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Date of the judgment (decision)	1996.05.31
Case Number	1996 (Gyo-Tsu) 28
Reporter	Minshu Vol. 50, No. 6 at 1360
Title	Judgment concerning the case where the grounds that the voter is on a trip on the date of election to outside the area of the municipality in which his/her voting district is located fall under the grounds for absentee voting
Case name	Case to seek revocation of a determination on the validity of the election of the mayor of Suzu City, and nullification of election
Result	Judgment of the Second Petty Bench, partially dismissed, partially quashed, and partially terminated
Court of the Prior Instance	Nagoya High Court, Kanazawa Branch, Judgment of December 11, 1995
Summary of the judgment (decision)	<p>1. The grounds that the voter is on a trip on the date of election to outside the area of the municipality in which his/her voting district is located may be deemed to fall under the grounds for absentee voting prescribed in Article 49, paragraph (1), item (ii) of the Public Offices Election Act, i.e. "due to an unavoidable business," only when there are such circumstances where the purpose of the trip is business that is necessary out of courtesy according to the socially accepted ideas or where it is extremely difficult to reschedule the trip to any day other than the date of election.</p> <p>2. Where absentee voting was conducted through a sloppy procedure for administration and execution---e.g. the chairperson of the election administration commission accepted absentee votes without fulfilling the duty to examine whether or not the grounds the voters argued fell under any of the statutory grounds for absentee voting, and at the place for making an entry for vote, absentee votes were cast in effect</p>

without observers---, given the facts that (i) as many as 1,713 voters, about 10% of all voters, cast absentee votes, and as many as 668 absentee votes were accepted despite the fact that the grounds they argued obviously did not fall under any of the statutory grounds for absentee voting or were insufficient to be judged to fall under any of the statutory grounds for absentee voting, and (ii) the share of absentee votes in all votes gained is 12.5% for the winning candidate and 6.5% for the defeated candidate, it should be concluded that the illegal aspects in the administration and execution of absentee voting were serious enough to question the fairness of the absentee voting as a whole, and since the total number of absentee votes exceeds the difference between the number of votes gained by the winning candidate and that by the defeated candidate, such illegal aspects were likely to change the result of the election.

References

(Concerning 1 and 2) Article 49, paragraph (1) of the Public Offices Election Act; (Concerning 2) Article 205, paragraph (1) of the Public Offices Election Act, Article 53, paragraph (1), Article 56, paragraph (2), and Article 59-4, paragraph (3) of the Order for Enforcement of the Public Offices Election Act, Article 10-5 of the Ordinance for Enforcement of the Public Offices Election Act

Article 49, paragraph (1) of the Public Offices Election Act

(1) A voter who is unable to go to the voting place and vote in person on the date of election due to any of the grounds listed in the following items, as provided by a Cabinet Order, shall be allowed to vote at a place administered by the absentee voting administrator which is provided for making an entry of vote, notwithstanding the provisions of the proviso to Article 42, paragraph (1) (Listing in Electoral Register and Voting), Article 44 (Voting at Voting Place), Article 45 (Delivery and Format of Voting Slip), Article 46, paragraph (1) to paragraph (3) (Matters to Be Entered for Vote and Casting), the preceding Article, and the following Article:

- (i) The voter is engaging in his/her duties or services outside the area of his/her voting district.
- (ii) The voter, due to an unavoidable business or accident, is on a trip to or staying outside the area of the municipality in which his/her voting district is located.
- (iii) The voter has extreme difficulties in walking due to an illness, injury, pregnancy or aging or physical disability, or puerperium, or is under detention at a prison, juvenile training school or women's guidance home.
- (iv) The voter is residing or staying on an island or in any other place with difficulty to access which is specified by an Ordinance of the Ministry of Home Affairs, or is engaging in his/her duties or services in such area.
- (v) The voter is residing at a domicile outside the area of the election district for members of the council of the prefecture to which the area of his/her voting district belongs.

Article 205, paragraph (1) of the Public Offices Election Act

(1) Where an objection is made, a petition for review is filed or a suit is filed with regard to the validity of an election, if there is a violation of any provision on election, the election administration commission concerned or the court shall make a decision, determination or judgment to declare nullification of the whole or part of the election, only when such violation is likely to change the result of the election.

Article 53, paragraph (1) of the Order for Enforcement of the Public Offices Election Act

(1) Where the chairperson of a municipal election administration commission has received a request for delivery of a voting slip and envelope for voting under the provisions of Article 50, paragraph (1) or paragraph (4), when he/she finds, by checking the request against the electoral register to be used for the election in question or extract thereof (in an election of members of the council of a prefecture or the head of a prefecture, with regard to a person who has the right to vote in the election under the provision of Article 9, paragraph (3) of

the Act, also by confirming, with a document submitted under the provision of Article 50, paragraph (5), that the person continues to hold a domicile within the area of the prefecture), that the voter who has made the request is unable to go to the voting place and vote in person on the date of election for any of the grounds listed in the items of Article 49, paragraph (1) of the Act, he/she shall take the following measures to deliver and send a voting slip and envelope for voting immediately (in cases where the chairperson has received the request prior to the date of public notice or announcement of the date of election, immediately after the date of public notice or announcement of the date of election (or, in the case of sending by mail, immediately after the date specified by the municipal election administration commission prior to said date of public notice or announcement). In this case, the type and date of the election in question shall be written on the surface of the envelope for voting:

- (i) In the case referred to in Article 50, paragraph (1), delivering the items to the voter in person or sending them to the voter by mail.
- (ii) In the case referred to in Article 50, paragraph (4), delivering the items or sending them by mail to the voting administrator for the absentee voting in question or agent thereof.

Article 56, paragraph (2) of the Order for Enforcement of the Public Offices Election Act
 (2) In the case referred to in the preceding paragraph, the absentee voting administrator shall have a person with the right to vote observe the absentee voting.

Article 59-4, paragraph (3) of the Order for Enforcement of the Public Offices Election Act
 (3) Where the chairperson of a municipal election administration commission has received a request under the provision of paragraph (1), when he/she finds, by checking the request against the electoral register to be used for the election in question or extract thereof (in an election of members of the council of a prefecture or the head of a prefecture, with regard to a person who has the right to vote in the election under the provision of Article 9, paragraph (3) of the Act, also by confirming, with a document submitted under the provision of the preceding paragraph, that the person continues to hold a domicile within the area of the prefecture), that the voter who has made the request falls under any of the categories of voters prescribed in Article 49, paragraph (2) of the Act, he/she shall send a voting slip and envelope for voting to the voter in question by mail immediately (in cases where the chairperson has received the request prior to the date of public notice or announcement of the date of election, immediately after the date specified by the municipal election administration commission prior to said date of public notice or announcement of the date of election). In this case, the type and date of the election in question shall be written on the surface of the envelope for voting.

Article 10-5 of the Ordinance for Enforcement of the Public Offices Election Act
 An envelope for voting under the provision of Article 59-4, paragraph (3) of the Order shall be prepared in accordance with Appended Form No. 13-7.

Main text of the judgment (decision)

The final appeal filed against the appellees of final appeal other than those indicated in Lists of the Dead I and II is dismissed.
 The appellants of final appeal shall bear the cost of the final appeal with regard to the final appeal mentioned in the preceding paragraph.
 The judgment of prior instance is quashed with respect to the part concerning the claims made by the appellees of final appeal indicated in List of the Dead I.
 The part of this suit concerning the claims made by the appellees of final appeal indicated in Lists of the Dead I and II was terminated by reason of the death of the appellees of final appeal indicated in said lists on the respective dates indicated in said lists.

Reasons

Concerning Reason for Final Appeal I argued by the appellant and the agents appointed for appeal, NAKAMURA Sanji, DOI Junichi, YAMAMOTO Shukuo, NOZAKI Satoshi, NAKAYAMA Takashi, and SUZAKI Hisamitsu

The holdings of the court of prior instance concerning the point argued by the appellant and the appeal counsels can be affirmed as justifiable, and the judgment of prior instance does not contain such illegality as argued by them. Their argument is nothing more a claim criticizing the judgment of prior instance based on their own views, and therefore cannot be accepted.

Concerning Reason for Final Appeal II argued by the appellant and the appeal counsels

According to the facts legally determined by the court of prior instance, in the written requests/oaths submitted by the 293 voters who cast the absentee votes in question, as the grounds due to which they would be unable to go to the voting place and vote in person on the date of election, they only stated that they would be on a trip, without mentioning the purpose of the trip, or stated that they would be on a trip for personal business, etc., and said written requests/oaths did not contain any statement on the specific purpose of their trips. It is appropriate to construe that the grounds that the voter is on a trip on the date of election to outside the area of the municipality in which his/her voting district is located may be deemed to fall under the grounds for absentee voting prescribed in Article 49, paragraph (1), item (ii) of the Public Offices Election Act (hereinafter referred to as the "Act"), only when there are such circumstances where the purpose of the trip is business that is necessary out of courtesy according to the socially accepted ideas or where it is extremely difficult to reschedule the trip to any day other than the date of election. In consequence, according to the facts mentioned above, we must say that the chairperson of the Suzu City Election Administration Commission (hereinafter referred to as the "City Election Administration Commission") has violated the provision of said item and Article 53, paragraph (1) of the Order for Enforcement of the Public Offices Election Act (hereinafter referred to as the "Order") in that the chairperson of the commission, upon receiving requests from the voters for the delivery of voting slips for absentee voting and envelopes for absentee voting (hereinafter referred to as "voting slips, etc."), delivered voting slips, etc. to the voters as requested, without requiring them to give oral explanation on whether or not there were such circumstances mentioned above. The holdings of the court of prior instance that go along with this reasoning can be affirmed as justifiable, and they are not in conflict with the judicial precedents cited by the appellant and the appeal counsels. The appellant and the appeal counsels' argument is a claim criticizing the judgment of prior instance based on their own views, and therefore cannot be accepted.

Concerning Reason for Final Appeal III argued by the appellant and the appeal counsels

I. With regard to the administration and execution of absentee voting in the election in question, in which a total of 1,713 out of 17,512 voters were absentee voters, the court of prior instance legally determined the following facts: (1) The City Election Administration Commission did not provide any training, etc. on how to deal with absentee voting for the officials who were in charge of the administration and execution of absentee voting as assistant personnel for the chairperson, and left most of the work for accepting requests for absentee voting to inexperienced officials. These officials who were in charge of the acceptance work accepted requests for the delivery of voting slips, etc. carelessly, without paying any special attention to whether or not there were grounds for absentee voting. As a result, there were 56 absentee votes that were accepted despite the fact that it was obvious from the statements in the written requests/oaths submitted by the voters that the grounds they argued did not fall under any of the statutory grounds for absentee voting, and 612 absentee votes (including the 293 absentee votes which are related to Reason for Final Appeal II) were also accepted even though

the statements in the written requests/oaths submitted by the voters were insufficient to judge that the grounds they argued fell under any of the statutory grounds for absentee voting and therefore in order to make such judgment, it was necessary to require these voters to give oral explanation, which was actually not given. (2) At the place for making an entry for voting provided by the City Election Administration Commission, on some occasions such as when the persons registered as voting observers for absentee voting had lunch, persons other than those registered took turns and observed absentee voting, and signed their names as observers on the outer envelopes for absentee voting. For ten absentee votes cast on such occasions, the officials engaged in assisting the execution of absentee voting affairs merely observed and signed their names as observers while they proceeded with said affairs, under the circumstances wherein they were unable to fully play the role of observer as a monitoring organ. (3) The chairperson of the City Election Administration Commission sent outer envelopes for absentee voting with no name or seal of the City Election Administration Commission indicated or affixed thereto, to the voters who wished to cast absentee votes by mail, and because of this, all of the 18 absentee votes sent by mail were enclosed in the outer envelopes with no name or seal of the City Election Administration Commission indicated or affixed thereto. (4) According to the results released by the election meeting, the difference between the number of votes gained by Candidate A (the winning candidate) and that gained by Candidate B (the defeated candidate) was 958, and the share of absentee votes in all votes gained is 12.5% for Candidate A and 6.5% for Candidate B.

It is a basic principle that each voter should go to the voting place to vote on the date of election. The absentee voting system is available only for exceptional cases, and it cannot be denied that this system has the risk of being used as a means for committing illegal acts. For this reason, the Act, as well as the Order and the Ordinance for Enforcement of the Public Offices Election Act (hereinafter referred to as the "Ordinance"), both of which follow the provisions of the Act, strictly stipulate the requirements, procedures and formats for absentee voting in order to prevent the abuse of the absentee voting system and avoid illegal votes getting mixed with legal votes. Unless absentee voting is administered and executed pursuant to the provisions of these statutes, abuse of absentee voting or mixture of illegal votes would occur, which would inevitably make it difficult to realize a fair election (See 1962 (O) No. 697, judgment of the Second Petty Bench of the Supreme Court of December 26, 1962, Minshu Vol. 16, No. 12, at 2581). In particular, the chairperson of the election administration commission who has received a request from a voter for the delivery of a voting slip, etc. shall strictly examine whether or not the grounds the voter argues fall under any of the grounds for absentee voting prescribed in the items of Article 49, paragraph (1) of the Act, and shall respond to the request for delivery only when he/she judges that any of the statutory grounds apply. Needless to say, the duty to examine the grounds for absentee voting is an extremely important and fundamental duty that the chairperson of the election administration commission should fulfill in the course of administration and execution of absentee voting.

According to the facts legally determined by the court of prior instance mentioned above, the chairperson of the City Election Administration Commission, with regard to the absentee voting conducted for the election in question, cannot be deemed to have fulfilled the duty to examine whether or not the grounds the voters argued fell under any of the statutory grounds for absentee voting, and such failure to fulfill this duty should inevitably be deemed to be in violation of Article 49, paragraph (1) of the Act and Article 53, paragraph (1) of the Order. In addition, in view of the fact that the ten absentee votes mentioned in (2) above were in effect cast without observers, which is in violation of Article 56, paragraph (2) of the Order, the City Election Administration Commission does not seem to have recognized the importance of the role of voting observers. The 18 absentee votes mentioned in (3) above can also be deemed to be in violation of Article 59-4, paragraph (3) of the Order and Appended

Form No. 13-7 set forth in Article 10-5 of the Ordinance. We must say that such a manner of administration and execution of absentee voting is extremely sloppy to the extent that it ignores the purport of the Act which strictly stipulates the requirements, procedures and formats for absentee voting. Through such sloppy procedure for administration and execution, as many as 1,713 voters, about 10% of all voters, cast absentee votes, and as many as 668 absentee votes were accepted by using voting slips, etc. delivered to the voters who requested absentee voting, despite the facts that the grounds they argued obviously did not fall under any of the statutory grounds for absentee voting or were insufficient to be judged to fall under any of the statutory grounds for absentee voting. In view of these facts, we cannot deny the possibility that these illegal aspects in the administration and execution of absentee voting caused the abuse of absentee voting or mixture of illegal votes. Also taking into consideration the share of absentee votes in the total votes gained by each candidate in the election in question as mentioned above, we must say that the illegal aspects in the administration and execution of absentee voting were serious enough to question the fairness of the absentee voting as a whole, and that they would make us suspect that the result of the election might have been different if absentee voting were implemented properly. Assuming so, in this case wherein the total number of absentee votes exceeds the difference between the number of votes gained by the winning candidate and that by the defeated candidate, even when we pay attention only to the illegal aspects in the administration and execution of absentee voting as a whole, we can conclude that such illegal aspects were likely to change the result of the election. Some of the absentee votes are acceptable because the grounds that the voters argued can be deemed to fall under any of the statutory grounds for absentee voting as far as the statements in the written requests/oaths submitted by the voters are examined ex post facto from a formality perspective, and the number of absentee votes mentioned in (1) to (3) above alone, which should obviously be excluded from valid votes ex post facto from a formality perspective, does not exceed the difference between the number of votes gained by the winning candidate and that by the defeated candidate. However, this does not affect our conclusion.

II. With regard to the vote counting procedure in the election in question, the court of prior instance legally determined the following facts: (1) In its first release, the election meeting only released the number of voters as well as the numbers of votes gained by Candidate A and Candidate B respectively, without releasing the number of invalid votes. According to the second release made by the election meeting on April 18, 1993, around 9:55 p.m., after the audience of the meeting asked about the breakdown of invalid votes, the number of voters was 17,512, the number of votes gained by Candidate A was 9,199, the number of votes gained by Candidate B was 8,241, and the number of invalid votes was 88 (the records suggest that these invalid votes included nine votes that were not accepted). This means that the number of votes was larger than the number of voters by 16 votes. (2) Subsequently, according to the final release made by the election meeting on April 20, around 7:50 p.m., the number of voters was 17,512, the number of votes gained by Candidate A was 9,199, the number of votes gained by Candidate B was 8,241, and the number of invalid votes was 77 (the records suggest that in addition to these invalid votes, nine votes were not accepted). Thus, the number of invalid votes was changed, and the number of votes was still larger than the number of voters. (3) The appellant of final appeal inspected the votes based on a request for review made by the appellees of final appeal, and found that the number of voters was 17,512, the number of votes gained by Candidate A was 9,199, the number of votes gained by Candidate B was 8,225, the number of invalid votes was 77, and the number of votes not accepted was 9. The number of votes gained by Candidate B as found by the appellant was smaller than that released by the election meeting by 16 votes, and the number of voters was larger than the number of votes by two. (4) The inspection of the voting records of

the respective election districts was conducted in the room called the voting record review office, which is different from the venue of the election meeting. In the midst of confusion at the venue of the election meeting over the result of vote counting released by the election meeting on April 18, the agent for the voting administrator for the tenth voting district was called into said room by the person in charge of vote counting, and ordered to correct part of the voting record.

Since the calculation of the number of votes directly affects the success or defeat of the candidates, there is no need to say that the calculation work should be executed strictly. In view of the circumstances mentioned above---(i) in the release made by the election meeting on April 18, 1993, around 9:55 p.m., the number of votes was larger than the number of voters by 16 votes; (ii) as a result of the inspection conducted for making a determination on review, the number of votes gained by Candidate B decreased by as much as 16 votes; (iii) the inspection of the voting records of the respective election districts was conducted at a place different from the venue of the election meeting despite the significant meaning of such voting records as materials to be used to determine the number of voters and the number of votes not accepted, and part of the voting record was corrected by a third person, other than the person in charge of vote counting, who was called into said place---, we must say that the handling of the vote counting work for the election in question was far from being strict. Taking this into consideration in addition to the illegal aspects in the administration and execution of absentee voting mentioned above, we cannot help having doubt if the whole procedure for the election in question was conducted strictly and fairly, and we also have a suspicion about the result of the election, and thus, it is clearer that these illegal aspects are likely to change the result of the election.

III. For the reasons stated above, the illegal aspects in the administration and execution of the election in question can be deemed to be likely to change the result of the election, and the holdings of the court of prior instance that go along with this conclusion can be accepted as justifiable. The appellant and the appeal counsels' argument cannot be accepted.

Concerning Reason for Final Appeal IV argued by the appellant and the appeal counsels

According to the records, it is obvious that the appellees do not seek revocation of the part of the determination in question which relates to the first paragraph of the main text, and the judgment of prior instance does not contain such illegality as argued by the appellant and the appeal counsels. The appellant and the appeal counsels' argument is an assertion based on incorrect understanding of the judgment of prior instance, and therefore cannot be accepted.

We have examined the case by this court's own authority. According to the records, it is obvious that the appellees indicated in Lists of the Dead I and II were dead as of the respective dates indicated in said lists. It should be construed that in the event of the death of each appellee, there is no room to succeed to this suit, and therefore the suit shall necessarily end. In consequence, the part of the judgment of prior instance which relates to the claims made by the appellees indicated in List of the Dead I, who had already been dead prior to the rendition of the judgment, should inevitably be quashed on the grounds that it was rendered while ignoring the death of the appellees indicated in said list. In order to clearly state that the part of this suit which relates to the claims made by the appellees indicated in Lists of the Dead I and II was terminated as of the respective dates of death indicated in said lists, we hereby make a declaration to that effect.

Therefore, according to Article 7 of the Administrative Case Litigation Act, and Article 401, Article 95, and Article 89 of the Code of Civil Procedure, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices.

	(List of the Dead I, List of the Dead II, List of Appellees of Final Appeal I, and List of Appellees of Final Appeal II: Omitted)
Presiding Judge	Justice KAWAI Shinichi Justice ONISHI Katsuya Justice NEGISHI Shigeharu Justice FUKUDA Hiroshi

(This translation is provisional and subject to revision.)

(* Translated by Judicial Research Foundation)

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