

prosecution of routine offenses has been much criticized,<sup>9</sup> has special advantages in the investigation and the prosecution of the conduct of public officers.<sup>10</sup> It may begin its investigation without the showing of probable cause necessary to a magistrate's investigation, and as a result its investigations are not confined within the limits of a definite charge. It can pursue its activities in secret and is not dependent upon a public officer. It may be true that the force of public opinion would prevent punishment of the informer in cases where there was no personal malice such as was evidenced by the defendant's letters in the instant case.<sup>11</sup> Nevertheless, it would seem that the decision in the present case will operate as a severe restriction upon the giving of aid by private persons in the prosecution of offenses of public officials.<sup>12</sup>

On the other hand, allowing citizens to present information as to crimes of public officials to a grand jury might tend to cause the grand jury to become a political weapon, and large scale investigation of the activities of public officials might seriously cripple the normal operation of the government.<sup>13</sup> These problems suggest the desirability of the plan urged by the Wickersham Report and adopted in some states:<sup>14</sup> a grand jury which would meet at regular intervals for the express purpose of investigating the conduct of public officers. Thus the desired prosecution of malfeasance in office could be had without the intervention of a private prosecutor and the difficulties and dangers which such intervention entails.

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Elections—Absent Voter Statute—Challenge of Absent Voter's Electoral Qualifications—[Kansas].—The plaintiff was a candidate for governor in the 1940 general election. While the State Board of Canvassers<sup>1</sup> was counting the ballots mailed in by

<sup>9</sup> Scragg, *The Grand Jury*, 2 Temple L.Q. 317, 319 (1928); Chamberlain, *Correspondence*, 5 Panel 3 (1927); National Commission on Law Observance and Enforcement [Wickersham Commission], *Report on Prosecution* 36, 124 (1931); cf. Hall, *Analysis of Criticism of the Grand Jury*, 22 J. Crim. Law 692 (1932).

<sup>10</sup> Konowitz, *The Grand Jury as an Investigating Body of Public Officials*, 10 St. John's L. Rev. 219 (1936); Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 295, 333 (1931); Moley, *Politics and Criminal Prosecution* 145 (1929).

<sup>11</sup> See an Illinois case reported in Davis, *The Grand Jury* 4-5 (1931), where the representative of a civic organization presented evidence of malfeasance to a grand jury. The state's attorney prepared an information charging contempt of court. The case attracted wide newspaper publicity and the court finally discharged the defendant.

<sup>12</sup> That the first prerequisite of efficient law enforcement is honest, competent officials has been attested repeatedly. Waite, *Criminal Law in Action* c. xvii (1934); Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 295, 365 (1931); Puttkammer, *Criminal Law Enforcement*, 33 *University of Chicago Magazine* 12 (1940). The office of public prosecutor in particular must remain uncorrupted because of its position as the gateway to criminal prosecution. Moley, *Politics and Criminal Prosecution*, c. iii (1929); Cockrell, *Successful Justice* 244 (1939).

<sup>13</sup> See McNair's Petition, 324 Pa. 48, 187 Atl. 498 (1936).

<sup>14</sup> National Commission on Law Observance and Enforcement [Wickersham Commission], *Report on Prosecution* 37 (1931); see American Law Institute, *Code of Criminal Procedure* (with commentaries) 488 (1931), for citations to state statutes; cf. Proposed Illinois Criminal Code, pt. iv (1937).

<sup>1</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) §§ 25-707, 25-1109, qualifying Kan. Const. art. 1, § 2.

voters absent from the state,<sup>2</sup> he brought an action in the Supreme Court of Kansas for a writ of mandamus<sup>3</sup> to compel the board to permit him or his authorized representatives to examine the affidavits which the absent voters are required to return with their ballots and which contain the names and voting qualifications of these voters. The examination was sought to enable the plaintiff to challenge the electoral qualifications of some of the absent voters. *Held*, that examination of the affidavits would violate the secrecy of the absent voters' ballots and that furthermore there is no statutory provision allowing challenge of the qualifications of the absent voters who have cast their ballots by marking them on election day. Writ denied, one judge dissenting. *Burke v. State Board of Canvassers*.<sup>4</sup>

Absent voter statutes have in the past been questioned as violating constitutional provisions requiring voting to be by secret ballot.<sup>5</sup> This issue arises because the absent voter is required to return with his ballot an affidavit giving his name.<sup>6</sup> Thus the election official who deposits the absent voter's ballot in the ballot box can, by unfolding the ballot, discover how a particular absentee voted. The danger of violation of secrecy is somewhat greater in the case of the absent voter than in the case of the ordinary voter who hands his ballot to an election judge on coming out of the marking booth. The absent voter's right to secrecy is protected only by the vigilance of challengers and watchers at the polls, while the presence of the elector voting personally is an added guarantee that his ballot will not be unfolded.<sup>7</sup> The danger of violation of secrecy increases if the statute requires the absentee's ballot to be printed on paper of a special tint.<sup>8</sup> Then if there is only one person in the precinct voting by absent ballot,

<sup>2</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) §§ 25-1101, 25-1113.

<sup>3</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) §§ 60-1701, 60-1702.

<sup>4</sup> 152 Kan. 826, 107 P. (2d) 773 (1940). The litigation in the principal case was highly charged with political considerations since the election was so close that the absentee ballots determined who was to be governor. The official totals of votes cast for candidates for governor in the general election, Nov. 5, 1940, were:

	Total	Local	Absent
Payne Ratner, Rep., . . . . .	425,928	421,528	4,400
William H. Burke, Dem., . . . . .	425,498	423,321	2,177

32d Biennial Report of the Secretary of State, State of Kansas, at 111 (1940). Such litigation is frequently embarrassing and discrediting to courts composed of elected judges. Thus in the instant case the court was divided along partisan lines, six Republican members voting that the writ be denied, one Democratic member dissenting.

<sup>5</sup> Some constitutions specifically guarantee secrecy of the ballot. N.Y. Const. art. 2, § 7; Pa. Const. art. 8, § 4; N.D. Const. § 129; Cal. Const. art. 2, § 5. Other constitutions do not require complete secrecy but have been construed as strongly favoring secret voting wherever practicable. Mo. Const. art. 8, § 3; Ill. Const. art. 7, § 2; Kan. Const. art. 4, § 1 (which merely states "all elections by the people shall be by ballot . . .").

<sup>6</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) §§ 25-1102, 25-1103, 25-1106.

<sup>7</sup> A large majority of the absent voter statutes provide that the absentee's ballot shall be returned to his residential precinct and there deposited in the ballot box with the ballots voted in person at the same election. See Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898 (1938); Vt. Pub. Laws (1933) § 104; N.D. Comp. Laws Ann. (1913) § 1001; Ill. Rev. Stat. (1939) c. 46, § 470; N.Y. Cons. Laws (McKinney, 1922), c. 17 § 210.

<sup>8</sup> N.D. Comp. Laws Ann. (1913) § 994. Some statutes provide that the ballot be labeled "Absent Voter's Ballot." Ala. Code Ann. (Michie, Supp. 1936) § 687(1); Ariz. Code Ann. (1939) § 55-1303. A majority of the states have some such identification of the absent voters' ballots. See Steinbicker, *op. cit. supra* note 7, at 904-5.

the members of the counting board may recognize his ballot. Maintenance of secrecy is less likely under the Kansas statute which does not require deposit of the absentee ballot in a ballot box but merely provides that a canvassing board open the envelope, identify the voter, and count his ballot. This type of statute might be held unconstitutional if the state constitution required absolute secrecy. Under a less specific constitutional provision it could be held, as was suggested by the dissenting judge, that the elector "waives" completely his right to vote secretly when he applies for an absentee ballot.<sup>9</sup> Or the court might limit such "waiver" of secrecy to the election officials who count the absent voter's ballot<sup>10</sup> or interpret the constitutional guarantee to mean "secret" with respect to the general public, but not with respect to the election board. A similar result could be reached by holding that the guarantee of secrecy is not absolute, but may be invaded where practically necessary. Thus statutes often require that identity of challenged votes be preserved<sup>11</sup> and permit physically disabled voters to vote in a manner involving at least limited disclosure of their choice.<sup>12</sup>

In the present case, the defendants argued that if the plaintiff were allowed to see the affidavits as well as the ballots returned by the absent voters he could determine how an individual voted by correlating the affidavit and the ballot numbers. The court recognized this possibility and protected the secrecy of the absent voters' ballots. Although the Kansas constitution does not expressly state that voting must be by secret ballot, prior decisions had firmly established the voter's right to secrecy.<sup>13</sup> In a previous decision the court had held that the absentee waived his right of secrecy, but in the principal case it modified that holding by limiting such waiver to the counting officials.<sup>14</sup> The court overlooked the fact that any possible invasion of the voters' secrecy by the plaintiff might have been prevented by placing opaque seals over the numbers on the affidavits.<sup>15</sup>

Absent voter statutes have also been questioned on the grounds that they conflict with constitutional provisions requiring residence by an elector for a specified period

<sup>9</sup> 152 Kan. 826, 107 P. (2d) 773, 782 (1940). This seems to have been the position taken by the court in the case of *Lemons v. Noller*, 144 Kan. 813, 63 P. (2d) 177 (1936), where the court held the absent voter statute constitutional. The theory of "waiver of the right of secrecy" had been adopted earlier in *Jenkins v. Board of Elections*, 180 N.C. 169, 104 S.E. 346 (1920); *State ex rel. Hutchins v. Tucker*, 106 Fla. 905, 143 So. 754 (1932).

<sup>10</sup> 152 Kan. 826, 107 P. (2d) 773, 778 (1940). It would seem that since election officials are frequently political partisans, they would be the very individuals who should be prevented from violating secrecy of the ballot.

<sup>11</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) § 25-413.

<sup>12</sup> *Ibid.*, § 25-416.

<sup>13</sup> Kan. Const. art. 4, § 1, quoted in note 5 *supra*, has been interpreted as guaranteeing secrecy. *State ex rel. Smith v. Beggs*, 126 Kan. 811, 271 Pac. 400 (1928). But notice the opinion of Dawson, C. J., at pages 816 and 403, where he indicated that under the same constitutional provision there were no requirements of secrecy prior to the adoption of the Australian Ballot Law in 1897.

<sup>14</sup> Note 9 *supra*.

<sup>15</sup> The suggestion of Judge Wedell in his concurring opinion in the instant case, at page 781, that the numbers might be clipped from the affidavits, appears to be unsatisfactory since it would prevent identification of the ballots of unqualified absent voters discovered by the examination of the affidavits. See note 11 *supra*.

"in the township or ward in which he or she offers to vote."<sup>16</sup> When the statute provides for deposit of the absent voter's ballot in a ballot box by an official at the polling place in the town or ward where the voter actually resides, this constitutional difficulty may be avoided by holding that the affidavit returned with the absentee's ballot is an "offer to vote" in the residential "township or ward."<sup>17</sup> In several states, however, the out-of-state voter's ballot is not sent to his township or ward but is delivered to a central board that counts the absentee ballots.<sup>18</sup> The New Mexico Supreme Court held that under such a provision casting and counting the absent voter's ballot did not occur in the voter's "township or ward," and hence there had been no "offer to vote" in the proper place.<sup>19</sup> The Kansas statute requires that absentee ballots in state elections be delivered to the State Canvassing Board for counting.<sup>20</sup> In *Lemons v. Noller*<sup>21</sup> the Kansas absent voter statute was held to satisfy the "offer to vote" requirement of the state constitution. There the court held that when the voter signed the "affidavit prescribed in the statutes,"<sup>22</sup> he "offered to vote" in his "township or ward." This statement is ambiguous since the absentee signs two affidavits: one, when he applies to the county clerk for an absentee ballot;<sup>23</sup> another, when he marks his ballot outside the state on election day.<sup>24</sup> If the former is the "affidavit" referred to by the court, an absent voter's qualifications seem to be irrevocably determined by the county clerk long before election. If the second affidavit is the offer, his qualifications are determined when he marks his ballot, as is the case with the ordinary voter.

Another problem involved in reconciling absent voter provisions with a state constitution or general election statute centers around challenge of an absent voter's right to vote. If some restraint on careless distribution of absentee ballots by elected officials with partisan interests is not permitted, absent voting may be used to evade constitutional and statutory provisions limiting the franchise to qualified electors.<sup>25</sup> In many states, statutes provide that any elector can challenge the qualifications of the

<sup>16</sup> Kan. Const. art. 5, § 1.

<sup>17</sup> *Jenkins v. Board of Elections*, 180 N.C. 169, 104 S.E. 346 (1920). Contra: *Lancaster City's Fifth Ward Election*, 281 Pa. St. 131, 126 Atl. 199 (1924); cf. *Clark v. Nash*, 192 Ky. 594, 234 S.W. 1 (1921).

<sup>18</sup> Some statutes provide for a central counting board for the absentee ballots of an entire county. Ariz. Code Ann. (1939) §§ 55-1308, 55-1309; Ark. Dig. Stat. (Pope, 1937) § 4783; Cal. Elec. Code (Deering, 1939) §§ 7801-7803; Neb. Comp. Stat. (Kyle, Supp. 1939) § 32-808; Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 5285. The Kansas absent voter statute, however, provides for counting the local and county ballots by the county canvassing boards and the state and national ballots by the State Canvassing Board. Kan. Gen. Stat. Ann. (Corrick, 1935) § 25-1109.

<sup>19</sup> *Thompson v. Scheier*, 40 N.M. 199, 57 P. (2d) 293 (1936); *Baca v. Ortiz*, 40 N.M. 435, 61 P. (2d) 320 (1936).

<sup>20</sup> Note 1 supra.

<sup>21</sup> 144 Kan. 813, 63 P. (2d) 177 (1936).

<sup>22</sup> *Ibid.*, at 827, 185, where the court stated, "it was within its constitutional power for the legislature to provide that an offer to vote in the township or ward in which the elector resides, could be made by subscribing to the affidavit prescribed in the statutes. . . ."

<sup>23</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) § 25-1104.

<sup>24</sup> *Ibid.*, § 25-1106.

<sup>25</sup> Kan. Const. art. 5, § 1; Kan. Gen. Stat. Ann. (Corrick, 1935), § 25-407.

absent voter when the election official in the absentee's precinct is about to deposit the mailed-in ballot in the ballot box.<sup>26</sup> Other statutes merely provide that the general election laws which "are in their nature applicable shall apply to all transactions under the act."<sup>27</sup> This phrase may be construed as allowing the challenge provisions of the general election law<sup>28</sup> to apply to absent voters. But the court in the present case refused to make such a construction. Instead it held that the marking of the ballot by the absent voter was equivalent to casting, and that after casting the vote could not be challenged.<sup>29</sup> Furthermore, it argued that challenge could not be made after the absentee had "offered to vote" by signing his application affidavit two to thirty days before the election.<sup>30</sup> The court was therefore in the anomalous position of saying that the absent voter's qualifications are to be determined from two to thirty days before the election rather than at the date of the election. The court's construction of the absent voter statute makes possible the argument that the act is unconstitutional because it makes an arbitrary and unreasonable classification by giving only to the absent voter the right to vote free from challenge of his qualifications on election day. A preferable result would appear to be to allow the plaintiff to examine the absentees' affidavits and challenge their qualifications as electors.<sup>31</sup>

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Evidence—Constitutional Law—Validity of Act Requiring Attendance of Non-Resident Witnesses in Grand Jury Proceedings—[Pennsylvania].—The Attorney General of the State of New York petitioned a Pennsylvania lower court for subpoenas ordering two residents of Pennsylvania to go into New York to testify before a grand jury. The application was made under the provisions of a uniform act entitled "an act providing for the securing of attendance of witnesses from without the state in criminal cases."<sup>32</sup> The act is designed to enable the prosecuting authorities of a state which has passed it to secure the attendance at either criminal or grand jury proceedings of witnesses who are within other states which have also adopted the act. In denying the subpoenas the court held, that the statute is unconstitutional because (1) it

<sup>26</sup> Cal. Elec. Code (Deering, 1939) §§ 7842-7844; Ill. Rev. Stat. (1939) c. 46, § 471; N.Y. Cons. Laws (McKinney, 1922) c. 17, § 210(2); Mo. Rev. Stat. (Gillespie, Supp. 1937) § 10188.

<sup>27</sup> Kan. Gen. Stat. Ann. (Corrick, 1935) § 25-1113.

<sup>28</sup> *Ibid.*, at §§ 25-407, 25-408, 25-411.

<sup>29</sup> 152 Kan. 826, 107 P. (2d) 773, 777-78 (1940). Cf. Ala. Code Ann. (Michie, 1928) § 406 (entitled, "How ballot cast by absent voter."); Colo. Stat. Ann. (Michie, 1935) c. 59, § 216 (introduced by the words, "In casting such absent voter's ballot. . . ."); Neb. Comp. Stat. (1929) §§ 32-805 (entitled, ". . . Ballot, How Cast."). Italics added.

<sup>30</sup> 152 Kan. 826, 107 P. (2d) 773, 778 (1940).

<sup>31</sup> In order to justify the result reached in the instant case, the court found it necessary to strike from their opinion in *Hansen v. Lindley*, 152 Kan. 63, 102 P. (2d) 1058 (1940) the italicized words in the following passage which had already appeared in the advance sheets: "*The first opportunity a candidate has to challenge a mailed-in vote, however, is when the board of canvassers is considering it.* Hence, there is no reason why the above section (Kan. Rev. Stat. Ann. (Corrick, 1935) § 25-407) should not be a guide to the board of canvassers, to the contest court, and on appeal to the district court and to this court." 152 Kan. 826, 107 P. (2d) 773, 779 (1940). (Italics by the court.)

<sup>32</sup> Pa. Stat. Ann. (Purdon, Supp. 1940) tit. 19, §§ 616-22, 9 Unif. L. Ann. 9 (Supp. 1940).