Junker	Middleton	Pavich	Tauke
Koogler	Millen	Pellett	Tofte
Krause	Miller, A. V.	Perkins	Varley
Kreamer	Miller, K. D.	Poncy	Walter
Lageschulte	Miller, O. L.	Readinger	Welden
Lindeen	Monroe	Rinas	Wells
Lipsky	Nealson	Scheelhaase	West
Lonergan	Newhard	Schroeder	Woods
McElroy	Nielsen	Small	Wulff
Menke	Norland	Spear	Wyckoff
Mennenga	Oakley	Stephens	Mr. Speaker
Middleswart	O'Halloran	Svoboda	

The nays were, none.

Absent or not voting, 9:

Brockett	Danker	Jochum	Spencer
Clark	Harper	Patchett	Stromer
Daggett			

The bill having received a constitutional majority was declared to have passed the House and the title was agreed to.

EXPLANATIONS OF VOTE

(Amendments H—3791, H—3800 and H—3804 to House File 864, House Files 558 and 864)

I was necessarily absent from the House chamber on Friday, May 9, 1975. Had I been present, I would have voted "aye" on amendments H—3791 and H—3804 to House File 864 and "nay" on amendment H—3800 to House File 864. I would have voted "aye" on final passage of House Files 558 and 864.

OAKLEY of Clinton

(House Files 824 and 843)

I was necessarily absent from the House chamber when the vote was taken on House Files 824 and 843. Had I been present, I would have voted "aye".

O'HALLORAN of Black Hawk

REPORT OF THE ELECTION CONTEST COMMITTEE

On behalf of the committee, Norman G. Jesse of Polk County submits the following report in the contest filed by James Spradling vs. Lyle Stephens for the seat in the Second Legislative District in the Iowa House of Representatives.

MR. SPEAKER: We, the members of the Contest Committee, to whom was referred the matter of the contest between James Spradling, contestant, versus Lyle Stephens, incumbent, for the seat in the Iowa House of Representatives, beg leave to report as follows:

The committee met pursuant to call of Norman G. Jesse, chairman, numerous times.

The evidence disclosed to the committee, by the sworn testimony of witnesses, the following facts:

1. That 135 persons cast absentee ballots in Plymouth County.

2. That those ballots were mailed by the County Auditor to those 135 persons, regardless of whether or not they were confined to a health care facility or a hospital.

3. That in fact 43 of those persons who cast absentee ballots in Plymouth County were confined in a hospital or health care facility.

4. That the absentee ballots to those persons in health care facilities and hospitals were not delivered personally by one member of each political party, as required by Section 53.17, Code of Iowa.

5. That some students from Westmar College in LeMars, Iowa, were discouraged from exercising the right to vote in the election.

6. That at least one of those students visited with the Plymouth County Auditor who discouraged that student from casting a ballot in the election.

7. That no one from the Auditor's office or the election board sought to advise the students of how they could cast a vote in the election, thus placing the burden on the students to know the law pertaining to voting a challenged ballot in an election.

8. That declaring the ballots in the absentee ballot precinct void as competent evidence in this election changes the results and makes James Spradling the winner by a vote of 4,537 to 4,530.

Section 53.17, Code of Iowa, provides in part that:

> "An applicant who is a resident or patient in a health care facility or hospital located in the county to which the application has been submitted shall have his absentee ballot delivered to him by one member of each of the political parties referred to in Section 49.13, who shall be appointed by the commissioner from the panel drawn up as provided by Section 49.15 for the special precinct established by Section 53.23. The persons so appointed by the commissioner shall be notaries public and shall be sworn in the manner provided by Section 49.75 for election board members. They may assist the qualified electors in filling out the ballot as provided in Section 49.90. The voted absentee ballots shall be deposited in a sealed container which shall be returned to the commissioner on the same day."

This issue therefore becomes whether the failure of the Plymouth County Auditor to comply with Section 53.17, Code of Iowa, renders the absentee ballots incompetent as evidence in the election between Lyle Stephens and James Spradling.

In past election contests in this House, the failure to comply with an election law written in mandatory language has been held to be sufficient reason to reject the ballots. The rejection has, in the past, caused a change in the result of the contested elections.

In Peyton v. Moore, 1937, and Randall v. Norland, 1941, the House rejected ballots that were not in the presence of at least two judges at all times because Section 898, Codes of Iowa 1937 and 1941 respectively stated:

> "And at all times when they are in possession of the counting board they shall be under constant observation of at least two judges."

In those contests the House found Section 898 to be written in mandatory language and thus rejected the ballots as evidence despite an absence of ballot tampering in either instance.

In Naughton v. Munger, 1947, the House rejected ballots as evidence in an election because more ballots had been counted in one precinct than there were eligible voters in that precinct.

The committee has found that Section 53.17, Code of Iowa, 1975, is written in mandatory language, and that any failure to comply with same section shall render the ballots of the precinct wherein there was failure to observe said requirements, void and incompetent as evidence in the result of an election.

We also find that the rules of statutory construction require us to find that the specific provisions in Section 53.17, Code of Iowa, govern other more general provisions found elsewhere in the election laws.

It is the conclusion of this committee that there was a violation of the statute, Section 53.17, Code of Iowa, in the casting of absentee ballots in Plymouth County, and that the votes cast in the absentee ballot precinct cannot be considered in finally determining who was elected as State Representative of and for the second legislative district for the Iowa House of Representatives.

This committee originally considered declaring the seat vacant, believing that the most desirable solution would be to submit this contest back to the voters of the second legislative district for a decision. This solution, however, has been labeled as unacceptable by all parties affected. We therefore must limit our consideration to the merits of the contest.

Mr. Speaker, the rejection of the absentee ballots makes the final vote tally in the second legislative district:

James Spradling 4,537, and
Lyle Stephens 4,530

and we therefore recommend that James Spradling be seated having received a plurality of seven votes in the second legislative district for the State of Iowa. The effective date of this report shall be the Monday following its adoption by the House of Representatives

Respectfully submitted
NORMAN G. JESSE
Election Contest Committee Chairman

MINORITY REPORT OF COMMITTEE ON PLYMOUTH COUNTY ELECTION CONTEST

The following report is submitted by Edgar H. Bittle and Reid Crawford, members of the committee in the contest filed by James W. Spradling vs. Lyle R. Stephens from the Second Representative District.

MR. SPEAKER: We, Edgar H. Bittle and Reid Crawford, members of the Contest Committee to whom was referred the matter of the contest between James W. Spradling, contestant, versus Lyle R. Stephens, incumbent, for the seat in the Iowa House of Representatives from the Second Representative District beg leave to report as follows:

The committee has met on numerous occasions, and on March 24, 1975, at 1:00 p.m. in Des Moines, Iowa, heard the testimony of the parties to this contest.

The contestant and incumbent appeared in person and each were represented by counsel. Counsel for the contestant conceded that he did not have

evidence to sustain the vote contest as alleged in Division 2, and that he would rely on Division 1 alone. On the basis of this statement by counsel, the committee dismisses Division 2 of the contestant's statement of contest.

The contestant called as an adverse witness, Mr. Clair Steele, Plymouth County Auditor. Steele testified that he received requests for absentee ballots from Nursing Homes and Hospitals and that all of these applications for absentee ballots were mailed to the applicant within 24 hours of receipt of the applications pursuant to the provisions of Section 53.8. Steele testified that he was aware of the provisions of Section 53.17, which provides for delivery of absentee ballots to applicants who were residents or patients in Health Care Facilities or Hospitals. He also testified that he did not pick persons to deliver absentee ballots as provided in Section 53.17, and that he had been of the opinion that the two sections were in conflict and was attempting to do everything he could to be certain that applicants for absentee ballots were not disfranchised.

Contestant conceded that there was no allegation of fraud, undue influence, intimidation in the procuring of the votes in question or illegality and there was no inference of fraud or wrong doing by the County Auditor. Counsel for the contestant stated that the only allegation was that Section 53.17 was not followed. There was no allegation that persons in Health Care Facilities or Hospitals were disfranchised by the actions of the County Auditor and there is no allegation that the vote results would have been questioned had the provisions of Section 53.17 been followed.

Contestant called no other witnesses.

Incumbent called Plymouth County Auditor, Clair Steele, who testified that he had been aware of an oral directive from the Attorney General that provisions of Section 53.8 would prevail and that absentee ballots should be mailed within 24 hours of the receipt of the application. Steele also testified that he became aware of a decision in the Polk County District Court prior to November 5, the date of the election. Steele testified that he was trying to let the most people vote, and that no Republican or Democrat challenged the procedure he was following prior to the election or at the time the absentee ballots were counted.

Incumbent presented no other testimony.

The issue is thus drawn whether failure to comply with the provision of Section 53.17 should cause the votes from the absentee ballot precinct to be disallowed.

The Iowa Courts and this House have stated that a vote will not be set aside in a precinct where election officials have violated a statute unless the contestant has proved that the violation cost him sufficient votes to change the results of the election. The theory behind this is that electors have nothing to do with the conduct of officials and the technical irregularity should not disfranchise or defeat the expressed wishes of the people.

The general rule is stated in 97 ALR 2d 266, 305 and 306:

> "In most jurisdictions absentee voting laws have been liberally construed so as to further their evident purpose of protecting and furthering the right of suffrage".

This was the clear intent of the Legislature in adopting House File 745, First Session, Sixty-fifth General Assembly.

At page 306 of 97 ALR 2d, it is stated:

> "The basic principle of construction in regard to the above provisions (which contain specific direction to election officers) is that erroneous or even unlawful handling of the ballots by the elec-

tion officers will be held not to disfranchise absentee voters who themselves fully complied with the provisions of the statute".

"The general rule that if ballots have been cast by voters who were, at the time, qualified to cast them, and such voters had at the time done all on their part that the law required the voters to do to make their voting effective, an erroneous or even unlawful handling of the ballots by the election officers charged with such responsibility will not be held to have disfranchised such voters by throwing out their votes on account of erroneous procedure had solely by the election officers, provided the votes were legal votes in their inception, and are still capable of being given proper effect as such, has been given effect or expressed in many decisions involving absentee voters' ballots."

This rule has been adopted by this House. In the case of Springer vs. Stoddard, the committee stated it was in favor of the more liberal rule of counting absentee ballots, at page 759 of the 1909 House Journal, which was a unanimous report.

The committee stated:

". . . Special attention should be called to the fact that Judges of elections seem to misapprehend or fail to follow the law either through ignorance or carelessness. Another committee, adopting a more strict rule, might have easily reached the conclusion that these ballots were not competent evidence and that a recount could not have been had because of the carelessness with which these ballots were returned by the election judges to the County Auditor. It is, therefore, recommended that this Honorable body adopt this report, and that it declare the incumbent, B. F. Stoddard, the duly elected Representative of the 67th Representative District of Iowa".

In the case of State of Iowa vs. Creston Mutual Telephone Company 195 (Iowa) 1368 at 1371-1372, the Iowa Supreme Court stated:

"Every intendment of the Legislature and every safe guard provided thereby for the securing of a fair election and the preservation of the ballots should be observed by election officers, and must be upheld by the court; but the clearly expressed will of the voters should not be thwarted or set aside by the courts because of irregularities and even illegalities which are not shown to have in any way affected the result or to have prejudiced anyone . . . We are firmly committed to the rule that prejudice must be shown".

In 1971 the Iowa Supreme Court stated the general rule governing election contests:

"The result of a school election is presumptively valid. Mere irregularities in the conduct of an election do not affect the result, but substantial material defects are fatal. It is the duty of the court to sustain an election if it has been so conducted as to give a free and fair expression of the popular will. Widmer, et al., v. Reitzler, et al., 182 N.W. 2d 177, Iowa, filed December 15, 1970, Harney v. Clear Creek Community School District (1967), 261 Iowa 315, 318-319, 154 N.W. 2d 88, 90; Headington v. North Winneshiek Community School District (1962), 254 Iowa 430, 438, 117 N.W. 2d 831, 836.

"An election which has resulted in a fair and free expression of the will of the legal voters upon the merits will not be invalidated because of a departure from the statutory regulations gov-

erning the conduct of the election, except in those cases where the legislature has clearly and unequivocally expressed an intent that a specific statutory provision is an essential jurisdictional prerequisite and that a departure therefrom shall have the drastic consequences of invalidity." Turnis v Board of Education in and for Jones County (1961), 252 Iowa 922, 927, 109 N.W. 2d, 198, 201."

See Stanley v Southwestern Community College, Merged Area, Iowa, 184 N.W. 2d 29 (1971).

There was an election contest case involving County Supervisors decided by the Wisconsin Supreme Court in 1974 which is strikingly similiar in fact to the present case. The challenge went to the manner in which the city clerk delivered the 51 absentee ballots to the individuals who has applied for them.

The statute provided:

"6.87 Absent voting procedure.

"(3) The municipal clerk shall mail it postage prepaid to the elector's residence unless otherwise directed, or shall deliver it to the elector personally at the clerk's office."

The City Clerk directed a courier to deliver a box containing the 51 absentee ballots and ballot envelopes to Luther Manor. He delivered the box, containing what he believed to be absentee ballots, to Luther Manor. He did not know the number of absentee ballots in the box, nor did he recall the name of the woman to whom he gave the box. He took nothing else to Luther Manor and did not return with any of the material.

It was the position of the appellant that these 33 ballots were invalid because the city clerk did not mail the absentee ballots, postage prepaid, to the electors' residences or deliver the ballot to the elector personally in the clerk's office as provided by statute.

The Wisconsin Supreme Court noted:

"There is nothing in the record which would in any way indicate any connivance, fraud or undue influence, and the parties make no such assertion. Likewise, there is no suggestion that the absentee electors from Luther Manor themselves did not comply with the absentee voting requirements. The issue then resolves itself to a question of whether the specific delivery requirements placed upon the city clerk by sec. 6.87(3) Stats., are mandatory to the extent that these 33 absentee ballots should be declared invalid. In the case before us, there was substantial compliance with the absentee voting procedure in all respects and full compliance in so far as the electors are concerned."

The Court discussed the effect of noncompliance with a provision of the election law:

"The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance. An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed "irregularities", and, as has been shown in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result,

as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election."

The Court concluded:

"We are fully cognizant of possible abuses of the absentee voter's law and share the concern of the legislature in preventing any such abuse. If the record in this case indicated the slightest evidence of any fraud, connivance or attempted undue influence, we would have no hesitance in declaring the absentee voters' ballots invalid. However, we are not inclined to disenfranchise (sic) these voters who acted in conformance with the statutory requirements. There is absolutely no evidence from which it could be inferred that the method of delivery by the municipal clerk in any way affected their vote.

"In Sommerfeld v. Board of Canvassers, supra, 269 Wis. pp. 303, 304, 69 N.W. 2d 238, it was stated

". . . We have held that the word 'shall' can be construed to mean 'may'. George Williams College v. Williams Bay, 242 Wis. 311, 7 N.W. (2d) 891. In passing upon statutes regulating absentee voting, the court should look to the whole and every part of the election laws, the intent of the entire plan, the reasons and spirit for their adoption, and try to give effect to every portion thereof."

"Considering all the facts of this case, we are of the opinion that the mandate of sec. 5.01, Stats., requires the conclusion that these absentee voters' ballots be counted."

This same liberal construction has been followed by the court in the case of Haggard vs. Misco (1957) 164 Nebraska 778 83 NW 2d 483. In Haggard vs. Misco, a Nebraska School Bond Election case, election officials rejected 38 absentee and disabled voters' ballots because of irregularities in the conduct of the election. If the absentee ballots were rejected the election failed. The court ruled that ballots should be counted, stating:

"The 38 absentee and disabled voters whose ballots are here questioned, were legal voters of the District, they have complied with the mandatory provisions of the statute in the exercise of their right to vote. They have committed no fraud nor any other wrong action. Their right to vote under such circumstances cannot be defeated by the mistakes of election officials, nor by the leaders disregard for the directory provisions of the election laws. The question involved was the irregularity of delivery of the ballot to the voters".

In Parades vs. Martinez (Texas) 264 SW 2d 958 (1954), the County Clerk personally took absentee ballots to voters at their homes contrary to the election law. The Court stated:

"It is the irregularity that is complained about and not that there was . . . any undue persuasion, fraud, undue influence, or intimidation in the procuring of the votes in question".

In the Iowa case of McDunn vs. Roundy, 191 Iowa 976 (1921), the Iowa Supreme Court refused to render invalid a School Board Election which was conducted by two Judges instead of three as directed by the Statute. The Court noted that the attack was on the result of the election not upon the actions of the two Judges.

The Iowa Supreme Court noted:

"It would be a different attack if mandamus had been brought to compel the appointment of a third Judge, or if injunction had been

instituted to restrain the two Judges from proceeding with the election without a third Judge".

The Iowa Supreme Court further stated:

"The general rule seems to have been adopted by many of the jurisdictions of this country, and has the great weight of authority upholding it. The true rule, as thus adopted, is that mere irregularity in conducting an election does not vitiate such election and render the same a nullity, unless some prejudice or injustice is shown to have resulted therefrom. Applying this rule to similar cases, the failure to hold an election with the required number of Judges is an irregularity only, and does not vitiate the election".

The election in this Iowa case was upheld.

In this case, the only allegation and the only evidence was that the Auditor did not comply with the provisions of Section 53.17. The House must thus weigh and balance this circumstance against the disfranchisement of the voters because of a technical violation. The presumption is that the election is valid.

Contestant has admitted there was no evidence of misconduct, fraud, undue influence, corruption, or illegal conduct in the voting of absentee ballots other than the manner of delivery. There is no proof or allegation that any of the absentee ballots cast in this election were tainted in any way. The Auditor did what he thought was prudent. No voter has been disfranchised. The manner of delivery did not affect any votes. The absentee ballots should be counted.

The Statute in this circumstance is directory. The votes cast by absentee ballot from Health Care Facilities or Hospitals in Plymouth County should be counted. The contestant's claim should be dismissed and the incumbent should be seated and his election confirmed.

Respectfully submitted
BITTLE of Polk
CRAWFORD of Story

BILLS SIGNED BY THE GOVERNOR

A communication was received announcing that on May 12, 1975, the Governor approved and transmitted to the Secretary of State the following bills:

House File 99, an act relating to temporary closing of highways.

House File 332, an act to establish a service program for the deaf within the Department of Health.

House File 398, an act relating to the Board of Psychology Examiners.

House File 463, an act relating to remedial eye care.

Senate File 114, an act relating to payment by the Executive Council of court related costs and expenses.

Senate File 193, an act to amend Chapter 135C of the Code so as to change the defined term "adult foster home" to "adult foster family home" and to make certain related changes in the use of that term.

Senate File 329, an act relating to the disbursement of costs in actions on appeal to the Supreme Court.

Senate File 383, an act to authorize name changes for school districts.