cases until the further order of this court in the premises should be made absolute.

(14 Colo. 51)

SIMONTON *et al. v.* ROHM *et al.*

(*Supreme Court of Colorado.* Jan. 17, 1890.)

PARTNERSHIP — PLEADING — PROVINCE OF JURY — INSTRUCTIONS.

1. An objection that the individual names of the defendants as co-partners are not set out in the complaint, appearing for the first time at the close of plaintiff's evidence, is not seasonably made.

2. The weight of the evidence, and the credibility of the witnesses, are matters of which the jury are the proper judges.

3. Though some of the instructions, separately considered, be not as perfect and accurate in form as they might be, nevertheless, if the charge as a whole fairly submits the questions at issue for the determination of the jury upon the evidence, the verdict should not be disturbed.

(*Syllabus by the Court.*)

Appeal from Eagle county court.

P. F. Quinn and *R. D. Thompson*, for appellants. *Brown & Glenn* and *Belford & Wikoff*, for appellees.

ELLIOTT, J. This was an action of unlawful detainer, commenced by R. L. and G. L. Rohm, plaintiffs, against T. H. Simonton & Co., defendants, before a justice of the peace. It was appealed to the county court, where it was tried to a jury, resulting in a verdict and judgment for plaintiffs. The defendant appeals to this court.

The objection that the individual names of the defendants as co-partners are not set out in the complaint appears for the first time at the close of the plaintiffs' evidence in the county court. This was in the nature of an objection on the ground of a defect of parties defendant, and, as such, was not seasonably made. The principal controversy at the trial related to the issues of fact made by the pleadings, as follows: The complaint avers in substance that Simonton entered the premises of plaintiffs as a monthly tenant. This averment is traversed by the answer, in which it is also averred that the defendants entered under a written lease for the period of two years. The replication denies the entry under a lease for two years. The testimony was conflicting. R. L. Rohm testified in behalf of plaintiffs, as shown by the abstract, as follows: "Mr. Simonton came to me some time in October, or the 1st of November, 1884, and wanted to rent the store from month to month. I told him he could have it at thirty-five dollars per month. He said he would give me thirty dollars in advance. I let him have it at thirty dollars per month. There was no stated time." This evidence tended to sustain the complaint. The weight of the evidence, and the credibility of the witnesses, were matter of which the jury were the proper judges. The court properly charged the jury to the effect that, if they believed from the evidence that a lease was made by plaintiffs to defendants from month to month at the rate of $30 per month, they should find for plaintiffs; also, that defendants, having affirmatively pleaded a written lease for two years, must prove the same by a fair preponderance of the evidence, in order to warrant a verdict in his favor on that ground. While some of the instructions, separately considered, are not as perfect and accurate in form as they might be, nevertheless, the charge, as a whole, fairly submitted the questions at issue for the determination of the jury upon the evidence, and the verdict should not be disturbed. The judgment of the county court is accordingly affirmed.

(14 Colo. 53)

LOVELOCK *v.* GREGG.

(*Supreme Court of Colorado.* Jan. 17, 1890.)

PAYMENT—BURDEN OF PROOF—BOOK ENTRIES.

1. Where plaintiff's claim for wages as sued for was admitted, defendant was properly required to assume the burden of proving payment.

2. Where the entries in a book of account were made a week or more after the transactions occurred to which they related, and where the book of account was mutilated by the book-keeper cutting out the leaves on which the account was kept, the book was properly excluded as evidence.

(*Syllabus by the Court.*)

Appeal from Boulder county court.

J. M. North, for appellant. *C. M. Campbell*, for appellee.

ELLIOTT, J. Appellee, Gregg, was plaintiff below. The action was originally brought in a justice's court, where plaintiff recovered judgment for wages due her as a dressmaker. Upon appeal and trial by the county court without a jury, plaintiff again recovered judgment for the sum of $51.40, interest and costs. Upon appeal to this court it is assigned for error that the judgment should have been in favor of defendant instead of plaintiff, and also that the court erred by admitting in evidence the book of account of plaintiff, and by excluding the book of account of defendant.

Counsel for appellant cites no authorities, and makes but slight argument, in support of the assignments of error. The plaintiff's claim for wages as sued for was admitted, and defendant was properly required to assume the burden of proving payment. The evidence shows that plaintiff's book of account was kept in a manner entitling it to be admitted in evidence as a book of original entry. But defendant's book of account was not so kept. The entries therein were made several days, and sometimes a week or more, after the transactions occurred to which they related. Besides, the book was mutilated by the cutting out of the leaves on which the account was kept. This was done by the husband of defendant, acting as her book-keeper. The court did not err in its rulings upon either of these questions. Upon careful examination, the finding and judgment of the trial court appear to be well sustained by the evidence. We are of the opinion that the litigation should not have been extended beyond the trial in the county court. The judgment of the county court is accordingly affirmed, with costs.