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Recommended Citation

Charles M. Kneier, *Misleading the Voters in Initiative and Referendum Elections in Cities*, 8 DePaul L. Rev. 36 (1958)

Available at: <https://via.library.depaul.edu/law-review/vol8/iss1/4>

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MISLEADING THE VOTERS IN INITIATIVE AND REFERENDUM ELECTIONS IN CITIES

CHARLES M. KNEIER

THE USE of the initiative and referendum is based on the assumption that the electorate will vote wisely and intelligently on the questions submitted. If the issues are submitted in a way to confuse or mislead the voter, any advantages to be derived from these newer institutions of democracy are lost.

MISLEADING AND FALSE CAMPAIGN STATEMENTS

Voters may be misled in initiative and referendum elections by misleading, confusing and untrue statements in speeches and campaign literature. Generally the courts will not disturb the results of elections, including those on initiative and referendum proposals, if the only objection is that misleading and untrue statements have been made during the campaign. The courts have refused to go behind the results to ascertain the persuasions that motivated the voters. As stated by the Supreme Court of the United States, the motives of the electors in acting upon initiative and referendum proposals are not a subject of judicial inquiry "so long as the means adopted for the submission of the question to the people conformed to the requirements of the law."¹

The fact that the untrue or misleading statements are made by city officials is held by most courts to be immaterial. As stated by the United States Circuit Court of Appeals, "Misrepresentations made during a campaign by public officials, or others will not vitiate an election."² Even though the mayor, council, and board of public

¹ *Detroit United Railway v. City of Detroit*, 255 U.S. 171, 178 (1921). "Where the election is regularly called and regularly held, and the voters freely and voluntarily exercise their right to vote, the election will not be invalidated simply because some of them may have been misled by some one interested in the result of the election." *Epping v. City of Columbus*, 117 Ga. 263, 43 S.E. 803 (1903). A mistake on the part of the voters as to the number of voters necessary to carry or defeat a proposition will not invalidate an election. *Denton v. Pulaski County*, 170 Ky. 33, 185 S.W. 481 (1916). Also see *Reid v. City of Muskogee*, 137 Okla. 44, 278 P. 339 (1929).

² *West Missouri Power Co. v. City of Washington*, 80 F. 2d 420, 422 (C.A. 10th, 1935).

works falsely represented to the public in newspaper advertisements and handbills the amount that would be expended to purchase a utility, the Supreme Court of Indiana refused to hold the election void.³

In a few cases the courts have implied that an election would be held invalid if false or misleading statements by public officials determined the result of an election. The Supreme Court of Kansas refused to invalidate an election where false and extravagant statements were made by city officials on the grounds that "there was no showing that the officiousness and other irregularities attributed to the mayor and commissioners were so potent as to have turned the scales at the election, nor any likelihood that their delinquencies did have such a result."⁴ The court implied that if there was such a showing the election might be invalidated. A similar position has been taken by the Supreme Court of Iowa.⁵ Since the courts in these cases found the voters had not actually been misled, their statements as to the effect of misleading statements by public officials were dicta only. Obviously it is difficult if not impossible to show that voters were actually misled by false campaign statements since no one can say what factors cause voters to vote as they do.

A few courts have taken a strict position relative to the effect of misleading the voters in initiative and referendum elections by false statements and unethical campaign methods. The Supreme Court of Nebraska has held that a city may be stopped from issuing general obligation bonds to acquire a public utility, even though under the statute and the favorable vote of the electorate they might do so, on the grounds that the mayor and city council promised the electorate that such action would not be taken.⁶ The court held that public officials should be held to "strict accountability for promises and pledges made to the electorate" and inferred from the circumstances appearing in evidence that the voters relied upon the promises and pledges made by the mayor and council. Such reliance, it was held, need not be proved by direct evidence.

³ *Public Service Co. v. City of Lebanon*, 221 Ind. 78, 46 N.E. 2d 480 (1943).

⁴ *Kansas Electric Co. v. City of Eureka*, 142 Kan. 117, 45 P. 2d 877 (1935). For other cases taking this position see *Woulfe v. Morrison*, 212 La. 1032, 34 So. 2d 251 (1948); *Barnes v. Kansas City*, 359 Mo. 519, 222 S.W. 2d 756 (1949). Cf. *Price v. Storms*, 191 Okla. 410, 130 P. 2d 523 (1942).

⁵ *Johnson v. Town of Remsen*, 215 Iowa 1033, 247 N.W. 552 (1933).

⁶ *May v. City of Kearney*, 145 Neb. 475, 17 N.W. 2d 448 (1945).

A manufacturer has been enjoined from entering into a contract with a city made possible by an election where the manufacturer "actively participated in the publishing of false and misleading statements" seeking to influence the result of the election, the outcome of which would determine whether or not it could have an opportunity to sell its products to the city.⁷ The court recognized the right of a manufacturer to engage in legitimate efforts to sell his products but held there must be a "fair presentation of the matters at issue." Advertisements in newspapers in this case were held to be vicious and more than booster statements. It should be noted that the election was not held void but the company which used such campaign tactics was enjoined from any benefit.

This strict view as to the effect of misleading the voters in initiative and referendum elections by false statements or unfair campaign methods is a minority view. The majority position is that "The courts may not go behind the result of an election to ascertain the persuasions that motivated voters."⁸ And in votes on bond issues, "Unscrupulous campaign methods must be met in some other way than by an action to enjoin issuance and sale of bonds."⁹

MISLEADING OFFICIAL DOCUMENTS

Voters may also be misled by misleading or confusing information given in official documents in initiative and referendum elections—petitions, ordinances, election notices and ballots. Thus an Arizona measure which, according to the title, represented to be for a system of old age and mothers' pensions, was accepted by the voters two to one; in doing so they abolished their county hospitals and poor farms, leaving their indigent sick and other victims of poverty without care.¹⁰ The Supreme Court of Arizona expressed the opinion that not one voter in a hundred who cast their votes for the measure knew or believed that all county hospitals were to be abolished. "It was the

⁷ *Mississippi Power Co. v. City of Starkville*, 4 F. Supp. 833 (N.D. Miss., 1932). This decision has been referred to as "a decision of poetic justice to say the least." *Kansas Power Co. v. City of Washington*, 145 Kan. 962, 67 P. 2d 1095 (1937).

⁸ *Pubic Service Co. v. City of Lebanon*, supra, note 3.

⁹ *Humphrey v. City of Pratt*, 93 Kan. 413, 144 Pac. 197, 198 (1914). Also see *Balducci v. Strough*, 135 Misc. 346, 239 N.Y. Supp. 611 (1929).

¹⁰ The title read as follows: "An act providing for an old age and mothers' pension and making appropriation therefor." Section 1 then provided that "all almshouses within the state shall be abolished, their grounds shall be sold for the best obtainable price. . . ." *Ariz. Laws 1915, Initiative Measures*, at 10.

generous and philanthropic title of the act," said the court, "that caught the eye and mind and heart of the voter."¹¹

The courts have taken a more strict position as to the effect of misleading the voters by information given in official documents in initiative and referendum elections than in those cases where they are misled by the campaign. Some courts consider whether the voters were actually misled. Obviously this can be a matter of conjecture only since it is not possible to prove or show that they were or were not misled. Other courts consider the nature of the error in the statement of facts and the probable effect in determining whether an election should be held to be valid. Again this can be conjecture only, based on what the court thinks the result would be on the average or reasonable voter. In many cases, however, voters do not respond at the polls as other reasonable people, including judges, expect them to respond.

An election has been upheld where the ballot stated that a proposed bond issue was to "purchase, establish, erect and extend" an electric light and power plant even though none existed. The Supreme Court of Iowa was of the opinion that "The inclusion of the word 'extend' could have misled no one. There was nothing to extend."¹² Earlier the same court held bonds invalid where the statute required a vote on bonds to acquire a utility, and the ballot stated the bonds were for the purpose of "erecting, maintaining, and operating a system of waterworks." The court held that adding the word "operating" was misleading and that it was in the nature of an inducement to the voter to cast an affirmative ballot since it stated the bonds would be used "not only to pay for construction, but also for maintenance." The court took the position that it was "not a question whether any voter was in fact misled. The validity of an election cannot be made to depend on extrinsic evidence."¹³

In some cases the courts take the position that the voters may have

¹¹ Board of Control v. Buckstegge, 18 Ariz. 277, 158 Pac. 837, 841 (1916).

¹² Johnson v. Town of Remsen, 215 Iowa 1033, 1042, 247 N.W. 552, 556 (1933).

¹³ Brown v. Carl, 111 Iowa 608, 610, 611, 82 N.W. 1033, 1034 (1900). An election has been held void where voters approved a bond issue of \$500,000 to "erect and maintain" a municipal electric light plant since under the statutes a city had no power to issue bonds for maintenance. As stated by the Supreme Court of Wisconsin, "It is impossible to say with reasonable certainty that the voters have authorized the issue of bonds to any specific amount for the construction alone of a municipal lighting plant, nor that they may not have been induced to vote in favor of the policy by reason of their approval of the use of the bonds for the purposes of maintenance." Wisconsin Power and Light Co. v. Pub. Service Comm. 224 Wis. 286, 292, 272 N.W. 50, 53 (1937).

relied, or they assume that they did rely, on the facts stated in the petition or on the ballot. Under this view an erroneous statement invalidates an election. Where the preamble to a petition was misleading as to the cost of a proposed municipal utility, the date electricity would be available from the public plant if the vote was favorable, and the rate to be charged, the election was held to be void. As stated by the Supreme Court of Nebraska, "these instruments [petition and ballot] did not fully, clearly and frankly disclose to the electors just what the city officials proposed to do, . . . In our opinion, the petition and the ballot presented statements of facts which were unfounded, and the voters relied upon these statements in casting their ballots."¹⁴ Again the question arises as to whether they did actually rely upon the statements. The addition on a bond issue ballot of the words "and vicinity" as the area of service for a proposed municipal utility has been held to invalidate the election where the city had no power to sell beyond its limits. As stated by the court: "To what extent, if any, votes were received in favor of the bond issue because of the 'and vicinity' feature, no one of course can say. The court is not permitted to speculate upon it. It may have attracted votes in sufficient number to entail a favorable result."¹⁵

A question may be stated on a ballot so as to have some indirect psychological effect on the voter even though it is not erroneous or misleading. Where the question submitted to the voters was whether the city should issue bonds in the sum of \$30,000 for the purpose of erecting a municipal hospital, it has been held improper to state the proposition on the ballot as "For Municipal Hospital" or "Against Municipal Hospital." The question should have been submitted as "For Bonds" or "Against Bonds."¹⁶ An election on the question of issuing bonds to provide for a municipal electric lighting plant has been held void where it was stated as instructions on the ballot that "If you favor Municipal Ownership Vote Yes. If you oppose Municipal Ownership Vote No." As stated by the court:

It was not intended that public officers charged with a duty to impartially submit a question to the vote of the people should use the ballot as a vehicle for information or argument as to the motives that might influence the voter

¹⁴ *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109, 115. Cf. *Hurd v. City of Fairbury*, 87 Neb. 745, 128 N.W. 638 (1910).

¹⁵ *Eastern Short Pub. Service Co. v. Town of Seaford*, 21 Del. Ch. 214, 187 Atl. 115, 122, 123 (1936).

¹⁶ *Mann v. City of Artesia*, 42 N.M. 224, 76 P. 2d 941 (1938).

in making his choice. Such suggestions as were made on this ballot are open to argument. It was not for the City Council of Elgin to determine that every voter in favor of municipal ownership should vote "Yes." It is quite conceivable that there might be among the voters those who favored municipal ownership but for reasons satisfactory to themselves did not favor the bond issue in question.¹⁷

Some courts take the position that accuracy in a notice or on a ballot is required only in the case of matters required by statute. Information or statements on other matters is surplusage and need not be observed after the election.¹⁸ On this principle inaccuracies, if surplusage, do not have any bearing on the validity of an election.¹⁹ This position may be justified if we accept the pessimistic (probably realistic) view of the Supreme Court of California when in considering the effect of an election notice it said:

It is a well-known fact that the ordinary newspaper notice of a forthcoming election does not, in fact, have the desired effect of notifying the electors thereof. The ordinary qualified voter is so busy attending to his private affairs, and is so apathetic regarding matters touching the public welfare, that a printed newspaper notice of an election to be held, whether in the near or the distant future, even if seen by such voter, excites in him no particular interest.²⁰

¹⁷ *O'Beirne v. City of Elgin*, 187 Ill. App. 581, 585, 586 (1914). For variations on a ballot from statutory requirements as to the arrangement or form, or by "slight deviations of capitalization or punctuation," see *Jaeger v. City of Hillsboro*, 164 Kan. 533, 190 P. 2d 420 (1948). In *State v. Carswell*, 78 Ga. App. 84, 50 S.E. 2d 621 (1948), the objection was that "there were no instructions upon the ballot to guide the voter in expressing his choice on the questions submitted." On the basis of this, along with other errors, the court held the election illegal and void.

¹⁸ *Yesler v. City of Seattle*, 1 Wash. 308, 25 Pac. 1014 (1890). The court held that even though the ordinance submitted to the voters fixed the rate of interest for bonds, since this information was not required by statute and was therefore surplusage, the council might sell them at a higher rate than provided in the ordinance. In criticizing this position the Supreme Court of California pointed out that the rate of interest "would influence any business man in determining whether he should incur a personal debt, and must do so when he is called upon as a voter to determine whether he will favor his municipality's incurring a debt, for the payment of which, in common with others, his property is liable to taxation. He might readily consent, upon very favorable terms being offered or proposed, and strenuously oppose it if the terms were unfavorable or were uncertain." Also see *City of Redding v. Holland*, 75 Cal. App. 2d 178, 170 P. 2d 132 (1946); *Skinner v. City of Santa Rosa*, 107 Cal. 464, 40 Pac. 742 (1895).

¹⁹ *Phillips v. Atkins*, 229 Ala. 15, 155 So. 537 (1934). In *re Verde River Irrigation and Power Dist. Bonds*, 37 Ariz. 580, 296 Pac. 804 (1931); *Alison v. City of Phoenix*, 44 Ariz. 66, 33 P. 2d 927 (1934); *State v. City of West Palm Beach*, 127 Fla. 849, 174 So. 334 (1937); *State v. Salt Lake City*, 35 Utah 25, 99 Pac. 255 (1908).

²⁰ In *re Validation of East Bay Municipal Utility District Water Bonds*, 196 Cal. 725, 738, 239 Pac. 38, 43 (1925). A similar position was taken by the Supreme Court of Wyoming relative to false statements in the preamble of an election ordinance when it said: "Bearing in mind the fact that voters generally are apt to give but scant attention to the details of a notice, riveting their attention on the main object thereof, and further bear-

Where an election notice and ballot both stated that a proposed bond issue, where computed with outstanding debt would not exceed 2 per cent of the assessed valuation, it was obviously misleading since the existing debt was almost 4 per cent and the new issue would increase it to $5\frac{1}{2}$ per cent. The Supreme Court of Wyoming stated that if the statute had required information on the point it would have been mandatory that it be correct. Since there was no such requirement, the court upheld the validity of the bond issue on the grounds that "The erroneous statement herein is in the nature of an inducement to vote for the bonds, and we cannot, we think, consider it in a light other than that of an irregularity merely. No fraud or intention to mislead is claimed."²¹

Some courts take a more strict view as to misrepresentations of fact in an election notice, even though the information is not required.²² Those courts which hold that erroneous statements may not be made even on points of information not required, take the position that "no one can say that, without these favorable conditions, [surplusage that misrepresents] the result of the election would have authorized the indebtedness to be incurred."²³

A question which frequently arises is whether the amount of a

ing in mind that at least some of the property owners actually and vitally interested in the amount of bonds already outstanding, would be apt to attempt to verify the statement in the notice by the records of the municipality, readily accessible, and would then call attention to the falsity of the notice, to treat the error herein as prima facie not affecting the result is, we think, more nearly in accord with the actual facts in life than a contrary course, and that fact, after all cannot be overlooked." *Anselmi v. City of Rock Springs*, 53 Wyo. 223, 80 P. 2d 419, 425 (1938).

²¹ *Anselmi v. City of Rock Springs*, 53 Wyo. 223, 80 P. 2d 419, 423 (1938). Where a statute requires the amount of existing debt to be stated, an election has been enjoined where it was improperly stated. *McGuire v. City of Philadelphia*, 245 Pa. 307, 91 Atl. 628 (1914).

²² *Mann v. City of Artesia*, 42 N.M. 224, 76 P. 2d 941 (1938); *City of North Sacramento v. Irwin*, 94 Cal. App. 652, 271 Pac. 788 (1928); *Neacy v. City of Milwaukee*, 142 Wis. 590, 126 N.W. 8 (1910); *Simpson v. City of Nacogdoches*, 152 S.W. 858 (Texas Civ. App. 1912); *City of Amarillo v. Slayton and Co.*, 208 S.W. 967 (Texas Civ. App. 1919); *Oklahoma Utilities Co. v. City of Hominy*, 168 Okla. 130, 31 P. 2d 932 (1934); *Percival v. City of Covington*, 191 Ky. 337, 230 S.W. 300 (1921); *Madera Irr. Dist. v. Miller and Lux*, 47 F. 2d 61 (C.A. 9th, 1931).

²³ *Skinner v. City of Santa Rosa*, 107 Cal. 464, 40 Pac. 742, 745 (1895). The court went on to say that "If the terms and conditions submitted to the electors may be departed from, and election held to authorize the issuance of bonds under other terms and conditions, a door will be opened authorizing the common council to submit a proposition so favorable as to secure beyond question a favorable vote, and then change the conditions as to rate of interest and otherwise, even without any fraudulent purpose or intent, so that, if again submitted, an overwhelming defeat would result" (at p. 745).

bond issue is stated in such a way that it misleads the voters. Under the view that a proposition should not only state the truth but the whole truth, an election has been held to be void where the voters were asked to vote on the question of whether the city should "issue sixty-five thousand dollars in bonds. . . . for the purpose of constructing an electric light distributing system, power-plant building and appurtenances thereto, for the purpose of supplying said city and its inhabitants with electric current for lighting, power and other purposes" when in fact the plant was to cost an additional \$99,974. The additional amount was to be raised by the issuance of "revenue certificates" payable out of the proceeds of sales of light and power. The court held that "the election was held to take the opinion and judgment of common men and women who are not trained in the niceties of language; and it is undeniable that the concluding language of the ballot, 'for the purpose of supplying said city and its inhabitants with electric current for lighting, power and other purposes,' not only would lead the voters to assume that was exactly what they were voting for, but would tend to obscure the idea that it was only a part of the municipal plant they would get from their bond issue."²⁴

An election has been held to be void where voters were asked to approve a bond issue of \$198,500 "for the purpose of erecting a school building" when in fact the total cost of the building was to be \$395,000—the amount in excess of the bond issue to come from the federal government. The court was of the opinion:

Had he [the voter] known that almost double that amount was to be expended, he might have reasoned that a \$390,000 expenditure meant increased costs for maintenance, supervision and upkeep, a larger school and a more expensive establishment than he thought necessary or advisable, and have voted against such an issuance. Plaintiff argues that the excess cost is to be paid through a federal agency and that it will not cost the taxpayer nor increase his burdens, but that is not entirely true, or if it were, he was entitled to know it when he was legally advised there was to be an election.²⁵

Some courts have taken the position that the whole truth need not be disclosed on the ballot if the resolution of the council calling the

²⁴ *Kansas Electric Power Co. v. City of Eureka*, 142 Kan. 117, 45 P. 2d 877, 879 (1935).

²⁵ *Board of Education v. Powers*, 142 Kan. 664, 51 P. 2d 421 (1935). The same court in the following year upheld a bond proposal "in the amount of three hundred thousand dollars . . . the proceeds of said bonds to be used only when used in cooperation and conjunction with other funds advanced for such purposes by the United States of America," even though the total cost of such improvement was \$1,756,000. *Robertson v. Kansas City*, 143 Kan. 726, 56 P. 2d 1032 (1936). Also see *McNicholas v. City and County of Denver*, 101 Colo. 316, 74 P. 2d 99 (1937).

election contains full details. A vote on a bond issue for erecting a civic center to house the offices of the city government has been upheld even though the city proposed to use the proceeds to erect a building containing an auditorium, a stadium, hockey rink, banquet hall, shooting gallery, veterans' memorial hall, and an art gallery, as well as offices for the city government on the grounds that the resolution of the council was sufficiently broad to cover these matters. "This resolution was a matter of public record. . .," the court stated, and "Voters desiring additional information as to details had the means at hand for ascertaining it."²⁶ The question arises as to whether it would not be more realistic to assume that some voters were or might have been misled. On the basis of experience may we expect voters to check the resolution? There may have been a psychological or tactical advantage in submitting the question as it was submitted in this case; to call a hockey rink and a shooting gallery "offices of the city government" is clearly misleading.

In some cases the attack on the validity of an election is based on the fact a statutory requirement as to certain information has not been met rather than on the fact that the voters have been misled.²⁷ The statutory requirements are, however, in most cases for the benefit of the voters, giving them information which is considered desirable, if not essential, for intelligent voting. A requirement of notice and popular approval of a municipal debt in excess of 3 per cent is met by a notice stating the debt would exceed such figure; it need not state how much was within and how much in excess of the constitutional limit of 3 per cent.²⁸ Under such a requirement, however, bonds have been held invalid where the notice of the election stated the amount of the proposed bonds and the purpose, but did not specifically state they would exceed the 3 per cent limit. The fact the notice stated the amount and that it did actually exceed the 3 per cent was held to be inadequate. The court held that "the principle that statutes authorizing municipalities to incur obligations in excess of those which are ordinarily permitted to be incurred should be strictly construed, and that the intent of the statutes referred to in this opinion was that the taxpayers should be advised that the proposed debt would be in excess

²⁶ *Lloyd v. City of Great Falls*, 107 Mont. 442, 86 P. 2d 395, 400, 401 (1938).

²⁷ *Albuquerque v. Water Supply Co.*, 24 N.M. 368, 174 Pac. 217 (1918); *State v. Carroll*, 17 R.I. 591, 24 Atl. 835 (1892); 29 Ore. Law. Rev. 53 (1949).

²⁸ *Commonwealth Pub. Service Co. v. City of Deer Lodge*, 96 Mont. 48, 29 P. 2d 667 (1934).

of the 3 per cent limit, and that such advice in the form of a question should be specifically and clearly stated.”²⁹

A frequent attack made on the validity of municipal bond issue elections is that a statutory requirement that the amount of a bond issue or the rate of interest to be paid has not been met.³⁰ Courts taking a strict view as to these requirements have held that a vote on a bond issue “not exceeding \$70,000”³¹ or a notice stating the amount as “\$100,000 or such part thereof as may be required”³² are inadequate to meet a statutory requirement that the amount be stated. This strict position is based on the grounds that voters “are entitled to know definitely what is proposed in the way of increasing the indebtedness of the city.” If exact information is not given, “complete opportunity is not afforded those interested to so investigate the various questions as to enable them to vote intelligently.”³³

Where a statute required the resolution of the city council to state the amount, purpose, “and all other pertinent facts relating to the loan,” it has been held that the resolution must state the interest rate.³⁴ A vote on a proposal to issue bonds to construct a courthouse and jail has been held null and void where in fact they were to refund bonds previously issued for that purpose.³⁵ Courts are not in agreement as

²⁹ *City of Bozeman v. Sweet, Causey, Foster and Co.*, 246 Fed. 370, 374, 375 (C.A. 9th 1917). Cf. *King v. Katterjohn*, 193 Ky. 359, 236 S.W. 250 (1922). Where a statute required the notice of an election to show “the time or times when the bonds are to mature and the amount that is to mature at each such time,” it has been held that failure to give this information was a mere irregularity and did not constitute a fatal defect in the validity of the bonds. *Browder v. Gunter*, 220 Ala. 407, 125 So. 646 (1930).

³⁰ The case may be of statutory interpretation to determine what is required. *City of Louisville v. Kesselring*, 257 S.W. 2d 596 (Ky. 1953); *State v. Miami Shores Village*, 60 So. 2d 541 (Ala. 1952); *Newberry v. City of Andalusia*, 57 So. 2d 629 (Ala. 1952); *Chase v. City of Sanford*, 54 So. 2d 370 (Fla. 1951); *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 49 N.W. 2d 804 (1951).

³¹ *State ex rel. Lexington and St. Louis R.R. Co. v. Saline County Court*, 45 Mo. 242 (1870). In *Hillsborough County v. Henderson*, 45 Fla. 356, 33 So. 997 (1903), a statement that the interest was to be “not more than 4 per cent per annum” was held to be inadequate.

³² *Stern v. City of Fargo*, 18 N.D. 289, 122 N.W. 403 (1909).

³³ *Ibid.*, at 407. For cases taking a strict position as to such statutory requirements see *Peterman v. City of Milford*, 104 A. 2d 382 (Del. Ch. 1954); *Kansas Utilities Co. v. City of Paola*, 148 Kan. 267, 80 P. 2d 1084 (1938); *Smith v. Mayor of City of Dublin*, 113 Ga. 833, 39 S.E. 327 (1901); *Crooke v. Board of Commissioners of Davies County*, 36 Ind. 320 (1871).

³⁴ *Peterman v. City of Milford*, 104 A. 2d 382 (Del. Ch. 1954).

³⁵ *Helton v. Martin*, 141 La. 835, 75 So. 740 (1917).

to whether a call feature at more than par in a bond issue must be submitted to the voters. Some say it is not necessary since the contingency may never arise.³⁶ Others hold that the voters have "a right to assume that earlier redemption of the bonds would be at par."³⁷

A more liberal view has been taken by the courts of some states relative to a statutory requirement that the amount of the bonds proposed to be issued be stated in the notice of election or on the ballot. Under such a statutory requirement, the Supreme Court of Kansas upheld an election where the amount of the bonds was stated in the election notice as "not to exceed \$30,000." The court answered the argument that this misled the voters, saying:

In any free government the wise and the foolish, the vain and the venal, the radical and the conservative, may and do exercise the liberty of persuading their fellows to adopt their views; and all sorts of reasons, logical and illogical, serious, trivial, and absurd, are given by electioneering advocates in their endeavors to win the support of the voters.³⁸

In view of such permissible practices the court apparently considered it would be unreasonable to invalidate bonds because the maximum rather than the specific amount of a proposed bond issue was stated on a ballot.³⁹

Other courts taking a liberal position in cases where the voters may have been misled have upheld an election where the written statement as to the percentage of debt increase was in error since the figures were correct. The court rejected the general rule of law that in commercial transactions words control the figures. It did so on the ground that "percentage is more often expressed in figures than in

³⁶ *City of Maryville v. Cushman*, 363 Mo. 87, 249 S.W. 2d 347 (1952).

³⁷ *McNichols v. City and County of Denver*, 123 Colo. 132, 230 P. 2d 591 (1951).

³⁸ *City of Oswego v. Davis*, 97 Kan. 371, 154 Pac. 1124 (1916). A vote on the issuance of bonds "not to exceed \$60,000" has been upheld. *Lee Electric Co. v. City of Corning*, 199 Iowa 680, 202 N.W. 585 (1925). And a statement that the "maximum amount" of the bonds would be \$1,700,000 has been approved. *Spencer v. Mayor and Board of Aldermen of Yazoo City*, 215 Miss. 160, 60 So. 2d 562 (1952).

³⁹ For other cases taking a liberal position as to statutory requirements in submitting propositions to the voters see *City of Maryville v. Cushman*, 363 Mo. 87, 249 S.W. 2d 347 (1952); *Sacramento Municipal Utility District v. All Parties and Persons*, 6 Cal. 2d 197, 57 P. 2d 506 (1936); *Chicago, Burlington and Quincy Railroad Co. v. Village of Wilber*, 63 Neb. 624, 88 N.W. 660 (1902); *Fishblatt v. Atlantic City*, 78 N.J.L. 134, 73 Atl. 125 (1909); *Village of Bronxville v. Seymour*, 122 App. Div. 377, 106 N.Y.S. 834 (1907); *Lumberton v. Nuveen*, 144 N.C. 303, 56 S.E. 940 (1907); *Knight v. Town of West Union*, 45 W. Va. 194, 32 S.E. 163 (1898); *Drenning v. City of Topeka*, 148 Kan. 366, 81 P. 2d 720 (1938); *Railey v. City of Magnolia*, 197 Ark. 1047, 126 S.W. 2d 273 (1939).

words.”⁴⁰ And an election has been upheld where the council in submitting an ordinance erroneously stated that it was an initiated measure and signed by more than twenty-five per cent of the electors. The council could have submitted such a proposal on its own initiative; the court would not review the motive of the council in submitting.⁴¹

The test as to whether failure to follow statutory requirements should invalidate an election for those courts taking a liberal position is whether the ultimate result was or may have been different had there been strict compliance. This, of course, is a subjective judgment but, as stated by the Court of Appeals of Kentucky, “common sense should be exercised in the interpretation of a statute as well as in its enactment.”⁴² Where the courts taking the liberal view as to statutory requirements in initiative and referendum elections find “no evidence that the ultimate result would have been affected had compliance been strict” they uphold the validity of the election.⁴³

In determining whether the voters have actually been misled by failure to meet a statutory requirement, such as publication for two weeks, some courts consider whether the voters have been informed by publicity in the press, on the radio, by circulars, or other means. They hold that the purpose of the statute may be accomplished in this manner, and this extrinsic material has been held adequate even though the statute has not been met.⁴⁴ According to this view, “The object sought by publication is to bring the ordinance to the attention of the people, that they might be thoroughly posted and advised of its import, and thus enabled to vote intelligently upon the measure.”⁴⁵ The method or means by which they get such information is immaterial; and, of course, it is the courts that decide whether they get

⁴⁰ *Chostkov v. City of Pittsburgh*, 177 Fed. 936 (W. D. Pa., 1910). The amount of the increase was correctly stated and the court considered that was the material fact; the statute did not require that the percentage be stated.

⁴¹ *Plaza Amusement Co. v. Carter*, 11 Cal. App. 2d 414, 54 P. 2d 67 (1936).

⁴² *Queenan v. City of Louisville*, 313 Ky. 816, 233 S.W. 2d 1010 (1950).

⁴³ *Witham v. McNutt*, 48 Ore. 1177, 208 P. 2d 459 (1949). “Technical failures to comply with the directory provisions of the statute by officials ought not to be permitted to disenfranchise electors or to set their exercise of the franchise at naught when there is no reason to conclude that the will of a majority of those present and voting was thwarted.” *Carnes v. Livingston County Board of Education*, 341 Mich. 600 67 N.W. 2d 795 (1954).

⁴⁴ *Queenan v. City of Louisville*, 313 Ky. 816, 233 S.W. 2d 1010 (1950). Also see *Bosworth v. City of Middlesboro*, 190 Ky. 246, 227 S.W. 170 (1921).

⁴⁵ *Gollar v. City of Louisville*, 187 Ky. 418, 219 S.W. 421, 422 (1920).

it. Newspaper stories have been held to correct an erroneous table of bond maturities in an election notice.⁴⁶ Courts rejecting this method of meeting a requirement of notice state that the voters may have seen none of the circulars, heard none of the discussion or read none of the newspaper reports.⁴⁷

Proposals submitted to the voters are frequently attacked on the grounds of duality, two or more questions being submitted as one proposal so that the voters are not given an opportunity to vote on each separately.⁴⁸ In such cases the courts have generally held that since the voters had no chance to express their desires the election is void. The question in most cases is as to whether duality does exist in the wording of a proposal.⁴⁹ Does the question as to whether the city should issue bonds "to purchase, procure, provide or contract for the construction of a new water plant" present one or two questions?⁵⁰ Courts taking the position that dual propositions are presented by such a statement say that two separate questions are before the voters: (1) municipal ownership versus private ownership and (2)

⁴⁶ *Board of Supervisors v. Rechenmacher*, 105 Cal. App. 2d 39, 232 P. 2d 514 (1951).

⁴⁷ *Henson v. School District*, 150 Kan. 610, 95 P. 2d 346 (1939).

⁴⁸ The problem of duality has been stated by the Supreme Court of Colorado as follows: "If there be two objects, and . . . they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice." *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311, 314 (1900). As stated by the Supreme Court of Missouri, "The vice of 'doubleness' in submissions at elections is universally condemned. It is regarded as a species of legal fraud because it may compel the voter, in order to get what he earnestly wants, to vote for something which he does not want." *Hart v. Board of Education*, 299 Mo. 36, 252 S.W. 441, 442 (1923). On the problem of duality in submitting a proposition to the voters see 15 *McQuillin, Municipal Corporations* § 40.09 (3d ed. 1950).

⁴⁹ For a liberal view as to when a proposition does not violate the principle of duality see *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E. 2d 904 (1954); *City of Monrovia v. Black*, 88 Cal. App. 686, 264 Pac. 286 (1928); *Board of Education of City of Pittsburgh v. Davis*, 120 Kan. 768, 245 P. 112 (1926); *State ex rel. Smith v. McCombs*, 129 Kan. 834, 284 Pac. 618 (1930); *Robertson v. Kansas City*, 143 Kan. 726, 56 P. 2d 1032 (1936).

⁵⁰ For cases holding if this presents dual questions see *City of Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400 (1904); *Elyria Gas and Water Co. v. City of Elyria*, 57 Ohio St. 374, 49 N.E. 335 (1898); *Truelsen v. Mayor of Duluth*, 61 Minn. 48, 63 N.W. 714 (1895); *McBryde v. Montesano*, 7 Wash. 69, 34 Pac. 559 (1893). For contra view see *Inslee v. City of Bridgeport* 153 Neb. 559, 45 N.W. 2d 590 (1951); *Hurd v. City of Fairbury*, 87 Neb. 745, 128 N.W. 638 (1910). On the question of duality see annotation in 5 A.L.R. 538.

purchase of an existing plant versus construction of a new plant.⁵¹ A vote on bonds for light and water plants has been held to be dual, and that "the voice of the electors has never been heard";⁵² a vote, however, on a bond issue to "establish, erect, maintain and operate a municipal electric light and power plant" has been upheld.⁵³ A vote on a bond issue to establish an "electric light or power plant" has been upheld on the grounds that it was clear to the voter that it was to establish an "electric light and power plant."⁵⁴ And a proposal to issue bonds "for purpose of purchasing a site or erecting and equipping a public building for such city, or both" has been held not to be dual.⁵⁵

If two propositions are so interrelated that one cannot be carried out without the other, most courts will approve the submission of both propositions as one question.⁵⁶ This is approved on the ground that the questions are reasonably related. It helps to avoid ridiculous results at elections where voters approve contradictory proposals, or where they approve a new public building but reject a bond issue for its construction. The problem with the rule is to determine whether two propositions are sufficiently related to be submitted as one question.⁵⁷

⁵¹ *Kansas Utilities Co. v. City of Paola*, 148 Kan. 267, 80 P. 2d 1084 (1938). For contra view see *Texsan Service Co. v. City of Nixon*, 158 S.W. 2d 88 (1941); *Simpson v. Nacogdoches*, 152 S.W. 858 (1913).

⁵² *Stern v. City of Fargo*, supra, note 32.

⁵³ *Wyatt v. Town of Manning*, 217 Iowa 929, 250 N.W. 141 (1933).

⁵⁴ *Lahn v. Town of Primghar*, 225 Iowa 686, 281 N.W. 214 (1938).

⁵⁵ *Drenning v. Board of Commissioners of City of Topeka*, 148 Kan. 366, 81 P. 2d 720 (1938).

⁵⁶ As applied to bond issues, the rule has been stated as follows by the Supreme Court of Florida: "The law is well settled that if bonds are proposed and issued for two or more purposes that are so related as to amount to a single purpose, they may be combined and voted on as a single issue, otherwise each proposition must be submitted so that it can be voted on separately." *State v. City of Daytona Beach*, 33 So. 2d 218 (Fla. 1948). Bonds for the purchase, development and improvement of a "public park and flying field" have been held to be for a single purpose. *East v. City of Camden*, 201 Ark. 505, 145 S.W. 2d 721 (1940). On the need of itemization on a bond issue ballot of the purposes for which bonds are being issued also see *Voss v. Chicago Park District*, 392 Ill. 429, 64 N.E. 2d 731 (1946).

⁵⁷ *Coeman v. Town of Eutaw*, 157 Ala. 327, 47 So. 703 (1908); *In re Validation Bonds City of Moss Point*, 170 Miss. 886, 156 So. 516 (1934); *Cain v. Smith*, 117 Ga. 902, 44 S.E. 5 (1903); *Blaine v. Hamilton* 64 Wash. 353, 116 Pac. 1076 (1911); note, 51 Mich. L. Rev. 609 (1953). For an attack on the validity of an election on the grounds that two proposals were submitted when in fact there was a single proposition which could not be separated see *Kendrick v. City of Birmingham*, 242 Ala. 112, 5 So. 2d 82 (1941).

The use of "and/or" in a proposition on a ballot has been condemned. The Supreme Court of Nebraska quoted with approval the condemnation directed at the use of "and/or" by the Supreme Court of Wisconsin as "that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to know what he did mean . . ." ⁵⁸ and held its use in a proposal on a ballot "led to the confusion of the voters, who were absolutely unable to determine definitely what they were voting for or against." ⁵⁹ The question on the ballot was as to whether the city should "construct, purchase, or otherwise acquire an electric light and power distribution system, and/or transmission lines." ⁶⁰ Obviously those who voted "Yes" might have favored different things.

The success of an attack on the validity of an election on the grounds that the question is stated in such a way as to confuse or mislead the voters may depend upon whether the attack is made before or after the election is held. A statutory requirement may be held to be mandatory if an attack is made before an election is held but directory only if the question is not raised until after the election. ⁶¹ After an election has been held the courts have generally taken the position that failure to follow a statutory requirement will not result in the election being held void unless it can be shown to have prevented the electors from giving a full and free expression of their will at the election. ⁶² As stated by the Supreme Court of Kansas, "Tech-

⁵⁸ *Employers' Mutual Liability Ins. Co. v. Trollefsen*, 219 Wis. 434, 263 N.W. 376, 377 (1935).

⁵⁹ *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109, 113 (1939).

⁶⁰ And/or has been referred to as a "baffling symbol" and as "a disingenuous modernistic hybrid, inept and irritating." Dissenting opinion of Justice Maxwell in *Bell v. Wayne United Gas Co.*, 116 W. Va. 280, 298, 181 S.E. 609 (1935). See annotation in 118 A.L.R. 1367 on "and/or."

⁶¹ A statutory requirement may be mandatory if direct proceedings for enforcement are brought, "but after election it should be held directory, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or the ascertainment of the result. . . ." Attorney General ex rel. *Miller v. Miller*, 66 Mich. 127, 253 N.W. 241 (1934). Also see *Carnes v. Livingston County Board of Education*, 341 Mich. 600, 67 N.W. 2d 795 (1954); *In re Validation of East Bay Mun. Utility Dist. Water Bonds*, 196 Cal. 725, 239 Pac. 38 (1925); *Wiesberger v. Nez Perce County*, 33 Idaho 670, 197 Pac. 562 (1921). For a more strict view as to the necessity of following statutory requirements even though the attack is made after the election has been held, see *City of Miami v. Romfh*, 66 Fla. 280, 63 So. 440 (1913); *Hatfield v. City of Covington*, 177 Ky. 124, 197 S.W. 535 (1917).

⁶² *City of Tulelake v. Roathe*, 41 Cal. App. 2d 522, 107 P. 2d 277 (1940).

nical questions as to the validity of a bond issue should be raised early or waived—for the good of the municipality itself, as well as for the protection of those who invest in the bonds.”⁶³ If, after a favorable vote by the electorate, bonds have been issued or contracts have been let, the hardship and the legal complications arising from holding an election invalid would be so great that most courts avoid this result by holding statutory provisions requiring certain information to be directory and not mandatory in cases where an attack is made after the election has been held.⁶⁴

CONCLUSION

As has been noted above, some courts invalidate initiative and referendum elections only where they find that the voters were in fact misled by the petition, election notice, or ballot, while others hold that reliance is not material, the fact that the statement was erroneous being fatal. This division of the courts applies even though the inaccurate information in the petition, election notice, or on the ballot is superfluous and not required by statute. A clear majority of the courts take a strict view as to the accuracy of information required by statute but a minority take a liberal view even as to this requirement.

Is there a valid basis for the more strict position taken by the courts toward misleading the voters by written words on a ballot or in an election notice than by written or spoken words in an election? From the point of view of the results there appears to be no basis for the distinction—and the courts offer none. In the case of the petition, election notice or ballot, the misleading information is in a public document and thus the voter has more reason to rely upon it. In the case of campaign spoken or written words, the voter should know that he must be on guard since the individuals and groups supplying the information are interested in the outcome.

The strict view taken by some courts in requiring accuracy in

⁶³ *State ex rel Smith v. McCombs*, 129 Kan. 834, 284 Pac. 618 (1930). Where voters approve bonds in excess of the debt limit it has been held that a city official may refuse to issue only those bonds in excess of the debt limit. The court held that the voters may vote more bonds than the constitutional debt limit but that the city could not issue them. *Board of Education of City of Pittsburgh v. Davis*, 120 Kan. 768, 245 P. 112 (1926).

⁶⁴ On the timeliness of objections in initiative and referendum elections see *Henson v. School District*, 150 Kan. 610, 95 P. 2d 346 (1939); *Drenning v. Board of Commissioners of City of Topeka*, 148 Kan. 366, 81 P. 2d 720 (1938); *State v. Wurts*, 63 N.J.L. 289, 43 Atl. 744 (1899); *Pearson v. Taylor*, 159 Fla. 775, 32 So. 2d 826 (1947).

statements of proposals in initiative and referendum elections would seem to be desirable from the point of view of public policy. While there is hardship where courts set aside and nullify what is technically at least the expression of the will of the voters, it should result in more care in framing initiative and referendum proposals in the future. It should reduce both the number of cases of misleading statements drafted with the intention of confusing the voters and obtaining a favorable vote, as well as innocent cases of careless drafting where the proposition to be voted on is not clear. The advantage from the point of view of democratic government outweighs the disadvantage of holding another election where the proposal submitted is not clear and there is a doubt as to whether the will of the voters has been expressed at the polls.

DE PAUL LAW REVIEW

Volume VIII

AUTUMN-WINTER 1958

Number 1

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