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A "MAJORITY OF THE ELECTORS" MEANS A MAJORITY OF THOSE VOTING ON THE QUESTION

(A criticism of *State v. Swift*, 69 Ind. 505; *In re Denny*, 156 Ind. 104; *In re Boswell*, 179 Ind. 292)

FRANK N. RICHMAN*

Three times has the Supreme Court of Indiana squarely faced the question of what constitutes "a majority of the electors" as found in Section 1 of Article XVI of the Constitution of 1851. Six opinions, three dissenting, have been written. The first majority opinion, *State v. Swift*,¹ written by Judge Biddle, and concurred in by Judges Worden and Howk, shows that he dissented from the view of the concurring judges, so that in fact there were at least four opinions in that case, a third, dissenting, written by Judge Niblack and a fourth, also dissenting, by Judge Scott.

The second majority opinion, written by Judge Baker in *In re Denny*,² indicates disagreement with the views of the majority in *State v. Swift*, and itself meets the approval only of Judges Dowling and Monks, for Judge Hadley concurs in part only, and Judge Jordan wholly dissents.

Not until *In re Boswell*,³ was an opinion written in which all the judges then sitting concur and the burden of that opinion,

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¹ 69 Ind. 505.

² 156 Ind. 104.

³ 179 Ind. 292.

which omits argument pro and contra, is that the court has twice before decided the point.

Intervening is another case, *City of South Bend v. Lewis*,⁴ dealing with a similar phrase in a statute, which indicates (Judge Baker to the contrary notwithstanding) that four judges (Howard not participating) would have dissented from the majority in *State v. Swift* and probably have held an amendment adopted if ratified by a majority of the electors voting thereon. And there are other cases similarly decided.

Besides this conflict of opinion in Indiana, two other states with almost identical constitutional provisions to those of Indiana, have taken opposite views, Idaho by a united court in *Green v. State Canvassers*,⁵ dissenting from, and Wyoming, also by a united court in *State ex rel. Blair v. Brooks*,⁶ agreeing with, the majority in Indiana.

With this conflict of opinion it surely is permissible to re-examine the question and, in that connection, the axiomatic saying keeps coming to mind that no question is settled until it is rightly settled.

If the Supreme Court, as now constituted, were to take the view of Judges Niblack and Jordan, two more or less vexatious questions would be eliminated for all time, first, the right of the court to prescribe educational standards of candidates for admission to the bar, and, second, the right of the legislature to provide for an income tax, gross or net. Amendments were voted upon covering each of those questions at the election in 1932, each receiving a majority of the votes cast thereon.

The majority, using the language of Judge Cox in the *Boswell* case, say "that the provision is too plain to carry more than one meaning and the question in any case is not one of construction but of evidence to determine the number of electors in the state and whether an amendment has received (the vote of) a majority of them." This statement would perhaps be acceptable if, first, the phrase had not prior to 1851 acquired a common law meaning presumably known to those who used it,⁷ and, second, if the rule of evidence used to determine the number of electors were itself not one of construction. Surely so many judges and courts would not have disagreed were there not difficulty either

⁴ 138 Ind. 512.

⁵ 5 Ida. 130, 95 Am. St. Rep. 169, 47 Pac. 259.

⁶ 17 Wyo. 344, 99 Pac. 874, 22 L. R. A. (N. S.) 478.

⁷ See 156 Ind. 150, 151.

in the meaning of the phrase itself or in applying the rule for determination of the number of electors.

Every judge who expresses an opinion thereon concedes that one amendment may be submitted at a special election called for the sole purpose of voting thereon, and, if more votes are cast for than against, the amendment is ratified and becomes a part of the constitution. This concession must, of necessity, be made by those who hold that the question is one of evidence, for the rule of evidence which they apply is judicial knowledge obtained from the official record of the particular election. In no opinion, except that of Judge Biddle, is there any other suggestion.

The rule adopted by the majority, therefore, may be used with absurd results. For instance, at the general election held November 6, 1932, 1,576,897 votes were cast for candidates for presidential electors, 1,566,909 for governor, 1,560,965 for secretary of state, 439,949 for and 236,613 against the lawyers' amendment. Applying Judge Baker's rule there were at least 1,576,827 electors in Indiana on that day of whom, obviously, 439,949 were less than half. Suppose, however, that the amendment had been voted on at a special election held on November 5th or 7th, the day before or after, the general election, and that the same number of votes had been cast for and against the amendment as actually were cast on November 6th. Again applying Judge Baker's rule, the court would take judicial knowledge that the number of electors in Indiana as determined by such special election was 676,562 of which 439,949 were more than half, so that the amendment would have been ratified. In other words the number of electors one day was 1,576,897 and on the preceding or succeeding day 676,582, an impossible increase or decrease in actuality. A rule which could easily result in such an absurdity can not be accepted without question and this is true whether it be considered a rule of evidence or one of construction.

First, examining the majority opinions, we find in that of Judge Biddle more by way of argument than in Judge Baker's and, as before stated, least of all in the final opinion of Judge Cox which is principally based upon the authority of the other two and of the Wyoming case, without mention of the Idaho decision *contra*. While it adds to the length of this paper, it seems advisable to take up each majority opinion separately, summarizing the points made and suggesting the arguments to the contrary.

JUDGE BIDDLE'S OPINION (69 IND. 505)

The opinion of Judge Biddle in *State v. Swift* first refers to the adoption of Section 7 in Article 10 at an election by less than a majority of all the voters voting at the election but a majority of all the votes cast on the amendment, and says that in view of the fact that the Governor and Secretary of State, the co-ordinate executive branch of the government, had declared the amendment adopted, the validity of its adoption had become *res judicata*.

Judge Biddle's first argument⁸ is that the Act of Congress authorizing the first constitutional convention in Indiana, required action "by a majority of the whole number elected," that by the act of the Legislature in 1849 "a majority of all the votes polled at such election" was required to adopt the constitution of 1851; that by the Act of 1850, under which the article in relation to negroes was submitted separately, "a majority of all the votes cast" was required to ratify; and that in Article 16, Section 1 itself is a provision for agreement "by a majority of the members elected to each of the two houses" and by Article 4, Section 25 a joint bill or resolution must be concurred in by "a majority of all the members elected to each house." From this he draws the conclusion that it is a settled policy in Indiana that neither the constitution nor any amendment may be adopted "by a plurality of votes of the electors or by any less number than a majority of the whole number cast at that election."

The conclusion seems farfetched. What Congress may have provided in its Act of 1816 surely has no bearing upon what the people of Indiana later provided either through their legislature or in their constitution. What the constitutional convention provided with reference to the vote necessary in either house as to amendment of the constitution or as to the passage of a joint bill or resolution, has no weight in determining what they did *not* provide as to the election for ratification, namely, what should be considered "a majority of said electors." The different provisions from which he drew his conclusion are not alike and one at least, the clause "a majority of all the votes cast," has been construed by many courts to mean the majority of the votes cast for and against the specific proposition voted upon.⁹

⁸ 69 Ind. 505, 514.

⁹ See the authorities cited *pro* and *con* on pages 481 and 482 of the case note in 22 L. R. A. (N. S.).

Judge Biddle argues further that constitutions ought not be amended by a plurality vote. He apparently overlooks the fact that "plurality" is synonymous with "majority" when only one proposition is being voted upon.¹⁰

Judge Biddle's next argument is that the proceedings of the constitutional convention disclose that a proposed amendment to the original article (which article was first introduced substantially in the words in which it ultimately passed), by requiring "a majority of all the votes cast for or against the same" to ratify an amendment, was rejected in committee. From this he concludes that such an interpretation is not warranted from the language ultimately used. The first and a good answer to this argument is that the debates and proceedings in a constitutional convention should not influence a court in interpreting the constitution.

"And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed; but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."¹¹

But, secondly, the action of the committee in reporting the amendment in its present form permits equally the conclusion that the committee understood the section as finally submitted to mean just what Stevenson's proposed amendment declared. Neither the journal nor the debates of the constitutional convention disclose what took place in the committee. Nor does either of these records show that any debate took place, in convention or committee, as to how "a majority of the electors" should be determined.

The proceedings, on the other hand, do show that the committee was asked to consider a provision for submission "to the people at the next general election for their adoption or rejection."

¹⁰ See the distinction made in Judge Niblack's dissenting opinion, 69 Ind. 529.

¹¹ 1 Cooley's Cons. Lim. 8th ed. (1927), p. 143.

tion in such manner as may be prescribed by law; and if a majority of all the electors voting at such election for members of the House of Representatives shall vote for such amendment or amendments, the same shall become a part of the constitution."¹² The Journal also¹³ discloses a proposal that the amendment should be submitted at a general election. Neither of these proposals was included in the final draft. Using the method of Judge Biddle's argument, from the fact that in the final draft the vote was not made dependent upon the vote cast for members of the House of Representatives, and that it was not required to be submitted at a general election, the conclusion may be drawn that the members of the convention did not intend that the vote on any other proposition or candidate for office should be considered in determining the vote on the amendment. It is obvious, of course, that at a special election for that purpose alone there could be no other proposition or candidate the vote for which or whom could determine the number of electors.

The next argument of Judge Biddle is that there is no analogy between electing officers and ratifying a constitutional amendment, that in the one case a plurality of votes may be sufficient and in the other it is insufficient. This statement disregards the fact that when the constitutional amendment is the only proposition voted upon, the words plurality and majority are equivalent.

He alludes in various places to the proposition that amendment of the fundamental law should be made more difficult than, for instance, the amendment of a legislative act. To this there may be assent without agreeing that the language of the provision for amendment of the constitution should be interpreted any differently from similar language in a statute. In other words, the meaning of a word or phrase, as used in the constitution, is no different from the meaning of an identical word or phrase used in an act of the legislature. The question is not what provision for amendment should be made but what was made.

The only authority cited by counsel for appellee which Judge Biddle thinks it necessary to distinguish, is the case of *Gillespie v. Palmer*.¹⁴

¹² Journal, page 693.

¹³ Journal, page 444.

¹⁴ 20 Wis. 544.

There were two provisions in the Wisconsin constitution which Judge Biddle states were "in apparent conflict," one, providing for extension of the right of suffrage "submitted to a vote of the people, at a general election, and approved by a majority of all the votes cast at such election," and the other providing for amendment of the constitution ratified "by a majority of the electors voting thereon." The Wisconsin court arrived at the conclusion that both provisions meant the same thing. In view of the fact the numerous courts, as heretofore pointed out, have held that "a majority of all the votes cast" means a majority of all the votes cast thereon, the Wisconsin decision is not anomalous, and, it is submitted, does not deserve the criticism which it later received (without being overruled) by the Wisconsin Court, but which criticism is relied upon as sufficiently condemnatory by Judge Baker in his opinion.¹⁵

Next Judge Biddle attempts to make a distinction between elections for ratification of constitutions and elections upon the question of levying taxes, granting privileges, establishing county seats and electing officers, etc., but as pointed out by Judge Niblack¹⁶ "when, in relation to the same general subject, the same or equivalent words are used, both in a constitution and in a statute, there is nothing either in reason or in the authorities, requiring a different construction to be given to such words when found in the constitution from that which ought to be given to them when used in the statute."

Referring again to the ratification of the amendment with reference to the Wabash & Erie Canal, Judge Biddle attaches some significance to the fact that in the Act submitting that amendment provision was made for the Governor's proclaiming that "the same was duly ratified by the people," whereas under the Act of 1879 the Governor "had no power to declare whether the amendment had been adopted or rejected." The answer to this argument is that the constitution itself provides for no action upon the part of the Governor. As stated by Judge Niblack¹⁷: "It is the vote of the electors which ratifies an amendment, and not the proclamation of the Governor."

Judge Biddle then asserts that the social, municipal and political consequences of the court's decision are not to be considered

¹⁵ 156 Ind. 123.

¹⁶ 69 Ind. 532.

¹⁷ 69 Ind. 537.

in determining whether or not a constitutional amendment has been ratified. With this statement there may be full agreement but, of course, it is not an argument in support of his opinion as to whether in fact the amendment has been ratified.

Finally,¹⁸ Judge Biddle announced that the "court holds that it requires at least a majority of all the votes cast at the same election to ratify a constitutional amendment" but in the succeeding paragraphs indicates that he is not in agreement as to the rationale of the decision with the other two of the judges who subscribe to the majority opinion. He states their view that the Act of 1879 is defective in not providing for the count of the votes, saying that "there is no source from which this court can ascertain whether the amendment received a majority of all the votes cast at the election or not." With this view he disagrees, asserting that "the number of electors of a state is a public fact" of which the courts may take judicial notice, but he does not say specifically how many electors there were at the time of this election nor point out specifically how he arrives at the conclusion that less than a majority voted for the amendment.

The effect of this opinion, taken with the dissenting opinions of Judge Niblack and Judge Scott, is that two judges, Howk and Worden, held that the amendment was not ratified because there was no way for the court to determine the whole number of electors in the state on the day of the election, two, Niblack and Scott, held that the amendment was ratified because it received a majority of the votes cast thereon, at this, a township election, and one, Biddle, held that it was not ratified because he knew there were more electors in the state than twice the number who voted for the amendment.

JUDGE BAKER'S OPINION (156 IND. 104)

Judge Baker, after stating the case, starts with the premise that it would be unnatural to expect that a constitution might be amended without the affirmative action of a "sovereign majority." He then asserts: "There is no room for construction. The language is too plain to admit of quibbling. 'Majority' means 'more than half.' 'Electors,' with reference to an election, means, according to the lexicographers and universally accepted usage,

¹⁸ 69 Ind. 525.

'persons possessed of the legal qualifications entitling them to vote.'" And promptly he reaches the conclusion that "in any case, the question becomes one, not of constitutional construction, but of evidence."

His next premise is that in the absence of a provision for registration the number of electors is determined by the election itself.

He then concedes that the General Assembly had the right to submit the amendment at a special election but having submitted the same at a general election, he asserts, as a matter of judicial knowledge, that 664,094 votes were cast for presidential electors, 655,065 for governor and 493,670 on another proposed amendment, in each case more than twice 240,031 who voted for the "lawyers' amendment," from which he asserts, rather positively, that such an amendment was rejected.

So far in the opinion there is little of argument. The judge has made up his mind and he is stating his conviction in absolute and positive terms.

He next takes up the argument of the attorney general, that the proposed amendment must be deemed to have been submitted at a special election in view of the fact that the legislature of 1899 in submitting the amendment did not conform to the Act of 1889 providing for the submission of future proposed amendments on the state ballot but provided for separate ballots containing the two amendments only. Of course, one legislature cannot bind future legislatures as to matters within their constitutional power, and the later act must be deemed to have repealed the former if inconsistent therewith. The election, if special, was such not because of departure from the Act of 1889 but because the amendment was voted upon separately just as it would have been at a special election for the purpose of ratifying or rejecting one constitutional amendment. Judge Baker further submits the question that if the election be deemed special as to the two proposed amendments, "how can the court properly shut its eyes to the fact that the 240,031 votes cast for the proposed amendment in question are less than half of the 493,670 votes recorded as having been counted on the other."

It was this argument upon which Judge Hadley rested his concurrence in the majority opinion. Judge Hadley's concurrence on this ground only seems inexplicable. The second section of Article 16 itself provides for a separate vote on amendments

submitted at the same time. Of course, the vote upon each of the offices to be filled at this election was likewise separate. If, therefore, in order to determine whether "a majority of the electors" ratified the particular amendment, it is permissible to look at any other vote then on the amendment itself, it is just as logical to look to the vote on governor, presidential electors, secretary of state or a judge of the supreme court as to the vote upon the other constitutional amendment.

Again referring to the fact that the court has judicial knowledge, which he designates as "evidence of the very highest class," that there were at least 664,094 persons entitled to vote, he says that it is permissible to conjecture that there may have been more persons entitled to vote but not that there may have been less. The argument of the attorney general which he thus assumes to answer apparently was based upon the assumption that the court might look to the vote on presidential electors to determine the number of persons then entitled to vote in Indiana. It is obvious that such an assumption would concede his case. No dissenting judge makes such assumption or concession.

Judge Baker then answers the rather specious argument of the attorney general that "a majority of the electors" was not intended to mean "all of the electors" because the word "all" before electors was rejected by the constitutional convention, by stating that "the one form of expression may be more intensive than the other, but it is not more inclusive."

The next argument of the attorney general which is considered, is that Section 2 of article 16, requiring a count of the votes for and against each amendment separately, indicates an intention that only the votes counted for and against such amendment should be considered in determining the number of electors. Judge Baker says that this "inference would destroy as well the direct command in section 1 that a proposed amendment 'shall be agreed to by a majority of the members elected to each of the two houses,' since a record of the votes 'for' and 'against' in each of the two houses is directed to be entered on their journals." He emphasizes the language "a majority of the members elected" stating that it is not a majority of a quorum or those voting for or against but a majority of the body that is required. And he asserts that the standard is made the same in the three bodies, that is, in each of the two houses and the electorate. If the argument of the attorney general is

not convincing,¹⁹ neither is the answer, for the requirement as to the vote in each house is based specifically on the number of members elected whereas there is no specific definition of the word "electors." The inference is that the members of the convention thought the word "elector" sufficiently specific, but the question still remains, what does it mean?

Judge Baker next refers to the history of the article in the constitutional convention. His argument follows that of Judge Biddle and is subject to the same criticism.

He then discusses the case of *State v. Swift* approving the majority opinion to the extent that "it requires at least a majority of all the votes cast at the same election to ratify a constitutional amendment" but disapproving the holding that the court judicially knew that more electors had participated in the township elections than had voted for or against the proposed amendment. He holds with Judge Niblack that township elections are local and that the courts may not take judicial notice of the vote therein.

Next the case of *City of South Bend v. Lewis* is discussed by Judge Baker. He agrees with the conclusion therein reached but on the ground that the statute in that case and the constitutional provision are essentially different and he adds that the court in that case "forecasts the doctrine that is controlling here." He then quotes the paragraph beginning with the last line of 138 Ind. 533, and continuing for ten lines on page 534, omits the remainder of page 534, all of page 535 and of 536 except the last four lines, and couples with the first paragraph quoted, as if it were a part of the same argument, the second of the "four leading principles" which the court in that case says may be deduced from the many decisions involving ratification by popular election. This coupling of paragraphs seems most unfair and it results in a distortion of the view that was expressed by Judge Dailey and concurred in by the other members of the court in the *South Bend* case. Reading that opinion fairly and in its proper sequence, we have the impression that the court was not in accord with the majority in *State v. Swift*. In fact, on page 532, Judge Dailey asserts: "It is, at least, evident to our minds that the rule declared by the court in *State v. Swift*, *supra*, should not be extended so as to embrace any litigation other than

¹⁹ But see concurring opinion of Morgan, C. J., in *Green v. Board of Canvassers and Holcomb v. Davis*, 56 Ill. 413, referred to *infra*.

that arising on the question of amending the organic law of the state."²⁰

Finally Judge Baker asserts that his conclusion is sustained by the overwhelming weight of authority and he cites cases occupying almost two pages of the opinion, sixty cases in all.

²⁰ Judge Dailey (138 Ind. 513) says:

"From what we have said, we think it clearly appears that four leading principles may be considered as fully established, namely:

"First. Where a measure is proposed to the people, and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote.

"Second. Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at 'such election', a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question.

"Third. Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary.

"Fourth. Where a legislative body provides that a proposition shall be submitted to the voters; that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to the proposition shall cast a negative vote, and that 'majority of the votes given' shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved."

"Of the correctness of these four principles we think there can be no dispute. The only doubts which can arise are those occasioned by a confusion of the second and third. Indeed it may be said that the first and third principles are identical, and control all such cases except such as are controlled by statute or constitutional law."

The facts in the South Bend case bring it within the fourth principle and, it is submitted, the Indiana provision for amending the constitution falls within the first and third. It certainly does not fall within the second because there is no provision in the constitution requiring the amendment to be submitted "at a certain regular election", or making the question depend upon a majority of the votes "cast at such election".

It will be noted that the Idaho constitution contains the first of these requirements, namely, the submission of the amendment "to the electors of the state at the next general election," but does not contain the second of the requirements, because it reads: "If a majority of the electors shall ratify the same", and omits the words "at such election". The Idaho constitution, therefore, comes more nearly within the second principle than that of Indiana, and if the decision of the Idaho court is wrong, it is because it goes beyond, not because it is in accord, with the dissenting view in Indiana.

Conspicuous among them are the cases of *Green v. State Board of Canvassers* and *Gillespie v. Palmer*, *supra*. Twelve others of the sixty are abstracted and expressly distinguished in the dissenting opinion of Judge Jordan.

Of the sixty cases, sixteen readily are distinguished, fifteen are against Judge Baker’s contention and fifteen of the other twenty-nine, it is submitted, may, upon careful examination, satisfactorily be distinguished. The sixteen which practically distinguish themselves are the following:

THIRTY-ONE CASES DISTINGUISHED

SLINGERLAND V. NORTON²¹

SMITH V. BOARD²²

These two cases involve the same statute which required that a petition for election must be signed by legal voters of the county in a number equal to 60% of the whole number voting at the preceding general election and then provided for a special election, canvass of the votes for and against, and “if 55% of the votes cast at such election shall be in favor, etc.” In *Slingerland v. Norton*, the court held that the 60% is determined from the poll lists, not the official count of the votes at such preceding election, and in *Smith v. Board* the court held that the unintelligible as well as the legal votes must be counted to determine the number of “votes cast.”

STATE V. MAYOR OF ST. LOUIS²³

A statute read “submitted to the qualified voters thereof at a general or special election * * * and accepted by at least three-fifths of the qualified voters voting *thereat*.”

STATE V. MCGOWAN²⁴

A constitutional provision read “whenever a majority of the legal voters * * * voting an any general election, shall so determine.” Another constitutional provision read “question of continuing same may be submitted to a vote of the electors of such county at a general election * * * and if a majority of all the votes cast upon that question shall be against, etc.” The court

²¹ 59 Minn. 351.

²² 64 Minn. 16.

²³ 73 Mo. 435.

²⁴ 138 Mo. 187.

called attention to the explicit language in the latter provision as indicating that the former should not be read to mean a majority voting upon the question. This comparison may have had weight in the decision of the Missouri court in previous cases, although not stressed therein.

STATE V. BABCOCK²⁵

This is one of the leading Nebraska cases. The constitution provided for notice for three months "preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting *at such election* adopt such amendments, etc." And one of the three judges dissented, claiming that the vote on the question should determine.

STATE V. VANCAMP²⁶

There was no decision on the point—merely an unconsidered dictum.

STATE V. FORAKER²⁷

The constitution provided for notice for six months "preceding the next election for senators and representatives at which time the same shall be submitted * * * and if a majority of the electors, voting *at such election*, etc." The case is like *State v. Babcock*.²⁵

GAVIN V. CITY OF ATLANTA²⁸

MAYOR V. WILSON²⁹

In these two cases, the second citing and approving the former, the question turned on whether or not there had been a registration of voters, the former, where special registration was required, holding that the number of qualified voters was determined by the registration list, the latter, where there had been no registration, holding that because thereof it was impossible to determine the number of qualified voters.

STATE V. CORNELL³⁰

The language of a statute was "if two-thirds of the votes cast on such proposition at such election" (general or special).

²⁵ 17 Neb. 188.

²⁶ 36 Neb. 91.

²⁷ 46 Oh. St. 677.

²⁸ 86 Ga. 132.

²⁹ 96 Ga. 251.

³⁰ (Neb.) 74 N. W. 59.

STATE V. WURTS³¹

BOTT V. SECRETARY OF STATE³²

The same litigation is involved in these cases. The principal question was whether the canvass of a vote by the legislative department was *res judicata* and *State v. Swift* was cited as authority therefor. The constitutional provision involved required submission of amendments "at a special election held for that purpose" and "if the people shall * * * ratify such amendment * * * by a majority of the electors qualified to vote for members of the legislature *voting thereon, etc.*"

SMITH V. PROCTOR³³

Here the language of the statute was "whenever a majority of all the inhabitants * * * entitled to vote, to be ascertained by taking and recording the ayes and noes of such inhabitants attending * * * at any meeting legally * * * held."

SOUTHERLAND V. GOLDSBORO³⁴

DUKE V. BROWN³⁵

The determination of the number of "qualified voters" is by this court limited to the registration lists. The first case held that "by the vote of the majority of the qualified voters therein," means a majority of those registered, regardless of the number who were eligible to register. The second case following the former held that a proposition failed where 245 voted for, 125 against and there were 607 registered.

DAVIS V. BROWN³⁶

A statute provided that if three-fifths of all votes cast at said election upon the question be in favor of the relocation" the county seat should be changed. The opinion contains language to the effect that where provision is made for a negative vote, one who does not vote should not be counted as voting "no."

Of the twenty-nine cases which Judge Baker would have been justified in citing as supporting his view, the following fifteen bear distinguishing marks.

³¹ 61 N. J. L. 163.

³² 62 N. J. L. 107.

³³ 130 N. Y. 319.

³⁴ 96 N. C. 49.

³⁵ 96 N. C. 127.

³⁶ 46 W. Va. 716.

PEOPLE V. BERKELEY³⁷

This was a constitutional provision reading "whenever a majority of the electors voting at a general election" and falls within Judge Dailey's second principle.

BELKNAP V. CITY OF LOUISVILLE³⁸

There were two constitutional provisions under consideration, the first permitting not more than one election (for all purposes) within a year, and the other forbidding certain action "without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose." The court held that there was only one election, though separate vote, and the proposition to carry must receive votes equal to two-thirds of the highest vote cast on any proposition or office. The reasoning is in accord with Judge Baker's view, but the words "voting at an election" serve to distinguish the clause from that in the Indiana constitution. And, besides, the case is expressly overruled in *Fiscal Court v. Trimble*.³⁹

STATE V. POWELL⁴⁰

The constitution provided that "notice * * * shall be given * * *, preceding an election, at which the qualified electors shall vote directly for or against such change * * * and if it shall appear that a majority of the qualified electors voting shall have voted for, etc.," the constitution shall be so amended. The word "voting" is of course indefinite. The court chose to insert the words "at the election" instead of "on the question." They were influenced, doubtless, by the wording of previous constitutions to which attention is called in the opinion. Judge Jordan's language⁴¹ concerning this case refers to the wording of the previous constitutions, not the clause in question above quoted.

STATE V. LANCASTER CO.⁴²

Like *People v. Berkeley*³⁷ and *Belknap v. Louisville*,³⁸ the words "voting at any general election" in the clause "whenever a majority of the legal voters of such county, voting at any gen-

³⁷ 102 Cal. 298.

³⁸ 99 Ky. 474.

³⁹ (Ky.) 47 S. W. 773.

⁴⁰ (Miss.) 27 S. 927.

⁴¹ 156 Ind. 129.

⁴² 6 Neb. 474.

eral election shall so determine," permit the inference that it is the vote at the election rather than on the question which determines the majority.

STATE V. BECHEL⁴³

In this case the reasoning of the court is in line with Judge Baker's view but the cases are differentiated by the last three words of the two constitutional clauses considered by the Nebraska court: "No such general law shall be passed by the legislature granting the right to construct * * * a street railroad within any city * * * without first requiring the consent of the majority of the electors thereof." Also, "and if a majority of the votes cast *at such election*, etc."

ENYART V. TRUSTEES⁴⁴

The opinion in this case contains neither argument nor authority. The words of the statute considered were "until a majority of the electors . . . at some regular election, shall vote in favor of said levy". The Court said that to get the correct meaning the word "voting" should be inserted before "at some regular election". Thus, the case is in line with *People v. Berkeley*,³⁷ and distinguished from the Indiana majority rule.

DUPERIER V. VIATOR⁴⁵

CITIZENS, ETC., V. WILLIAMS⁴⁶

These cases should be considered together. The former is a short opinion citing only *Bayard v. Klinge*.⁴⁷ The language considered is "submitted to a vote of the property taxpayers of such parish . . . entitled to vote under the election laws of the State, and if a majority of same voting at such election shall have voted therefor". The Court said these words were "liable to no other construction" than that the majority be determined by the number who voted at the election, not on the question. But in the second case, with this language, "by a vote of the property tax payers in numbers and in value", the number who voted on the proposition was taken to determine the majority. So Louisiana is committed to the Indiana dissenting opinion.

⁴³ 22 Neb. 158.

⁴⁴ 25 Oh. St. 618.

⁴⁵ 35 La. Ann. 957.

⁴⁶ 49 La. Ann. 422.

⁴⁷ 16 Minn. 249.

COCKE V. GOOCH⁴⁸

BOULDIN V. LOCKHART⁴⁹

BRADEN V. STUMPH⁵⁰

In the first of these cases, while the language directly involved, "without the consent of two-thirds of the qualified voters", is not dissimilar from that of the Indiana constitution, the court calls attention to another constitutional provision containing specific language showing that it is "binding upon those not voting", and says, by contrast, that the clause in question required a majority of all the voters, not merely those who vote thereon. The second case deals with a similar clause where the word "concurrence" is used instead of "consent". The third cites and follows the other two.

ST. JOSEPH TP. V. ROGERS⁵¹

Bonds had been issued by a Missouri township after an election in which only a minority of those entitled to vote participated. Held, that as a majority of those voting at the election voted for the bond issue, the same was legal within the constitutional provision "when elections have already been held, and a majority of the legal voters of any township were in favor of" such bond issue. There is no issue raised in this or the other United States Supreme Court cases cited by Judge Baker as to whether a majority voting upon the question, not being a majority voting at the election, would be such a majority as is contemplated by this provision.

COUNTY OF CASS V. JOHNSTON⁵²

DOUGLAS V. CO. OF PIKE⁵³

CARROLL CO. V. SMITH⁵⁴

KNOX CO. V. BANK⁵⁵

In the first of these cases the court holds that a Missouri statute reading "whenever two-thirds of the qualified voters of

⁴⁸ 5 Heisk (Tenn.) 294.

⁴⁹ 3 Baxt. (Tenn.) 262.

⁵⁰ 16 Lea (Tenn.) 581.

⁵¹ 16 Wall. 644.

⁵² 95 U. S. 360.

⁵³ 101 U. S. 677.

⁵⁴ 111 U. S. 556.

⁵⁵ 147 U. S. 91.

the township, voting at an election called for that purpose, shall vote in favor of the subscriptions", is within a constitutional provision reading "unless two-thirds of the qualified voters of the town at a regular or special election to be held therein shall assent thereto". In the second case the first is re-examined and approved. In the third, involving a Mississippi constitutional provision reading "unless two-thirds of the qualified voters of such county at a special or regular election to be held therein, shall assent thereto", the court noted that both Missouri and Mississippi had constitutional provisions requiring registration of voters. The evidence showed 3,129 registered voters, a vote of 918 for and 362 against, the 918 being a majority of the total vote cast. Held that the bond issue was authorized. The last of these cases merely reaffirms the holding in the others.

The remaining fourteen of the cases fairly sustaining Judge Baker's view come from six jurisdictions, Illinois, Michigan, Minnesota, Missouri, Nebraska and New York. Those from each state may be examined together.

SIX JURISDICTIONS SUSTAIN JUDGE BAKER'S VIEW

PEOPLE V. BROWN⁵⁶

PEOPLE V. GARNER⁵⁷

PEOPLE V. WIANT⁵⁸

CHESTNUTWOOD V. HOOD⁵⁹

The language of the constitution involved in the first three of these cases was "whenever a majority of the voters of such county, at any general election shall so determine". In the Brown case, without argument or citation, the court said the language admitted of one meaning, a majority of all the legal voters. In the Garner case, without citation of authority, the court gave the same meaning, adding that the vote cast is prima facie evidence of the number of voters. In the Wiant case the decision was the same, with only one case cited, *People v. Warfield*.⁶⁰ In the fourth case the language was "unless a majority

⁵⁶ 11 Ill. 478.

⁵⁷ 47 Ill. 246.

⁵⁸ 48 Ill. 263.

⁵⁹ 68 Ill. 132.

⁶⁰ 20 Ill. 160.

of the legal voters of said town . . . shall vote for the same, at an election to be held under the order of the corporate authorities . . . as is . . . or may be . . . provided for". The court relies on *People v. Wiant*, distinguishing *Holcomb v. Davis*.⁶¹

STEBBINS V. JUDGE⁶²

"Unless the qualified electors of said city, voting in their respective wards, shall have authorized . . . by a majority of their votes cast at any regular election, or at a special election called for the purpose of voting upon such question." The courts are divided on this class of cases as hereinbefore noted. In this case the court held that the total votes cast at the election, not the votes cast on the question, was the determining factor. While the reasoning supports Judge Baker, the language of the Michigan constitution differs materially from that of Indiana.

BAYARD V. KLINGE⁶³

EVERETT V. SMITH⁶⁴

These two cases are based upon *Taylor v. Taylor*,⁶⁵ not cited by Judge Baker. In the Bayard case the court held that a statute reading "after the submission to the electors of said county at the next general election after the passage thereof, and its adoption by a majority of such electors voting thereon" was not within a constitutional provision requiring the question to "be submitted to the electors of the county, at the next general election after the passage thereof, and be adopted by a majority of such electors".

The other case merely followed the two former. The Minnesota constitution differs from Indiana's in requiring the question to be submitted at a general election, from which it may be inferred that the intention was to get an expression from a larger number of voters drawn to the polls by interest in the candidates and that the test should be the number voting at the election.

⁶¹ 56 Ill. 413.

⁶² 108 Mich. 693.

⁶³ 16 Minn. 249.

⁶⁴ 22 Minn. 53.

⁶⁵ 10 Minn. 107.

STATE V. WINKELMEIER⁶⁶

STATE V. SUTTERFIELD⁶⁷

STATE V. FRANCIS⁶⁸

Like the early cases of first impression in other jurisdictions, no authorities are cited and the reasons are not given for the court's holding in the Winkelmeier case that "whenever a majority of the legal voters of the respective cities in said county authorize", requires a majority of all the legal voters of the city and "not merely of all those who might at a particular time choose to vote upon the question". The Sutterfield case has slightly differing language: "Unless two-thirds of the qualified voters of the county . . . at a general election, shall vote in favor of such removal." State v. Francis construes these words, "whenever a majority of the legal voters authorize them so to do". In the two later cases State v. Winkelmeier is relied upon as authority. As heretofore noted in comment on State v. McGowan,⁶⁹ the court in all three of these cases may have been influenced by a companion clause in the constitution which expresses clearly the intention that a vote on the question should determine, indicating that without such expressed intention the vote at the election should be the guide.

STATE V. ANDERSON⁷⁰

BRYAN V. CITY OF LINCOLN⁷¹

TECUMSEH, ETC., V. SAUNDERS⁷²

These three cases rely upon State v. Babcock,⁷³ in which it would seem there ought to have been no difference of opinion, although one of the three judges dissented. In the Anderson case the language was: "If it appears that two-thirds of the votes cast are in favor"; in the Bryan case: "when the same shall have been authorized by a vote of the people". The third case follows State v. Babcock, but extends it to mean a majority of the highest number of votes cast at the election, not a majority of the number cast for representatives and senators.

⁶⁶ 35 Mo. 103.

⁶⁷ 54 Mo. 391.

⁶⁸ 95 Mo. 44.

⁶⁹ 138 Mo. 187.

⁷⁰ 26 Neb. 517.

⁷¹ 50 Neb. 620.

⁷² 51 Neb. 801.

⁷³ 17 Neb. 188.

PEOPLE V. TRUSTEES⁷⁴

In this case it was held that a majority of all the taxable inhabitants, not a majority of the votes cast, is required by the words: "The taxable inhabitants may at a meeting by a majority vote decide."

NINE JURISDICTIONS AGAINST JUDGE BAKER'S VIEW

Remaining for consideration are fourteen of the fifteen cases cited by Judge Baker which do not support his contention but tend to show that the weight of authority, by jurisdiction, was then with Judge Jordan's dissenting view. These nine jurisdictions (with one dissenting case in Illinois) are Idaho, Kansas, Kentucky, Louisiana, Maryland, North Dakota, Oregon, Wisconsin, and a Federal Court sitting in Kansas.

The Idaho case, *Green v. State Board*,⁷⁵ one of the two Wisconsin cases, *Gillespie v. Palmer*,⁷⁶ and the Louisiana case, *Citizens, etc., v. Williams*,⁷⁷ have been discussed, *supra*.

The dissenting Illinois case, *Holcomb v. Davis*,⁷⁸ had under consideration a statute which required both affirmative and negative votes on the question. There was also a section reading "until it shall be ratified by a majority of the legal voters of the county". The court said: "This section considered independent of other provisions of the act, would, no doubt," (as theretofore held in *People v. Wiant*) "require a majority of all the votes cast at the election at which the question was submitted for its adoption." But "if those not voting are to be counted against the law, why require them to vote at all upon the question. It would be a supererogation. Hence we conclude, there was a reason for requiring a negative as well as an affirmative vote. And that reason was, no doubt, to enable a majority voting on the question, to control in its adoption or rejection."

⁷⁴ 70 N. Y. 28.

⁷⁵ 47 Pac. 259.

⁷⁶ 20 Wis. 544.

⁷⁷ 49 La. Ann. 422.

⁷⁸ 56 Ill. 413.

COUNTY SEAT OF LINN CO.⁷⁹
 COMMISSIONERS V. WINKLEY⁸⁰
 STATE V. ECHOLS⁸¹

In the first of these three cases the constitution read: "No county seat shall be changed without the consent of a majority of the electors of the county." Held, where the legislature has provided an election, made no provision for registration, and designated no other list or roll as evidence of the number of electors, it may, under the constitutional provision quoted, declare that the place receiving a majority of the votes cast shall be the county seat.

The second case, which cited the former and also *Rex v. Foxcraft*,⁸² *Gillespie v. Palmer*,⁷⁶ *Cass v. Johnston County*,⁵² and *Railroad Co. v. Davison*,⁸³ held that under a statute reading, "call an election, to be held at a general election . . . and shall submit to the electors the question to adopt or reject the bounty. . . . If a majority of the votes are for the bounty, etc.," a majority voting on the question was sufficient to authorize the bounty.

State v. Echols, following the *Winkley* case, held that language, "shall be submitted to the voters of a county at a general or special election . . . and if a majority of all the votes cast shall be in favor of," authorized a majority of the votes cast on the question to determine.

FISCAL COURT V. TRIMBLE⁸⁴
 JONES V. COMMONWEALTH⁸⁵
 RUSH V. COMMONWEALTH⁸⁶

The *Trimble* case expressly overrules *Belknap v. City of Louisville*, *supra*, and holds that "without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose" permits the majority voting on the question to

⁷⁹ 15 Kan. 500.

⁸⁰ 29 Kan. 36.

⁸¹ 41 Kan. 1.

⁸² 2 Burr. 1017.

⁸³ 1 Snead 638.

⁸⁴ (Ky.) 47 S. W. 773.

⁸⁵ (Ky.) 47 S. W. 328.

⁸⁶ (Ky.) 47 S. W. 586.

determine. The Jones case held likewise as to this language: "until approved by a majority of the votes cast at an election to be held at the next regular November election," but adds that while held on the same day it was a separate election. *Rush v. Commonwealth* had these words under consideration: "If it shall appear from a comparison of the polls that a majority of the votes cast at said election are against the sale." The court said: "In our opinion this is equivalent to saying 'voting on such question'." The first of these three cases construed a section in the constitution, the others statutes.

WALKER V. OSWALD⁸⁷

From this case Judge Jordan quotes at length (156 Ind. 146). It involved a statute requiring both affirmative and negative votes. The words "if a majority of the voters of said county shall determine by their ballots in favor of the high license law" were held to mean "voting on the question."

STATE V. BARNES⁸⁸

STATE V. LANGLIE⁸⁹

The Act of Congress authorizing adoption of a constitution and election of the first state officers at the same election contained this clause: "At the elections provided for in this section the qualified voters of said proposed states shall vote directly for or against the proposed constitution . . . and if a majority of the legal votes cast shall be for" the constitution shall be adopted. A majority of those voting on the adoption but not a majority of those voting on the offices was declared to have adopted the constitution. In the Langlie case the court reached the same conclusion in the consideration of the statute reading: "If upon canvassing the vote so given it shall appear that any one place has two-thirds of the vote polled" (at a general election).

STATE V. GRACE⁹⁰

"At the next general election the question . . . shall be submitted to the legal voters of the county, and the place receiv-

⁸⁷ 68 Md. 146.

⁸⁸ 3 N. Dak. 319.

⁸⁹ 5 N. Dak. 594.

⁹⁰ 20 Ore. 154.

ing a majority of all the votes cast shall be the permanent county seat." This statute was held to mean a majority of the votes cast on the proposition, not on some other question.

ARMOUR BROS. BANKING CO. V. BOARD⁹¹

A Kansas statute read: "Shall be submitted to a vote of the people at some general election and a majority of all the votes cast, at a poll opened for that purpose, shall be in favor of such assessment." The court, citing *Jones v. Lancaster*⁹² and *State v. Winkelmeier*,⁹³ declined to follow them and held the assessment adopted by the vote of the majority who voted thereon.

At the time of the decision of *In re Denny*, another jurisdiction, Connecticut, might have been added to those against Judge Baker's view. *State ex rel. Duane v. Fagan*,⁹⁴ erroneously cited by counsel in the Wyoming case,⁶ discloses that under a statute providing for a "major vote of the qualified members present" it was held that the number of "members present" was determined by the vote cast on the office in question. The later case of *Town of Southington v. Southington Water Co.*,⁹⁵ to the same effect, does not refer to the former, but itself is the subject of a lengthy note in 13 *Ann. Cas.* 416, which attempts to collect but not to harmonize the cases.

In determining whether or not, as stated by Judge Baker, his conclusion "is sustained . . . by the overwhelming weight of authority," it is permissible to look to the dissenting opinion of Judge Jordan for cases therein cited, which, of course, were available also to Judge Baker. Among these are *Dayton v. City of St. Paul*,⁹⁶ which, as shown by Judge Jordan on page 134, is in harmony with the dissenting rather than the majority opinion. This case rather discounts the effect of the earlier Minnesota cases cited by Judge Baker.

Howland v. Board of Supervisors,⁹⁷ as abstracted by Judge Jordan on page 143, eliminates the *Town of Berkeley*⁹⁸ case and puts California in the dissenting class.

⁹¹ 41 Fed. 321.

⁹² 6 Neb. 474.

⁹³ 35 Mo. 103.

⁹⁴ 42 Conn. 32.

⁹⁵ 80 Conn. 646.

⁹⁶ 22 Minn. 400.

⁹⁷ 109 Cal. 152.

⁹⁸ 102 Cal. 298.

May v. Bermel,⁹⁹ referred to by Judge Jordan on page 149, is not in harmony with People v. Trustees,¹⁰⁰ so that the State of New York may not be cited as a jurisdiction wholly committed to the Indiana majority rule.

The case of Schlichter v. Keiter,¹⁰¹ cited by Judge Jordan on page 152, places this jurisdiction in the group that had rejected Judge Baker's conclusion. This case also and the similar cases, including Lamb v. Cain,¹⁰² answer Judge Baker's assertion that the question is one of evidence. It was found as a fact in the Pennsylvania case that the enrolled membership was over 200,000. Of this number 51,070 voted affirmatively and 3,310 negatively. The evidence showed also that 16,187 preferred another mode of proceeding than that which had been taken so that there was a total expression from 70,567, about one-third of the enrolled membership. The constitution of the church organization provided: "There shall be no alteration of the foregoing constitution unless by the request of two-thirds of the whole society." Clearly the court had sufficient evidence to determine that the necessary two-thirds had not requested the change but the court held that those who did not vote when the opportunity was presented, should not be counted against but as acquiescing.

In view of the decisions available to the court when *In re Denny* was decided, it is hard to understand how Judge Baker could have come to the conclusion that the overwhelming weight of authority supported his view. If he had intended to cite all the cases on the subject, whether for or against his view, he would have included in addition to those cited, some twenty or more referred to in Judge Jordan's opinion. The inference is rather that he did not analyze the cases which he did cite. And he was mistaken as to the weight of authority. This, however, was probably of no significance to him, for it is apparent that his conclusion was not reached by balancing arguments or authorities. The solution to him was simple. Electors meant all the people in the state qualified to vote, and if there had been some way of determining their number independent of the election, he would have adopted that method. The one he chose

⁹⁹ 20 N. Y. App. Div. 53.

¹⁰⁰ 70 N. Y. 28.

¹⁰¹ 156 Pa. St. 119.

¹⁰² 129 Ind. 486.

is just as arbitrary as the one advocated by Judge Jordan and, as before stated, leads to more incongruous results.

JUDGE COX'S OPINION, 179 IND. 292.

This, the third of the majority opinions in Indiana, asserts as a matter of judicial knowledge that 627,133 ballots were cast for the several candidates for Secretary of State in 1910, all of them containing thereon the amendment, but only 60,357 marked for and 14,494 against. After quoting from *State v. Swift* and *In re Denny*, Judge Cox says: "that the court adheres to the holding in them and finds no difficulty of evidence as the same ballots which contained the amendment also carried the names of candidates for all state offices headed by Secretary of State and "it is thus made manifest that there were at least" 627,133 electors in the state qualified to vote at the election.¹⁰³ Then is cited the Wyoming case. The remainder of the opinion deals with the question of whether the constitution is "locked" by this amendment. The sum total of this opinion is that twice before the court decided the question and now adheres to that decision.

THE DISSENTING OPINIONS

A detailed analysis of the dissenting opinions is not necessary, for the purpose of this paper is not to sustain either of the dissenting judges but to show the weaknesses of the majority opinions. However, the views of Judges Niblack, Scott and Jordan should be summarized and their conclusions shown. In certain things they agree, as follows:

1. Under the common law and the usual practice those electors who are absent from an election or, who attending, do not vote, are not counted against but as acquiescing in the will of the majority of those voting. All the authorities cited therefor in the three opinions are listed in the foot note.¹⁰⁴

¹⁰³ 179 Ind. 292, 297.

¹⁰⁴ McCrary, *American Law of Elections*, Sec. 183; *Cooley's Constitutional Limitations*, p. 619; *Dillon, Municipal Corporations*, Sec. 215; *Cushing, Parliamentary Law*, 117, 120, 131; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 21 L. ed. 328; *Angell & Ames, Corp. Sec.* 499, 500; *Louisville, etc., R. R. Co. v. County Court*, 1 Sneed (Tenn.) 637, 692; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *State ex rel., etc. v. Renick*, 37 Mo. 270; *People v. Warfield*,

2. A constitutional amendment may be submitted at a special election for that purpose only and if the votes in the affirmative are more than those in the negative, the amendment is ratified.

3. Both of these rules are true in the absence of express provision in the constitution to the contrary.

4. The Supreme Court may take judicial notice of the votes cast at an election wherein candidates for state office or state-wide issues have been voted upon, but such "judicial information" must be exact and not merely approximate.¹⁰⁵

5. The court will not look beyond the official canvass of votes at the particular election to determine the number of electors on that day.

6. The election in April, 1880,¹⁰⁶ the one in November, 1900,¹⁰⁷ and, by inference, that in November, 1932, each was, as to the constitutional amendment, a special election, for though the same "machinery" was used in obtaining the vote, separate ballots were provided and separate returns were made.¹⁰⁸ This distinction is emphasized also in the cases noted below.¹⁰⁹

Perhaps in other minor matters, the three judges were in agreement. They did not agree, however, in their final con-

20 Ill. 160 (all above cited by Niblack, 69 Ind. 528 et seq.); *People v. Garner*, 47 Ill. 246; *People v. Wiant*, 48 Ill. 265 (cited by Scott, 69 Ind. 542); *City of South Bend v. Lewis*, 138 Ind. 512; *McCrary on Elections*, (4th ed.) Sec. 208; *Dayton v. City of St. Paul*, 22 Minn. 400; *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711; *Smith v. Proctor*, 130 N. Y. 319, 29 N. E. 312; *May v. Bermel*, 20 N. Y. App. Div. 53, 46 N. Y. Supp. 622; *Oldknow v. Wainwright*, 2 Burr 1017, 1021; *Gosling v. Velvey*, 7 Ad. & El. (N. S.) 406, 456 (see also 7 Q. B. 406); *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206; *State v. Dillon*, 125 Ind. 65; *Lamb v. Cain*, 129 Ind. 487; *State v. Vanosdal*, 131 Ind. 388; *Pittsburgh, etc., R. Co. v. Harden*, 137 Ind. 486; *Schlichter v. Keiter*, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161; *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343 (cited by Jordan, 156 Ind. 132 et seq.).

¹⁰⁵ Niblack, 69 Ind. 355.

¹⁰⁶ *State v. Swift*.

¹⁰⁷ *In re Denny*.

¹⁰⁸ Niblack, 69 Ind. 534; Scott, id. 540; Jordan, 156 Ind. 159.

¹⁰⁹ *City of South Bend v. Lewis*, 138 Ind. 512, 532; *Green v. State Board*, 5 Ida. 130, 95 Am. St. Rep. 169, 47 Pac. 259; *State v. Barnes*, 3 N. Dak. 319, 55 N. W. 883; *Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738; *Tinkel v. Griffin*, 26 Mont. 426, 66 Pac. 859; *State ex rel. McCue v. Blaisdell*, 18 N. Dak. 31, 119 N. W. 360; *Davis v. Brown*, 46 W. Va. 716, 34 S. W. 839; *Jones v. Commonwealth*, 104 Ky. 468, 47 S. W. 328.

clusion. Judge Niblack could see a distinction between a local election, of which the court might not take judicial notice, and a general election.¹¹⁰ He probably would have aligned himself with the majority in the Boswell case, where there was only one ballot containing the names of all candidates and listing all issues.

But Judges Jordan and Scott went further. They carried the above noted rules to a logical conclusion, finding nothing in the constitution itself to indicate that the common law and usual procedure should not apply in determining the vote on the amendment. They accordingly held that only those votes should be counted which were for and against the amendment itself, and that a majority of this total was "a majority of the electors" within the meaning of the constitution.

Judge Jordan had additional reasons for his conclusion, among which is the argument¹¹¹ that Section 2 of Article 16 requires two or more amendments to be submitted so that the vote for or against each may be recorded separately. Why provide for vote "against" if every elector not voting "for" is to be counted "against". This is the distinction that makes the case of *Holcomb v. Davis*¹¹² stand out from the other Illinois cases. In it was a constitutional provision not distinguishable from that in Indiana. And the Illinois court, already committed by *State v. Wiant* to what is herein called the majority rule, departed therefrom solely because of the additional requirement of both affirmative and negative vote, which satisfied that court that the intention of those who used the language was that the vote for and against the proposition itself should be the sole determining factor. This case, it is submitted, has not been sufficiently stressed. It contains a vital distinction which is recognized as well in *Davis v. Brown*,¹¹³ *Green v. State Board of Canvassers*,¹¹⁴ and *City of South Bend v. Lewis*.¹¹⁵

In the beginning the absurd consequences of certain application of the majority rule was suggested. This is not true of the rule concurred in by Judges Scott and Jordan. The num-

¹¹⁰ 69 Ind. 534.

¹¹¹ 156 Ind. 157.

¹¹² 56 Ill. 413.

¹¹³ 46 W. Va. 716, 34 S. E. 839.

¹¹⁴ 5 Ida. 130, 47 Pac. 259, 262.

¹¹⁵ 138 Ind. 512, 536.

ber of electors remains the same whether the election is general or special. It cannot be a million one day and one hundred thousand the next. It is not determined by the total votes cast for presidential electors, as in 1880; for secretary of state, as in 1900; and by the ballots, marked and unmarked, deposited in the boxes, as in 1932. It is determined by counting the ballots for and against the amendment itself. This is the usual, the common law, way of deciding the question. If a different method had been intended, it could and would have been made specific.

No attempt is made herein to collect all the authorities, even those prior to the decision of *In re Denny*. It might be noted, however, that North Dakota has in two later decisions reaffirmed *State v. Barnes*.¹¹⁶

South Dakota had apparently followed *In re Denny*. See *Williamson v. Aldrich*,¹¹⁷ although the case might be distinguished in that the court said the demurrer admitted "that there were more than 1,700 duly qualified electors in such municipality at the time of the election and that but 833 voted in favor of the bonds."

Kansas has a case, *Clayton v. Hill City*,¹¹⁸ that "out-Herod's Herod," holding that neither the votes on the bond issue nor the votes on other candidates or issues at a general election will be considered as determining the total number of electors under a clause reading that no bonds shall be issued except upon "a vote of a majority of the qualified electors of such city." The issue required more proof than the election returns.

With the exceptions above noted, the texts, digests and case-notes examined do not indicate any material change in the weight of authority or new or additional reasons in support of either view.

Government in the United States, as in England before the American revolution, has often been by minority. It was so in 1852 and becomes so more impressively as the population increases and suffrage is extended. Other state constitutions, particularly those adopted in recent years, expressly provide for amendment by a majority of the vote thereon. Without

¹¹⁶ See *State v. Blaisdell*, 18 N. Dak. 31, 119 N. W. 360; *State v. Board of Canvassers*, (1919) 44 N. Dak. 126, 172 N. W. 180.

¹¹⁷ 22 So. Dak. 13, 108 N. W. 1063.

¹¹⁸ (1922) 111 Kan. 595, 207 Pac. 770.

such construction Indiana's constitution is impossible of amendment except at the prohibitive cost of a special election which probably would poll a smaller vote on the identical question than a general election. This is not an argument of convenience, for social or political purposes, but a suggestion to remove the opposing motive that evidently actuated Judge Baker, who believed that for the public good constitutional amendment should be made difficult. It can be made difficult, to the verge of impossibility, but, it is submitted, that was not the intention of the convention that framed nor the people who ratified the constitution of 1852. Both reason and authority, it is submitted, sustain the view, best expressed in Indiana by Judge Jordan, that the majority of those voting on the amendment, whether the election be general or special, is the "majority of the electors" contemplated by the constitution.¹¹⁹

¹¹⁹ At least three practical lines of inquiry are presented to those who accept the conclusions of the writer:

1. Is the question *stare decisis*? The answer seems to be in the negative. *Robinson v. Schenck*, 102 Ind. 307; *State ex rel. City of Terre Haute v. Kolsem*, 130 Ind. 434, 449; *Jasper County v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; *The Legal Tender Cases*, 12 Wall. 457, 554, 570, 20 L. ed. 287; *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 458, 13 L. ed. 1058; *Brickhouse v. Hill*, 167 Ark. 513, 268 S. W. 865, 867; *Weaver v. First National Bank*, 76 Kan. 540, 94 Pac. 273, 123 A. S. R. 155, 16 L. R. A. (N. S.) 110; 7 R. C. L. 1008.

2. How may the question be raised? The answer seems to be that it is already raised by the election of 1932. The language of Judge Scott, 69 Ind. 544, is pertinent. Each amendment then voted upon became a part of the constitution "the moment the last ballot was cast, and all that was afterwards done in relation to the election, such as the aggregation, compilation and certification of the vote by the several officers, and the proclamation of the Governor, was done in compliance with the methods adopted by the General Assembly for the purpose of ascertaining *an already accomplished fact*."

3. How may "the accomplished fact" be judicially noticed? The suggested answer, so far as the "lawyers' amendment" is concerned, is that the Supreme Court may prescribe more rigid educational qualifications for admission to the bar, sustaining them by an express declaration that the constitution was amended in 1932, eliminating Article 7, Section 21. With this provision out of the constitution there can be no question of the Court's inherent power to prescribe the qualifications and regulate the conduct of its officers, the members of the bar. If the Court chooses not to make such a declaration of its own motion, the issue may be raised by petition of the Indiana State Bar Association or in an adversary proceeding.