purchasers of the real estate under and subject to the mortgage lien, then the overage due the defendant becomes $21,833.06 less costs of sale and accrued interest on the plaintiff's judgment.

In our judgment a denial of the petition would impose an unconscionable, unreasonable and lasting financial hardship upon the petitioners and unjustly enrich the defendant beyond his wildest expectations. Such inequitable and unjust results are shocking to the conscience of this Court and unacceptable as a matter of law. We conclude the petition to set aside the Sheriff's sale must be granted.

We note that defendant has contended that the setting aside of the sale would be injurious to his position because there was active bidding at the sale, and there may not be as many interested bidders at a resale; and, also, that the Court would be reluctant to order another sale if he (Hess) were to urge that the second sale price was inadequate and there were no other irregularities. On these points, we note that there is no reason to suppose that a fair price would not be bid at a second sale of the property. The remote possibility of a reduction in interested bidders cannot determinative of this case in the light of the injury that would be suffered by the petitioners should the sale not be set aside. The injury potential asserted by the defendant is, of necessity, always present in cases involving the setting aside of sheriff's sales, but the courts have not afforded that possibility great weight in reaching their decisions. It is a factor which we have considered with the other equities in the case and not found controlling.

While we are persuaded that the facts and the law require the setting aside of the sheriff's sale, we are also persuaded that equitable principles dictate that a penalty be exacted from the petitioners for their negligence, which led to this factual situation and this litigation. To that end we conclude:

1. The costs of this Sheriff sale shall be paid in full by the petitioners, for it would be unjust to impose any part of those costs on the defendant. The poundage and satisfaction fee cost items will be remitted as unearned.

2. All interest accrued on the judgments of the plaintiff and the mortgage of Mechanics' Building and Loan Association accrued from and after March 25, 1977 to the date of this Order shall be paid by the petitioners, for it was the petitioners who secured the stay of proceeding.

3. The defendant has incurred expense and counsel fees in connection with this litigation. This amount being unknown to the Court, the sum of $750.00 will be paid to the plaintiff as a credit against the principal sum due from the defendant.

NOW, this 6th day of January, 1978, the petition of William D. Rotz and Twyla K. Rotz to set aside the Sheriff sale of the real estate of Ronald D. Hess is granted. The Sheriff of Franklin County is ordered to list, advertise and expose said real estate at the earliest possible date.

The Sheriff of Franklin County is ordered to pay from the $7,700.00 deposit made by the petitioners:

1. All costs incurred as a result of the Sheriff's sale of defendant's real estate on March 25, 1977, except poundage and satisfaction fee charges, which shall be remitted.

2. All interest accrued on the judgments of Farmers and Merchants Trust Company and the mortgage of Mechanics' Building and Loan Association from March 25, 1977 to this date.

3. $750.00 to Farmers and Merchants Trust Company to be applied to the principal sum due on the plaintiff's judgments against the defendant.

4. The balance remaining to the petitioners. Exceptions are granted the defendant and the petitioners.

IN RE: ABSENTEE BALLOTS OF EVELYN S. ZIMMERMAN AND MYRTLE M. SECRIST, C.P., Franklin County Branch, Misc. Doc., Vol. X, Page 56

Election Code - Subject Matter Jurisdiction - Absentee Ballot

1. Section 1308(e) of the Pennsylvania Election Code, 25 P.S. Sect. 3146.8 specifically confers jurisdiction of subject matter initially upon the county election board and for purposes of review, the Common Pleas Court, notwithstanding the fact that they might ultimately decide that they are unable to grant the request sought in the particular case.

2. County election boards are not bound, under the Pennsylvania Election Code, by technical rules of evidence in hearings on absentee ballot challenges.

3. An absentee ballot, issued on the elector's statement that he will be absent from the county on an election day due to duties, occupation or business, may not be converted to an absentee ballot predicated upon illness or physical disability where the evidence establishes that the elector was not absent from the county as planned.

Stephen E. Patterson, Esq., Counsel for Petitioner.

Denis M. DiLoreto, Esq., Counsel for Clifford R. Harnish.

OPINION IN SUPPORT OF ORDERS OF DECEMBER 8, 1977

KELLER, J.:

The absentee ballots cast by Evelyn S. Zimmerman and Myrtle M. Secrist at the Municipal Election of November 8, 1977, were challenged by Carl E. Carbaugh on the grounds that the absentee electors were within the county of their residence on the day of election during the period the polls were open, and the absentee electors were able to appear personally at the polling place on the day of election during the period the polls were open. Pursuant to the provisions of the Election Code, the challenger deposited Ten ($10.00) Dollars for each challenge, the local election board marked the envelope containing each ballot "CHALLENGED" and returned the envelopes unopened to the Franklin County Board of Elections. On November 14, 1977 at 11:30 A.M. Paul W. Bricker, Fred J. Rock and J. Byers Schlicter, the County Commissioners of Franklin County, sat as the County Election Board to receive evidence on the challenged absentee ballots. On the same day, the County Board orally announced its unanimous decision that the challenges to the two absentee ballots were sustained.

On November 16, 1977, the petition of Evelyn S. Zimmerman to review the decision of the County Election Board sustaining the challenge to her absentee ballot was presented. On the same date the petition of David L. Cook, a candidate for the office of Supervisor of Warren Township, to review the decisions of the County Election Board sustaining the challenges to the absentee ballot was presented. Both petitions were presented by attorney Stephen E. Patterson. Orders were entered the same day setting December 5, 1977 at 1:30 P.M. for hearings on both petitions. On petitions of Attorney Patterson, orders were entered on December 1, 1977 consolidating the Zimmerman and Cook actions and amending the order of November 16, 1977 to order the prothonotary to issue a writ of certiorari to the County Election Board directing it to bring up the record in the consolidated proceeding.

On December 1, 1977 the official court reporter certified and filed the transcript of testimony of the hearing held November 14, 1977 before the County Election Board.

On December 1, 1977 the Franklin County Election Board's unanimous decisions were filed.

On December 5, 1977 this Court heard arguments of counsel for the petitioners and for Clifford R. Harnish, an apparently successful candidate for the office of Supervisor of Warren Township. On December 8, 1977 this Court entered orders finding that the County Election Board did have jurisdiction to hear the challenges, that the decisions of the Board were not against the law, the evidence or the weight of the evidence, denying the petitions and sustaining the decisions of the Franklin County Board of Elections. The orders specifically noted that they were filed without Opinions to expedite the completion of the official election tally, and Opinions would be filed, if necessary.

On December 19, 1977 notice of appeal to the Commonwealth Court was given by counsel for David L. Cook. On December 21, 1977 an order was entered pursuant to Pa. R.A.P. 1925(b) directing the filing of record of a concise statement of the matters complained of on appeal. The statement of reasons was filed on December 28, 1977. This Opinion is filed in support of the orders of December 8, 1977.

To clarify the posture of this matter, we enter the following Findings of Fact:

1. The record of the Franklin County Election Board maintained in the Office of the Commissioners of Franklin County, Pennsylvania in the Franklin County Court House, Chambersburg, Pennsylvania establish that at the Primary Election held May 17, 1977:

(a) David L. Cook was nominated as a candidate of the Republican Party to run for the office of Township Supervisor of Warren Township, Franklin County, Penna. at the Municipal Election to be held on November 8, 1977.

(b) Clifford R. Harnish was nominated as a candidate of the Democratic Party to run for the office of Township Supervisor of Warren Township, Franklin County, Penna. at the Municipal Election to be held on November 8, 1977.

(c) Carl E. Carbaugh was nominated as a candidate of the Democratic Party to run for the office of judge of elections of Warren Township.

2. Evelyn S. Zimmerman and Myrtle M. Secrist were at all times relevant to this proceeding registered electors residing in Warren Township, Franklin County, Pennsylvania.

3. On September 23, 1977, Evelyn S. Zimmerman and Myrtle M. Secrist each completed an "Application for Absentee Ballot" and signed and dated that portion of the printed application form which provides:

"ABSENCE FROM COUNTY

I expect to be absent from the county of my residence on the day of the election/primary because of duties, occupation or business, (includes leaves of absence for teaching or education, vacations, sabbatical leaves, and all other absences associated with the elector's duties, occupation or business, and also include an elector's spouse who accompanies the elector)."

4. Pursuant to the Election Code the Franklin County Election Board prepared and caused necessary ballots to be printed for all county election districts, including Warren Township, and distributed the same to the election boards.

5. The Municipal Election 1977 ballots printed and distributed for Warren Township included the names of David L. Cook and Clifford R. Harnish as candidates for the office of Supervisor and Carl E. Carbaugh as a candidate for judge of elections.

6. No portion of the "Illness or Physical Disability" section of the printed "Application for Absentee Ballot" was completed by either Evelyn S. Zimmerman or Myrtle M. Secrist.

7. On November 8, 1977 at approximately 10:00 A.M. Mrs. Nellie Lathrop visited the home of Evelyn S. Zimmerman and Myrtle M. Secrist in Warren Township, Franklin County, Pennsylvania. She observed Mrs. Zimmerman collecting eggs at a chickin house and talked to her. Mrs. Secrist met Mrs. Lathrop at the door of the house and was observed taking care of two young children aged two and three or four.

8. Mrs. Secrist, age 88, suffered a broken hip in April 1977 and in November 1977 used a walker or required some support to get around.

9. Mrs. Secrist and Mrs. Zimmerman had planned to travel to McConnellsburg, Fulton County, Penna. on November 8,

1977 to see a doctor and have blood tests, but did not go because Mrs. Secrist was not feeling well.

10. Neither Mrs. Secrist nor Mrs. Zimmerman appeared or testified at the hearing held by the Franklin County Election Board on November 14, 1977.

11. No evidence was introduced that either Mrs. Secrist or Mrs. Zimmerman were unable to attend their proper polling place on November 8, 1977 by reason of illness or physical disability.

12. Carl E. Carbaugh, who was serving as judge of elections in Warren Township on November 8, 1977, challenged the absentee ballots of Evelyn S. Zimmerman and Myrtle M. Secrist and filed his "Challenge of Absentee Elector" forms with receipts evidencing a Ten ($10.00) Dollar deposit made for each challenge by the challenger.

13. David L. Cook received 59 votes, including an unsuccessfully challenged absentee ballot, and Clifford R. Harnish received 60 votes according to the unofficial count of the Warren Township Election Board. Carl E. Carbaugh was defeated by a vote of 59 to 57.

14. No evidence was introduced at the County Election Board hearing that Carl E. Carbaugh was a candidate at the November 8, 1977 election. The County Board made no finding as to the standing of Mr. Carbaugh to challenge the Zimmerman and Secrist absentee ballots.

15. Neither the standing of Mr. Carbaugh to challenge the absentee ballots nor the jurisdiction of the Franklin County Election Board were raised at or before the time of the County Election Board hearing by the petitioner or their counsel.

The issues raised by petitioner, David L. Cook, before this Court and on appeal to the Commonwealth Court are:

(a) The Franklin County Board of Elections lacked jurisdiction to hear the challenges to the absentee ballots because the record does not affirmatively disclose that the challenger, Carl E. Carbaugh, was an individual authorized by the Election Code of Pennsylvania to challenge an absentee ballot. This Court erred in failing to reverse the decisions of the County Election Board for want of jurisdiction.

(b) The Franklin County Election Board erred in not

finding that Evelyn S. Zimmerman and Myrtle M. Secrist were as a matter of fact and law entitled to vote by absentee ballots on November 8, 1977. This Court erred in not reversing the County Election Board's decision.

I

JURISDICTIONAL QUESTION

In his attack on the jurisdiction of the County Election Board to hear the challenges to the absentee ballots petitioner asserts:

A. That Sect. 1308(e) of the Pennsylvania Election Code, 25 P.S. 3146.8(e), permits only an attorney, a watcher or a candidate to challenge an absentee ballot, and in the absence of on-the-record evidence that Mr. Carbaugh possessed such standing neither the County Election Board nor this Court could properly conclude that the challenger had the requisite legal standing to have his challenges acted upon.

B. That in the case at bar, this Court sits as an appellate court presumably reviewing the acts of "the court below", i.e., the County Election Board, and an appellate court may not take judicial notice of facts such as the candidacy of Carl E. Carbaugh.

C. That in the absence of a qualified challenger the Franklin County Election Board lacked jurisdiction of the subject matter. Therefore, the petitioner's failure to raise the jurisdictional issue, i.e., lack of record standing of the challenger, cannot, as a matter of law, be deemed a waiver of the issue because lack of jurisdiction of subject matter can be raised at any time, irrespective of prior proceedings on the merits.

Section 1308(e) of the Election Code, 25 P.S. 3146.8(e) provides:

"At such time the local election board shall then further examine the declaration on each envelope not so set aside and shall compare the information thereon with that contained in the 'Registered Absentee Voters File,' the absentee voters' list and the 'Military Veterans and Emergency Civilians Absentee Voters File.' If the local election board is satisfied that the declaration is sufficient and the information contained in the 'Registered Absentee Voters File,' the absentee voters' list and the 'Military Veterans and Emergency Vivilians Absentee

Voters File' verifies his right to vote, the local election board shall announce the name of the elector and shall give any watcher present an opportunity to challenge any absentee elector upon the ground or grounds (1) that the absentee elector is not a qualified elector; or (2) that the absentee elector was within the county of his residence on the day of the primary or election during the period the polls were open, except where he was in military service or except in the case where his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability; or (3) that the absentee elector was able to appear personally at the polling place on the day of the primary or election during the period the polls were open in the case his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability. Upon challenge of any absentee elector, as set forth herein the local election board shall mark 'challenged' on the envelope together with the reason or reasons therefor, and the same shall be set aside for return to the county board unopened pending decision by the county board and shall not be counted. All absentee ballots not challenged for any of the reasons provided herein shall be counted and included with the general return of paper ballots or voting machines, as the case may be as follows. Thereupon, the local election board shall open the envelope of every unchallenged absentee elector in such manner as not to destroy the declaration executed thereon. All of such envelopes on which are printed, stamped or endorsed the words 'Official Absentee Ballot' shall be placed in one or more depositories at one time and said depository or depositories well shaken and the envelopes mixed before any envelope is taken therefrom. If any of these envelopes shall contain any extraneous marks or identifying symbols other than the words 'Official Absentee Ballot,' the envelopes and the ballots contained therein shall be set aside and declared void. The local election board shall then break the seals of such envelopes, remove the ballots and record the votes in the same manner as district election officers are required to record votes. With respect to the challenged ballots, they shall be returned to the county board with the returns of the local election district where they shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges and notice shall be given where possible to all absentee electors thus challenged and to every attorney, watcher or candidate who made such challenge. The time for the hearing shall not be later than seven (7) days after the date of said challenge. On the day fixed for said hearing, the county board shall proceed

without delay to hear said challenges and, in hearing the testimony, the county board shall not be bound by technical rules of evidence. The testimony presented shall be stenographically recorded and made part of the record of the hearing. The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board. Such appeal shall be taken, within two (2) days after such decision shall have been made, whether reduced to writing or not, to the court of common pleas setting forth the objections to the county board's decision and praying for an order reversing same. Pending the final determination of all appeals, the county board shall suspend any action in canvassing and computing all challenged ballots irrespective of whether or not appeal was taken from the county board's decision. Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots shall be added to the other votes cast within the county."

Considering the explicit language of Sect. 1308(e) imposing upon the county board the duty to fix and give notice of the time and place for formal hearing on challenges to absentee ballots, conduct the hearing without being bound by technical rules of evidence and render a decision upholding or dismissing the challenges and granting review jurisdiction to the court of common pleas, we find petitioner's contention that the Franklin County Board of Elections and this Court lack jurisdiction of the subject matter extremely puzzling and singularly without citations of legal authority.

If we comprehend the thrust of petitioner's jurisdictional argument, his complaint is predicated on the fact that no evidence was introduced and no finding made by the county board that Carl E. Carbaugh was a candidate and thus one of the group legislatively authorized by Sect. 1308(e), supra, to challenge absentee ballots. This is not the criterion for testing subject matter jurisdiction. "The test of jurisdiction was the competency of the court to determine controversies of the general class to which the case presented for its consideration belonged, whether the court had power to enter upon the inquiry, not whether it might ultimately decide that it was unable to grant the relief sought in the particular case; . . ." *Zerbe Township School District v. Thomas*, 353 Pa. 162, 44 A. 2d 566, 568 (1945); *Studio Theaters, Inc. v. Washington*, 418 Pa. 73, 77, 209 A. 2d 802, (1965).

It is our judgment that Sect. 1308(e), supra, specifically

confers jurisdiction of subject matter initially upon the Franklin County Election Board and for purposes of review upon this Court.

The petitioner has, in fact, challenged the standing of Mr. Carbaugh to challenge the absentee ballots. "Standing has been generally expressed by an indication that the alleged aggrieved party has asserted a legal right which was his to assert, or has been injured, or has been threatened with injury. . . standing is basically a means by which courts can accept or refuse jurisdiction, and it generally alludes to the capacity of a party to obtain judicial review of an administrative action." *Investment Co. Institute v. Camp*, 244 F. Supp. 624, 632 (D.C. 1967).

Despite the absence of testimony identifying Carl E. Carbaugh as a candidate at the November 8, 1977 election, and the failure of the County Election Board to make a specific finding either that he was a candidate or was a person entitled to challenge absentee ballots, we conclude that Carl E. Carbaugh did have requisite standing to assert the challenges for:

1. Pursuant to Sect. 302(c,h,k, and l) of the Election Code, as amended, 25 P.S. 2642(c,h,k and l), the Franklin County Election Board had canvassed the results of the 1977 Primary Election, published the results of that Primary Election, including the nomination of Mr. Carbaugh, prepared or caused the preparation of all county election district ballots and the printing of the same, including Mr. Carbaugh's name as a candidate for Judge of Elections in Warren Township, and the necessary election advertisements. From these facts, we reach the inevitable conclusion that the County Election Board had to know the ultimate fact that Carl E. Carbaugh was a candidate entitled to challenge absentee ballots.

2. It would have been most convenient and most helpful to this Court had the County Election Board made a finding that Mr. Carbaugh was a candidate. However, recognizing that the three Franklin County Commissioners are not learned in the law, and that the Legislature excused county boards from being bound by technical rules of evidence in hearings on absentee ballot challenges (Sec. 1308(e), supra), we are satisfied that the County Election Board is not bound to the legal format and technical niceties demanded of the judiciary or those trained in the law. We refuse to exalt form over substance as urged by petitioner.

We further conclude that the petitioner waived his right to

challenge the standing of Mr. Carbaugh to challenge the absentee ballots by failing to raise the issue before the County Election Board. In effect, counsel for the petitioner elected to enter into a hearing on the merits, permit his client to take his chances on the decision of the board, and then hope to have the reviewing court overrule the board and declare the hearing a nullity. This is analogous to the failure of counsel to take exceptions to the charge of a trial judge. It is now hornbook law that appellate courts will decline to consider such matters on appeal where counsel have failed to give the court of original jurisdiction the opportunity to correct alleged errors. We adopt this salutory rule in the case at bar.

II

RIGHT OF ZIMMERMAN AND SECRIST TO VOTE THE ABSENTEE BALLOTS ISSUED

Here, the petitioner appears to contend in the alternative that either:

1. The challenger did not sustain his burden of proving that Mrs. Zimmerman and Mrs. Secrist were in Franklin County on November 8, 1977 during the period the polls were open, and they were able to appear personally at the polls, or

2. Despite the fact that the absentee electors were present in Franklin County on election day at the time when the polls were open, the challenger failed to sustain his burden of proving that they were physically able to appear at the polls; and their absentee ballots should, therefore, be treated as if originally issued on the grounds of illness or physical disability and counted.

Preliminarily, and to place this issue in its proper legal context, we note the following:

1. "The right of suffrage is the most treasured perogative of citizenship, . . . it may not be impaired or infringed upon in any way except through the fault of the voter himself. . . . Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." *Absentee Ballots Case* (No. 1), 431 Pa. 165, 173 (1968), *Wilkes Barre Election Contest*, 400 Pa. 507, 512 (1960), *Absentee Ballot Case*, 423 Pa. 504, 515 (1966).

2. The burden of proof is upon the challenger to establish by a preponderance of the credible evidence

before the county board of elections the grounds asserted in his challenge. *Appeal of Petrucci, et al.*, 56 Luz. L.R. 31, 32 (1965), 223 *Absentee Ballot Appeals*, 81 York L.R. 137, 140 (1967).

3. The court may not substitute its judgment as to the credibility of witnesses for that of the county board of elections which has had the opportunity to hear and observe the witnesses. *Appeal of Petrucci, et al.*, supra.

4. The court may reverse the county board of elections only for a mistake of law or for a clear abuse of discretion, including a capricious disregard of the testimony. *Appeal of Petrucci, et al.*, supra, *In Re: 1968 Primary, 3rd Ward Dupont*, 59 Luz. L.R. 20 (1968).

The petitioner's alternative theory directly raises the question of law whether an absentee ballot issued on the elector's statement that he will be absent from the county on an election day may be converted to an absentee ballot predicated upon illness or physical disability where the evidence before the county election board establishes that the elector was not absent from the county as planned because of the on set of an illness or physical disability rendering him unable to go to the polls. We will first consider this question of law.

The petitioner has cited *In Re: Appeal of Petrucci, et al.*, supra, in support of his position. A majority of the court en banc of Luzerne County did reach the conclusion contended for by petitioner, but did so without any discussion or citation of authorities supporting its conclusion. We have the highest regard for the Luzerne County Court of Common Pleas and have given careful consideration to the weight to be given the secision of our sister court. However, we find ourselves unable to agree with the conclusion reached, and in the absence of guidance from the Apellate Courts of Pennsylvania feel free to adopt our own conclusion on the issue.

The Act of 1963 P.L. 707, Sect. 20, as amended; 25 P.S. 3146.1 (j) and (k) provides:

"The following persons shall be entitled to vote by an official absentee ballot in any primary or election held in this Commonwealth in the manner hereinafter provided:

"(j) Any qualified registered and enrolled elector who expects to be or is absent from the Commonwealth or county of his

residence because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election; or

"(k) Any qualified registered and enrolled elector who because of illness or physical disability is unable to attend his polling place or operate a voting machine and secure assistance by distinct and audible statement as required in section 1218 of this act."

The Act also provides, 25 P.S. 3146.2 (e) (1) (2):

"(1) The application of any qualified registered elector, including spouse or dependent referred to in subsection (1) of section 1301, who expects to be or is absent from the Commonwealth or county of his residence because his duties, occupation or business require him to be elsewhere on the day of any primary or election, shall be signed by the applicant and shall include the surname and christian name or names of the applicant, his occupation, date of birth, length of time a resident in voting district, voting district if known, place of residence, post office address to which ballot is to be mailed, the reason for his absence, and such other information as shall make clear to the county board of elections the applicant's right to an official absentee ballot.

"(2) The application of any qualified registered elector who is unable to attend his polling place on the day of any primary or election because of illness or physical disability and the application of any qualified registered bedridden or hospitalized veteran in the county of residence shall be signed by the applicant and shall include surname and christian name or names of the applicant, his occupation, date of birth, residence at the time of becoming bedridden or hospitalized, length of time a resident in voting district, voting district if known, place of residence, post office address to which ballot is to be mailed, and such other information as shall make clear to the county board of elections the applicant's right to an official ballot. In addition, the application of such electors shall include a declaration stating the nature of their disability or illness, and the name of their attending physician, if any, together with a supporting declaration signed by such attending physician, or, if none, by a registered elector unrelated by blood or marriage of the election district of the residence of the applicant: Provided, however, that in the event any elector entitled to an absentee ballot under this subsection be unable to sign his application because of illness or physical disability, he shall be excused from signing upon making a statement which shall be witnessed by one adult

person in substantially the following form: I hereby state that I am unable to sign my application for an absentee ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or have received assistance in making my mark in lieu of my signature.

_____
Date

_____
(Complete address of witness)

_____
(Mark)

_____
(Signature of Witness)

No more than one application for an absentee ballot shall be issued to any elector. A copy of the request for the application shall be kept on record at the office of the county board of election."

On the "Application for Absentee Ballot" form in addition to the section provided for the identification of the applicant and the blocked out section marked "Absence From County: (quoted in Finding of Fact 3, supra) there is a separately blocked out section which provides:

"ILLNESS OR PHYSICAL DISABILITY"

"I expect to be unable to attend my proper polling place on the day of the election/primary because of illness or physical disability. The nature of which appears below:

_____
(Insert disability or illness here)

_____
Date of signing

_____
Signature of Voter)

(If unable to sign, complete reverse side of card)

FILL OUT THE APPLICABLE SECTIONS BELOW:

IF YOU HAVE AN ATTENDING PHYSICIAN--YOU MUST INSERT HIS NAME AND SUCH ATTENDING PHYSICIAN MUST SIGN THIS DECLARATION:

I declare that the facts set forth above regarding disability or illness are true to the best of my knowledge and belief.

(You must insert the name of your attending physician here)

(Your attending physician must sign here)

IF YOU DO NOT HAVE AN ATTENDING PHYSICIAN—SECURE THE SIGNATURE OF A REGISTERED ELECTOR OF YOUR VOTING DISTRICT NOT RELATED TO YOU BY BLOOD OR MARRIAGE.

I declare that I am not related to the above applicant, that I am a registered voter of the voting district of the applicant and that the facts above regarding disability or illness are true to the best of my knowledge and belief.

(Signature of Registered Elector Executing Declaration)

In our judgment, the foregoing conclusively demonstrates a carefully designed legislative plan distinguishing between absentee ballots issued to electors who will be absent from their county of residence due to duties, occupation or business, and electors who will be present in their county, but unable to attend their polling place due to illness or physical disability. We also find that the legislature imposed specific conditions for the issuance of the absentee ballot for illness or physical disability, viz., (1) identification of the illness or disability, and (2) signature of applicant's attending physician confirming the illness or disability, or (3) signature of a non-related elector confirming the illness or disability.

To conclude that an absentee ballot issued in reliance upon the elector's statement that he intends to be absent from the county converts itself into an absentee ballot issued for use of an ill or disabled elector flies in the face of the clear mandate of the legislature and totally frustrates the legislative intention to require compliance with certain conditions as a prerequisite to the issuance of absentee ballot for the ill or disabled. As a matter of law, the county board of elections would have no right to issue an absentee ballot in reliance on an incomplete application; and we conclude as a matter of law that this Court has no right by legal legerdermain to convert an "absence from county" absentee ballot to an "illness or physical disability" absentee ballot.

We therefore, find no merit in the petitioner's second or alternate contention.

The petitioner asserts as his first alternate theory that the challenger failed to sustain the burden of proving that the absentee electors were in Frnaklin County and able to attend their polling place on November 8, 1977. (Underlining ours) Counsel for petitioner has, however, conceded, and the evidence conclusively establishes that both Mrs. Zimmerman and Mrs. Secrist were, in fact, seen at or near their home on election day at a time when the polls were open. In the light of this concession, the type of absentee ballot applied for, and our conclusion that absentee ballots are not "convertible", we are persuaded that the physical ability or inability of the electors to attend the polls was irrelevant, and the county board of elections correctly sustained the challenges.

However, to avoid any misapprehension as to the position taken by this Court, we are also of the opinion that the evidence presented by the challenger did support the conclusion of the county board that the absentee electors were able to appear personally at the polls on November 8, 1977, and that the board was guilty of no mistake of law, no clear abuse of discretion and no capricious disregard of the testimony. The Franklin County Election Board sat as the trier of fact in this case. It is hornbook law that the judge of the facts must weigh the credibility of the witnesses and may believe all, some or none of the evidence presented. It is neither the duty nor the right of this Court to substitute its judgment for that of the board.

We, therefore, dismiss the petitioner's second major challenge to the decision of the Franklin County Board of Elections.

Editor's Note--
This case has been appealed to the Commonwealth Court. See 2465 C.D. 1977.

NOLDER v. CHAMBERSBURG AREA SCHOOL DISTRICT, C.P. Franklin County Branch, No. 74 November Term, 1975, No. 75 November Term, 1975

School Code - Hiring - Temporary professional employee - Permanent Substitute - Temporary Substitute

1. Representations concerning matters of hiring by school administrators are not binding upon the board of school directors nor can the terms of a teacher's employment be supplemented or enlarged by actions of school district officials.