Chapter XXX.

GENERAL ELECTION CASES, 1758 To 1880.

902. The Florida election case of Finley v. Walls, in the Forty-fourth Congress.

Election officers fraudulently chosen and acting illegally were held to be intruders and not de facto officers.

Fraud having been commited by election officers, no reliance was placed on their returns, and they were rejected.

Where returns are rejected, the vote may not be proven aliunde by the opinion of a person who kept a tally sheet.

On March 23, 1876,[2] Mr. Charles P. Thompson, of Massachusetts, from the Committee on Elections, submitted the report of the majority of the committee in the case of Finley *v.* Walls, of Florida. As returned by the State canvassers, the sitting member had a majority of 371 votes, which the contestant sought to overcome by proving frauds and irregularities. While a large number of allegations were made, the decision was universally conceded in the debate to depend on the disposition of the returns from the Colored Academy precinct, where sitting member received 588 votes and contestant 11. This disparity was not of itself a suspicious circumstance, since under the laws of Florida the voter might cast his vote at any precinct in the county, and the white and colored people quite generally sought different polls.

The law of Florida provided:

> The polls of the election shall be opened at 8 o'clock a.m. on the day of the election.

And also—

> The county commissioners shall * * * appoint a board of three discreet electors to be inspectors of the election for each place designated for voting within the county.

And—

> In case of the death, absence, or refusal to act of any or all of the inspectors appointed by the county commissioners, the electors present at the time appointed for opening the election may choose,

[1] Also Lee *v.* Rainey, South Carolina (Vol. I, sec. 641).

[2] First session Forty-Fourth Congress, House Report No. 295; Smith, p. 367; Rowell's Digest, p. 305.

viva voce, from the qualified electors, such a number as, together with the inspector or inspectors present, if any, will constitute a board of three, and the persons so chosen shall be authorized to act as inspectors of that election. The inspectors shall, before opening the election, choose a clerk, who shall be a qualified elector, and said inspectors and clerk, previous to receiving any votes, shall each take and subscribe an oath or affirmation in writing that they will perform the duties of clerk or inspectors of election according to law, and will endeavor to prevent all fraud, deceit, or abuse in conducting the same. Such oath may be taken before any officer authorized to administer oaths or before either of the persons chosen as inspectors, and shall be returned with the poll list and the returns of the election to the clerk of the circuit court. One of the inspectors shall be chosen as chairman of the board.

The majority of the committee say in regard to the Colored Academy precinct:

At this precinct your committee find that there was a conspiracy to commit a fraud upon the election. That the conspirators were Dr. E. G. Johnson, who was a candidate for State senator in Columbia County and was voted for at this precinct, together with Charles R. King and John W. Tompkins, who acted as inspectors, Charles A. Carroll, who acted as clerk, and one Duval Selph, a supporter of Doctor Johnson. Carroll and Selph were at Doctor Johnson's during the night previous to the election, and King took breakfast with him in the morning. They all, except Selph, left the house of Doctor Johnson in the morning, a little after daylight, and proceeded to the place where the election was to be held, and, in pursuance of the object of the conspiracy, opened the polls at about 7 o'clock in the morning, an hour before the time at which the meeting was notified and an hour before the duly appointed inspectors were called upon to be present and an hour before the election could be held according to law. No one of the duly appointed inspectors, unless it was Aleck, Hamilton, was present or acted at this precinct. Tompkins and King had been requested to be present by Doctor Johnson and act as inspectors, and Charles A. Carroll had been requested by him to act as clerk, and these several persons were either nominated by, or acted at the request of, Doctor Johnson. They were not legally elected, as there was no regular meeting of the electors having power to choose inspectors before Tompkins and King undertook to act as such, and without legally appointed or chosen inspectors no legal clerk could be chosen or appointed, so that the election at this precinct was conducted by persons not legally authorized, with the exception of Hamilton, and by persons who were ready and willing to violate the election laws of the State, and who did violate them.

The committee then go on to quote testimony that there was fraud at the precinct, persons voting who had voted at other precincts and others voting who had not conformed to the legal requirements. And the committee insisted that there was fraudulent collusion on the part of the election officers. They say:

Your committee are satisfied that the irregularities at this precinct were not the result of ignorance, inadvertence, or carelessness, but were the result of fraud, and that there were no legally appointed inspectors nor a legally appointed clerk at this precinct; that Johnson took the entire charge of the polls through persons who, by his procurement, acted as inspectors and clerk. They can not stand better than mere intruders, having no official character; intruders not for the purpose of aiding in conducting an election fairly, but for the purpose of carrying into execution a previously arranged fraud upon the ballot box. It is clear that the pretended clerk, Charles A. Carroll, arranged with Doctor Johnson to commit a gross fraud at this election, and although he did not do the particular acts it was arranged he should do, still the evidence is clear that Doctor Johnson himself carried out the fraud planned with the clerk, of putting illegal votes into the ballot box with the knowledge of the clerk.

In conclusion the majority say:

The law is, that where fraud is proved to have been committed by the officers of an election in conducting the election, no reliance can be placed upon any of their acts and their return must be rejected as wholly unreliable. The party claiming under the election must prove the actual vote in some other way. The only evidence as to what the vote was is from John V. Brown (p. 79), one of the challengers, a Conservative, who says: "Finley got 11 and Walls 588, 1 think. I derived my information from being present and keeping a tally sheet." This certainly can not establish the vote, as his testimony at most can only be evidence of the actual number of votes cast, but one of the principal objections

is that illegal votes were cast, and this, too, with the guilty knowledge of the officers of the election. There being proof that such illegal votes were cast and the real number of legal votes not being proved, there is nothing upon which the true vote can be ascertained, and, therefore, the entire poll must be rejected; and your committee so find and determine.

The minority dissent from the majority's views as to the facts, deny that fraud is proven, and hold:

As these men acted as inspectors and clerk, and as no proof is given to show that they were not, in fact, appointed, and as it is now claimed that their return went into the Columbia County return, counted by the State board, and found at page 23, and as it is now sought to deduct this vote from the State count, these inspectors and clerk must be taken to be officers de facto, and full faith, prima facie, is due to their acts.

The committee considered at length other objections of the contestant, and came to conclusions thereon:

903. The case of Finley v. Walls, continued.

Persons actually registered but omitted from the copy of the list in use at the polls were held to have cast valid votes, although a required oath was not administered when they voted.

Where the nature of illegal votes had not been determined the Committee on Elections deducted a proportionate number from the poll of each candidate.

(1) At the Gainesville precinct about 60 persons voted whose names were not on the certified copy of the registration list. The majority say:

It is clear by the election laws of Florida that a person, in order to be entitled to vote at any election, must, six days prior thereto, be duly registered as a voter in the clerk's office of the circuit court in the county. If, on offering to vote, his name is not on the certified copy of the registry list at the voting precinct, he may then, if he takes the oath prescribed in section 16 and the additional oath required by section 9, which is "that his name has been improperly struck off from the list of registered voters," be entitled to vote. And the taking of the oath in section 9 is indispensable to the right of the person to vote whose name is not upon the registration list. The officers presiding at the election have no right to receive his vote without this oath. But it also appears by the evidence that, although the names of these 60 voters were not on the certified copy of the registration list furnished for this poll, still a large number of the names were actually on the registration list in the clerk's office of the circuit court. Your committee, in view of this fact, although the inspectors were in fault in allowing the persons to vote whose names were not on the list furnished them by the clerk of the circuit court, still, as their names should have appeared on such list, and they were deprived of the legal right to vote without taking the oath in section 9, by the neglect of the clerk of said court in not providing a correct list of the voters of said precinct, have arrived at the conclusion that, they having voted, their votes should be counted when their names are found to have been on such registry list at the clerk's office. This leaves the poll to be purged of 12 votes. "In purging the polls of illegal votes, the general rule is that, unless it is shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidates having the highest number." "Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each." (Am. Law of Elec., sec. 298.) Although this is the rule to be applied where it can not be ascertained for whom the illegal votes were cast, and in this case there is nothing to show that it might not have been ascertained for whom the illegal votes were cast, as the names of the unregistered voters could have been ascertained by comparing the poll list and the registry list, and the evidence of the illegal votes taken as to whom they voted for, and the poll purged in this the more regular mode; still, as this has not been done, your committee, unwilling to reject the entire poll, there being not evidence sufficient to prove actual fraud on the part of those having charge of the election, have determined to purge the poll of the 12 illegal votes by subtracting from each of the candidates a proportionate number of the illegal votes, according to the entire vote returned for each.

904. The case of Finley v. Walls, continued.

An entire poll is not to be rejected except after the fullest attempt to purge it of illegal votes.

Where election officers did not follow State law and draw out an excess of ballots, the Elections Committee deducted proportionately.

Failure to swear the election officers, combined with other irregularities, was, by a divided committee, held not to require rejection of the poll, actual fraud not being shown.

Failure to return the poll book to the county officer, as the law required, was not held in the absence of proof of fraud to vitiate the election.

(2) As to sheriff's office precinct the report says:

> There was at this precinct a grave omission on the part of the officers of election in their failure to purge the poll, as directed by the law of Florida. It appears from the testimony of Albert A. Ellenwood, one of the inspectors (pp. 96, 97), that there were only 298 names on the poll list while there were 309 votes cast and counted.
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> There appearing to be 11 more votes than names on the poll list, it was the duty of the inspectors to replace the ballots in the box and have one of their number publicly draw out and destroy, unopened, so many of such ballots as were equal to such excess. (Sec. 22, above.)
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> This not having been done, it becomes a difficult problem to determine what shall be done with the poll. The statute having prescribed the method of and the person by whom the poll should have been purged, can it be purged in any other manner? Your committee, upon a careful consideration of the question, regarding it as settled that an entire poll is not to be rejected except after the fullest attempt to purge the poll of illegal votes, and, to ascertain the real vote by all reasonable means, have decided to regard this statute of Florida as providing a principle upon which, as well as a mode by which, the poll in such a case should be purged; and, as the method was omitted without fraud, have not regarded its omission an act of such a character as to compel the rejecting of the entire poll, but have decided to apply the principle established by the law, viz: that the excess of votes shall be regarded as thrown proportionately for both candidates, according to the entire vote for each, and that the drawing out in the manner provided by law would draw a proportionate number for each candidate. Your committee have taken from each candidate a proportionate part of said 11 votes.

Certain members of the committee who concurred in the majority report generally advocated more severe treatment of this poll, Mr. J. S. C. Blackburn, of Kentucky, insisting that it should be thrown out altogether.

(3) At Archer precinct, besides the voting of certain persons whose names were not on the lists and the presence of a few more ballots in the box than there were names on the poll list, the committee found other irregularities:

> At this poll other and serious informalities are found to exist, such as a failure to swear the inspectors, the concealment of the ballot box from public view during the adjournment for dinner, being about a half hour (Geiger, p. 56), not opening of the poll until about half past 9 o'clock, and the keeping it open after sunset. There was also an improper interference with the election by W. U. Saunders, United States marshal, both in meddling with the ballots and controlling the order of voting, so that several conservatives could not vote at all. These irregularities are grave ones and might, with much reason, be adjudged sufficient to vitiate the poll; still, your committee are unwilling to reject an entire vote where there is not proof of actual fraud and the poll may probably be purged of its illegal votes. They have, therefore, allowed the returns to stand as certified by the inspectors, deducting only the 35 illegal votes proportionately from each candidate, which will leave the vote 260 for Walls and 23 for Finley, instead of 293 for Walls and 25 for Finley.

Mr. Blackburn and three other members of the majority of the committee considered the decision too lenient.

(4) As to irregularities in Alachua County, the report says:

That said election at precinct No. 3, at Gainesville, within the county of Alachua, and within said Second Congressional district of Florida, was irregularly and illegally conducted, and was null and void, and I hereby notify you that I will ask that all the votes cast at said precinct be rejected on the following grounds, viz: First. Because no poll book or list of the names of the electors voting at said precinct was returned to the judge of the county court or to the clerk of said county, with the certificates of the election at said poll, as the law requires, but a paper list of names was found eight days after said election, unsigned by any of the officers of the election at said precinct; second, because a large number of illegal votes at said election were received and counted at said poll, viz, about 58 votes not registered, and 5 not checked, as the law requires, were received at said poll, and changed the result of the election at said poll, and only 3 appeared to be sworn, and because the oath administered to the unregistered voters who voted at said poll was not such as the law prescribes.

To which the contestee answers in substance that it is untrue that said election was irregularly and illegally conducted, or was null and void. He admits that the poll book was not returned to the judge of the county court nor to the clerk of the county with the certificate of the election at said precinct, but alleges that the same was found eight days after said election, and that this irregularity is not such as will affect the rights of the contestee. He also objects to proof of any illegal votes, as it does not appear from the contestant's said specifications for whom said illegal votes were cast. A poll may be purged of illegal votes without it being proved for whom they were cast. (Am. Law of Elec., sec. 298.)

The not returning of the poll list, although an irregularity which might, connected with other irregularities, be entitled to very considerable weight, still, in this case, it being shown that the poll list used at this precinct was found and used by the county canvassers in canvassing this precinct, and there being no evidence that it had been tampered with, or was by reason of fraud not returned in the ballot box, the committee have not regarded it as a sufficient reason for rejecting said poll.

The majority of the committee concluded, from an application of the principles set forth, that the true result showed a majority of 343 votes for Mr. Finley, the contestant, and reported resolution giving the seat to him.

The report was debated at length on April 18 and 19,[1] the debate being confined almost exclusively to the Colored Academy precinct. On the latter day the resolutions of the minority, confirming the title of sitting Member to the seat, were offered as a substitute, and were disagreed to, yeas 84, nays 135.

Then the resolutions of the majority were agreed to without division.

The contestant, Mr. Finley, then appeared and took the oath.

905. The Alabama election case of Bromberg v. Haralson, in the Forty-fourth Congress.

Illustration of a specification in a notice of contest condemned as too general.

Testimony taken after the time allowed by law was rejected.

Original testimony, taken on notices stating that witnesses were to be examined in rebuttal, was rejected.

On March 23, 1876,[2] Mr. John T. Harris, of Virginia, from the Committee on Elections, submitted the report of the committee in the case of Bromberg *v.* Haralson, of Alabama. The contestant alleged fraud and intimidation sufficient to overcome the majority of nearly 2,700, by which sitting Member had been returned.

Two preliminary questions were discussed and passed on in relation to the vote of the district, especially of Wilcox County.

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[1] Journal, pp. 817, 825, 826; Record, pp. 2553, 2593–2603.

[2] First session Forty-fourth Congress, House Report No. 294; Smith, p. 364; Rowell's Digest, p. 303.

(*a*) The report quotes one of the specifications:

Twelfth. That illegal and undue influences were employed by United States and State officials, or by persons representing themselves to be such, adherents of the Republican party, to prevent voters in this district from voting for me (the contestant), or inducing or intimidating voters into voting for you (the contestee), by threats of prosecution and otherwise, by the presence of detachments of United States troops at or near the polls, and by the illegal distribution of provisions donated by act of Congress to sufferers by the overflow of the Tombigbee and Alabama rivers in 1874.

And says:

The twelfth specification is too vague and uncertain to be good. The statute requires that the contestant, in his notice, "shall specify particularly the grounds upon which he relies in his contest." (Rev. Stat., pp. 17, 18, sec. 105; McCrary, sec. 343; Wright *v.* Fuller, 1 Bartlett, 152.)

It is impossible to conceive of a specification of the grounds of contest broader or more general in its terms. It fixes no place where any act complained of occurred. It embraces the whole district in one sweeping charge. This specification embraces three general grounds of complaint, not one of which possesses that particularity essential to good pleading; but it can subserve no valuable purpose to pursue the question of legal sufficiency of this specification further, because there is another ground upon which the whole evidence of the contestant, relating to the election in this county, must be rejected.

(*b*) As to the notice of contest and validity of certain testimony, the committee say:

The sitting Member served his answer to the notice of contest on the contestant on the 23d of December, 1874. The statute gives ninety days next after the service of the answer in which to take the testimony. (See act of February, 1875.) This period is to be divided as follows: The contestant shall take testimony during the first forty days, the returned Member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period. (Rev. Stat., p. 18, sec. 107.) During the first forty days the contestant took no testimony in Wilcox County or elsewhere to sustain any specification in his notice of contest affecting the election in said Wilcox County. His entire evidence was confined to the election held in other counties. During the succeeding forty days the returned Member did not take any testimony in Wilcox County or elsewhere relating to the election held in said county of Wilcox; and yet, on the 15th and 16th days of March, 1875, the contestant caused notices to be served on the attorney of the returned Member that on the 22d of March, 1875, he would take testimony in said county of Wilcox. Both notices specify that the witnesses therein named "will be examined in rebuttal of the testimony taken" by the returned Member. Knowing that he had taken no testimony in relation to the election in Wilcox County at all, and hence that there was nothing to rebut, the returned Member did not attend the taking of the testimony of contestant in said county. In violation of the statute, and contrary to the terms of the notices served upon the attorney of the sitting Member, the contestant took a large number of ex parte depositions or affidavits for the purpose of proving the truth of the general charges embraced in the twelfth specification above quoted. The whole of the testimony taken in Wilcox County is directed exclusively to the proof of the contestant's original case, and no portion of it is directed to the rebuttal of the proofs adduced by the returned Member. The rules of law and the principles of common fairness alike require that the whole of contestant's testimony relating to the election in Wilcox County should be entirely rejected, first, because the time within which the contestant could lawfully take testimony to prove his original case had long previously expired; and, second, because the notices explicitly state that the witnesses were to be examined in rebuttal, and under such notices, in the absence of the returned Member, it would be to give sanction to a surprise to allow any other than rebutting testimony to stand. And, in addition thereto, the contestee would have no right or opportunity to introduce evidence in answer to the original evidence thus taken during the ten days prescribed by law for taking of rebutting testimony.

906. The case of Bromberg v. Haralson, continued.

Clear and satisfactory proof of fraud or mistake is required to remove the legal presumption in favor of the correctness of the acts of sworn election officers.

Isolated cases of violence or intimidation do not justify a rejection of the poll.

The mere presence of United States soldiers in the neighborhood of the polls, unaccompanied by disorderly or threatening conduct, does not vitiate the poll.

As to the merits of the contest, several considerations were involved:

(1) Extensive frauds were alleged in the city of Mobile through the agency of a club organized for the purpose of encouraging fraudulent voting.

The committee discuss at length the quality of the evidence required for proof of such a charge:

> The burden of proof is always upon the contestant or the party attacking the official returns. The presumption is that the officers charged by law with the duty of ascertaining and declaring the result have discharged that duty faithfully. (Am. El. L., secs. 306, 394, subdiv. 10.)
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> The action of a board of supervisors of election, when in due form, is prima facie correct, and it must stand until it is shown by extrinsic evidence to be illegal and unjust. The presumption is always the commission of a fraudulent or illegal act, and in favor of the honesty and correctness of the official acts of a sworn officer. The rule on this subject is thus stated in the New Jersey cases, 1 Bartlett, 25:
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> "It is not sufficient that there should exist a doubt as to whether the vote is lawful or not; but conviction of its illegality should be reached to the exclusion of all reasonable doubt before the committee are authorized to deduct it from the party for whom it was received at the polls."
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> The true rule is believed to be one which, while it may not require the exclusion of all reasonable doubt, does require clear and satisfactory proof of fraud or mistake before the legal presumption in favor of the correctness of the acts of sworn officers shall be nullified. The testimony of a conspirator swearing to his own infamy and implicating others in the same crime is always jealously scrutinized, and unless corroborated in material points by evidence coming from uncontaminated sources, can not generally be received as sufficient to establish a litigated fact. And if in addition to this, such conspirator declines to submit to a full, thorough, and searching cross-examination upon the whole subject-matter testified to by him in his examination in chief, this circumstance casts additional suspicion upon his testimony. And if to this be also added the fact that such conspirator is at the time he so testifies the paid agent of the party producing him in ascertaining and arranging the evidence for his employer, this circumstance is one calculated to cast additional doubt and suspicion upon his testimony. There was a period in the history of both English and American jurisprudence when the paid attorney or counsel of a litigant party would not be heard to testify in behalf of his client.
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> Bearing in mind these salutary rules, there can be found no reliable evidence to sustain the charges of fraud and overcome the legal presumption in favor of the returns. It would seem upon its bare statement incredible that, in the city of Mobile, at an election where the contestant polled 6,497 votes, mostly cast by the intelligent and lately master race, a number nearly 2,000 in excess of the entire vote polled for the sitting Member, such a conspiracy to repeat, if it existed, could have been consummated. It demands large credulity to believe that in the presence of 6,500 white voters, intelligent, alert, jealously watching their rights, 250 colored men, with the aid of a few white leaders, could have polled about 2,000 votes, or in the neighborhood of 1,700 fraudulent votes. There are nine witnesses who were examined to prove that such a fraud was consummated.

The witnesses, however, did not testify to any specific acts of illegal voting, and the report concludes:

> This evidence given by these conspirators is so vague, indefinite, and contradictory that if it came from purer and less suspicious sources it would furnish no safe or reliable basis upon which to act.

To undertake to purge the poll upon such evidence would be impossible. No man can safely say how many illegal votes, if any, were cast. There is no basis furnished by the evidence from which it can be determined whether there was 1 or 1,000 illegal votes cast. Admitting that there is evidence that there were some illegal votes cast, still, no reliable data are furnished to show how many there were. The result in such case would be that the whole poll would have to be thrown out. The rule is thus stated in Howard *v.* Cooper, 1 Bartlett, 275: "When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents as well as the evident requirements of truth not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown." The application of this rule would end the contestant's case if every other charge of fraud were admitted, and it is therefore safe to say that he will concede that the proper rule is not to reject this poll.

(2) As to intimidation:

The report says:

As to the violence, intimidation, and deception alleged to have been practiced by the Republican voters in Mobile County, the evidence is so meager and unsatisfactory that it can serve no useful purpose to enter into an analysis of it. While there doubtless were isolated cases of violence and intimidation, the election seems in the main to have been orderly, full, and fair. All the witnesses, with perhaps one single exception, testify that they were amply protected in voting as they pleased. This evidence presents a case which the precedents concur in showing can not affect the poll. (McCrary, secs. 416, 424, 586; Harrison *v.* Davis, 1 Bartlett, 341; Brown *v.* Loan, ib., 482.) Nor is there anything in the argument that the colored vote polled was so large as to suggest the existence of illegal voting. The census of 1870 shows the population of Mobile County to have been 49,311, divided by races as follows: Whites, 28,195; colored, 21,107. The evidence tends to show that there has been little increase in the population since that time, and that the races maintain about the same relative proportions. The contestant, in 1874, received 6,497 votes, and the sitting Member 4,753. It may be safely inferred that each race voted about equally solid for the candidate of its own color and blood. On this basis the contestant received 1 vote for every 4.34 inhabitants, while the sitting Member received only 1 vote for every 4.44 inhabitants, thus showing a larger vote polled in proportion to the population by the white than by the colored people. Hence it seems clear that the poll of Mobile County ought not to be disturbed.

(3) In Monroeville, in Monroe County, both bribery and intimidation by soldiers were alleged. Of the latter charge the report says:

There was a small squad of United States soldiers stationed at Monroeville, and on the day of the election they were in the neighborhood of the polls. But the evidence fails to show any disorderly or threatening conduct on their part, and it is apparent that no man of ordinary firmness was or could have been thereby intimidated from voting. The allegation that the presence of this small squad of soldiers intimidated a large number of Democratic voters and kept them from voting the Democratic ticket is not sustained. Indeed, in the year 1872 the contestant received, at the Monroeville precinct, 214 Democratic votes only, while in 1874, at the same precinct, he received 218 votes.

907. The case of Bromberg v. Haralson, continued.

The Elections Committee leaned to the view that a promise of general distribution of food to voters was a corrupting influence justifying purging of the poll.

Discussion as to validity of English rule that to justify rejection of votes bribery must be practiced by the candidate or agent.

It is not safe to assume voting by nonresidents on mere testimony as to migrations of large numbers of persons.

(4) The above precinct of Monroeville was attacked on other grounds, however. The report says:

It is established by the evidence before the committee that a report was industriously circulated among the colored voters that in order for them to obtain bacon they would have to vote the straight

Republican ticket; that if they received bacon, and afterwards neglected or refused to vote the Republican ticket, they would forfeit their legal rights; that they should come to Monroeville on election day, and that Perrin would give them a big barbecue and meat enough to last them a year. It seems that no effort was made by the Republican leaders to correct these reports and disabuse the minds of the colored voters of their truth. It is testified by Perrin and many others that, in their opinion, the belief in the truth of these reports induced the colored voters to cast for the sitting Member at least 800 votes more than he would otherwise have received. The evidence fails to connect the sitting Member with these reprehensible practices. But it is apparent that these corrupt practices did have an influence to swell the vote of the sitting Member at this precinct. There are but a few voters who are shown to have been directly influenced to vote otherwise than they would have done by these means. It is apparent that more were corrupted than can be distinctly proved to have been influenced. It is probable that the truth has between the extremes. On the one hand it is claimed that at least 800 votes were obtained for the sitting Member by corruption and bribery; on the other hand it is claimed that this estimate is proved by the mere opinions of witnesses, and that the evidence does not point distinctly to more than 10 or 12 voters who are shown to have been thus corrupted. It perhaps would be fair to assume that the whole vote cast at this precinct in excess of the vote of two years before, when no such influence existed, was cast by voters who came there under the influence of the corrupt practices and promises disclosed in the evidence. At the Congressional election held in that precinct in 1872, the total vote polled was 516, and at the Congressional election in 1874 the total vote polled was 848. The excess in 1874 over the vote of 1872 is thus shown to be 332. The practice indulged in by Perrin and others to corrupt the colored voters in this county is of a most shameless and reprehensible character. It strikes at the foundations of republican government, and poisons the very sources whence all legitimate authority flows. No system of government can long endure where public opinion tolerates such conduct. Its general prevalence must lead to anarchy and bloodshed, and loosen the very ligaments binding society together. It strikes a fatal blow at the social compact. It overturns all just distinctions between honesty and corruption in the delegation of authority to the representatives of the people. No language can too strongly express our disapproval of the practices indulged in to corrupt the purity of the ballot box, at Monroeville, in particular. Votes thus obtained, even if cast by legal voters, it would seem ought to be rejected as illegal and void, even though it is not shown that the candidate who received them knew or consented to the corrupt practices whereby they were obtained. Such is the rule of law laid down in the unanimous judgment of a highly respectable court of last resort in one of the States of the Union. In that cue it is said:

"In our form of government, where the administration of public affairs is regulated by the will of the people, or a majority of them, expressed through the ballot box, the free exercise of the elective franchise by the qualified voters is a matter of the highest importance. The safety and perpetuity of our institutions depend upon this. It is therefore particularly important that every voter should be free from any pecuniary influence. For this reason the attempt by bribery to influence an elector in giving his vote or ballot is made an indictable offense. * * * Can a vote thus obtained, in direct violation of the statute, be considered a valid or legal vote? If it can, then the very object of the statute, which is that it should not be so obtained, is defeated. We are of opinion that such votes are illegal, and that the judge was right in directing the jury to disregard them. This conclusion is sustained by the authorities, so far as we have been able to find any." (State ex rel. Hopkins *v.* Olin, 23 Wis., 326.)

The Lex Parliamentaria of England seems to require that the bribery which will justify the rejection of a vote shall be practiced by the candidate to be affected, or by his agent. It is not necessary to the decision of this case to determine which rule should be applied in election cases depending before this House, and hence the committee express no judgment upon it. If it should be held that 332 votes cast at this precinct should be thrown out, or that every vote cast for the sitting Member should be rejected, it would not affect the result at which the committee have arrived.

Further on the report says:

No sufficient evidence has been produced to warrant the rejection of any votes cast in Monroe County except at the Monroeville precinct.

(5) Changes were made that in Dallas County 1,000 votes were cast by persons not residents of the county. The report says:

There was a large body of testimony produced before the committee which tended in some degree to raise an inference that a large number of votes had been cast by nonresidents of the county. This testimony is susceptible of being grouped into two general classes:

1. The testimony of a large number of witnesses showing quite a large emigration of colored people from this county since the year 1869.

In the opinion of the witnesses the number was from 2,000 to 3,000, of whom it is estimated that from one-half to three-fourths were colored voters.

2. The second class of testimony is that of railroad officers, steamboat men, and other persons engaged directly or indirectly in procuring and sending away colored laborers into Western States, particularly Mississippi and Louisiana.

It is quite apparent that it would be unsafe to hold that illegal votes had been cast on deductions drawn from testimony so infirm. The number of persons removing into the county would have to be ascertained; also how many of those who went abroad to seek labor went away temporarily and afterwards returned would have to be determined; and, in addition to this, it would be necessary to determine how many who were minors in 1869 had attained their majority in 1874. With so many elements of uncertainty the committee do not realize the force which the contestant attached to this class of proofs.

Therefore the committee held that the charge was not made out.

In conclusion the-committee found:

In conclusion, and without entering into any recapitulation of the votes rejected by the committee in the several precincts in this district, the committee content themselves with the statement that when all such illegal votes have been rejected, it still lacks much of overcoming the majority of nearly 2,700, which the sitting Member received; and it is believed no beneficial purpose would be subserved by any more minute analysis of the votes which we agree should be rejected.

And your committee have unanimously agreed to report to the House the following resolutions:

Resolved, That Frederick G. Bromberg was not elected a Member of the Forty-fourth Congress of the United States and is not entitled to a seat in this House.

Resolved, That Jere Haralson was elected a Member of the Forty-fourth Congress of the United States and is entitled to a seat in this House.

On April 18[1] the House agreed to the resolutions without debate or division.

908. The Illinois election case of Le Moyne v. Farwell, in the Forty-fourth Congress.

Where rejection of the poll (although undoubtedly merited) would accrue to advantage of the offending party, the House purged by deducting the illegal votes from the latter's poll.

On April 10, 1876,[2] John T. Harris, of Virginia, from the Committee on Elections, submitted the report of the majority of the committee in the Illinois case of Le Moyne *v.* Farwell. The official returns gave sitting Member a majority of 186. The contestant alleged fraud and irregularities. Three questions arose, the first two being of essential importance.

(1) In the first precinct of the Twentieth Ward of Chicago the returns gave sitting Member a majority of 171 votes. It was admitted by the whole committee that these returns were entirely unreliable. The minority say:

In reference to this precinct the committee are all agreed that the election was thoroughly corrupt; that an organized effort was made to commit fraud, commencing with a false registration list and ending in the polling of hundreds of illegal votes. Unless these votes can be eliminated and the poll purged,

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[1] Journal, p. 817; Record, p. 2552.

[2] First session Forty-fourth Congress, House Report No. 385; Smith, p. 406; Rowell's Digest, p. 308.

we must reject the entire returns, as the number of fraudulent votes cast was clearly sufficient to change the majority. We clearly recognize the duty to follow the rule, that the exclusion of an entire poll is the very last resort, and that it must never be done where there is any rational means by, which the illegal votes can be eliminated and we be enabled to arrive at the truth. In this case no such means exists. The evidence clearly shows not only fraud, but that the judges of the election were parties to it, that they were corrupt and dishonest, and so conducted the election that frauds might be and were committed. They would not respect challenges nor allow challengers in the room; they numbered the ballots so that no one can tell who cast them, although under the Illinois law it was their duty to place on the ballot cast by each voter a number corresponding to that opposite his name on the poll list; and when the ballots were produced from the clerk's office, it was found not only that the ballots were not so numbered, but that on a count there was a discrepancy of 48 against Farwell between the returns of the officers and a count of the ballots. These facts destroy the prima facie character of the returns, the judges are impeached, and their returns become as blank paper.

The only question which arose, then, was as to the disposition of the poll, whether it should be wholly rejected or purged. While the majority of the committee—seven in all-sustained the whole report, which recommended purging, yet two of this seven indorsed their dissent and favored the entire rejection of the vote. The four minority members also favored the rejection of the vote, so on this branch of the case the report submitted by the majority of the committee actually represented the opinion of a minority.

The report makes this argument:

Presumption is raised against contestee from the fact of his receiving a large majority in the precinct. It is also proven that one person who was furnishing names to illegal voters was providing them with tickets bearing contestee's name, and that the four men who made out the fraudulent registry, who, with one addition, constituted the judges and clerks of election, all voted for contestee. All the testimony proving illegal voting in this precinct is adduced by contestant. The contestee has called no witness nor made any attempt to show an illegal vote in the precinct, nor does he claim that there was any fraud practiced therein by contestant, but in his answer says that there was no illegal votes given for him in said precinct, and only asks to have the whole vote of the precinct thrown out, after the number of illegal votes proven by contestant to have been given to contestee exceeds his (contestee's) majority in the precinct. Contestee's majority in the precinct is 171. The number of illegal votes proven to have been given him in the precinct is 252, so that a rejection of the whole poll would give to contestee the advantage of the difference between these numbers, or 81 votes. "No man shall be allowed to take advantage of his own wrong," is one of the plainest and best settled of legal principles. The law says, "A wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it." The old rule is, "At law fraud destroys rights. If I mix my corn with another's, he takes all." If contestee can have the whole vote of this precinct rejected because of the fraud perpetrated by his own supporters and in his own interest, as proven in the record and not denied, then he is rewarded to the extent of 81 votes for the perpetration of said frauds. The proposition appears to be inequitable and illegal, bordering too closely upon absurdity to admit of argument.

By the law of elections it is held (American Law of Elections, sec. 304):

"Nothing short of the impossibility of ascertaining for whom the majority of the votes were given ought to vacate an election."

Again, section 305, page 231:

"It is the first duty of the tribunal trying the contest to purge the poll of the illegal votes, if this can be done."

This rule is particularly applicable in a case where it is proven that illegal votes were received and counted, rather than in cases where from the proof of irregularities upon the part of the judges it was to be presumed that the count and returns were illegal. The method used in this election was such that had fairness and honesty been observed, the poll of this precinct could have been purged with certainty and without difficulty. Every voter's name was entered upon the poll book as he voted. Opposite his name was written the street and number of his residence, as given by himself; also a poll-book number, and the testimony of the judges shows that the same number as that opposite his name on the

poll book was written on the ballot of every voter before it was put into the box, so that when proof is made that any name on the poll book is fictitious, or not the name of a legal voter, it is only necessary to select the ballot bearing the corresponding number, and thus identify the candidate from whose vote the deduction should be made. In this case the proof shows that after the election was closed, the ballot box was taken off by one of the judges to the house of a candidate on the same ticket with the contestee, and there left for two days before the official returns were made, and that the friends of contestee having charge thereof withheld their returns until the other precincts were heard from; that when said official returns were made the ballots were sealed and returned to the county clerk, and were not again opened until in taking the testimony in this case they were produced and opened in the presence of the parties to this contest or their attorneys and the officers taking the testimony. Then great irregularity appeared in the numbering of the ballots. There were found 183 names on the poll book for which no ballots were found, 198 ballots of duplicate and triplicate numbers. There were only 673 names on the poll book, but there are ballots numbered 674, 675, 675, 676, and 677. It is clear that the ballot box had been tampered with, but it must be remembered that the box was in the custody of the friends and supporters of contestee, which raises the presumption that whatever alterations or changes were made were in his interest and to his advantage. It must be to the disadvantage of contestant to be forced to purge this poll of fraudulent or illegal votes, after the ballots had been thus manipulated by the friends and in the interest of contestee. In such a condition of things, would it be inequitable or unfair to hold that whenever an illegal vote was proven it should be charged to contestee, whether a ballot bearing a corresponding number was found for him or not? In the case of Duffey (4th Brewster, p. 531), the court held, "Upon notice, etc., that fraudulent votes had been received, the burden of proof falls upon the candidate advantaged by the count, to show that the person so voting was a legal voter or voted for his opponent; otherwise it will be presumed that they were polled and counted for him, and the poll will be purged by striking the whole number of such votes from his count." This ruling was no doubt based upon the presumption that the party receiving the majority is responsible for the fraud, and upon which presumption the court felt warranted in throwing the burden of proof on him, and thus purging the poll. But the application of this rule, which might be claimed to be stringent, is not asked or contended for in this case. Here it is only proposed to deduct from the returned vote of the contestee the number of illegal votes, with ballots bearing numbers corresponding to the names of the illegal voters proven to have been received by him in this precinct (there are 84 names in addition to these proven to be of illegal voters, for which there are no ballots, and we disregard them), and it is held that the adoption of this method for the purging of said poll will necessitate the deduction of 252 votes from the returned votes of contestee.

The minority views,[1] after quoting section 442 of McCrary's American Law of Elections, say:

> Returns which are impeached are good for no purpose whatever; they prove nothing; and to us the result seems inevitable that if it is admitted, as it is by every member of the committee, that the judges of the election were corrupt and the election fraudulent, that then the whole of the return becomes valueless, does not import verity, and can be used for no purpose whatsoever. The rule of the law, falsus in uno, falsus in omnibus, applies and we have no middle course except to admit all or reject all; and we shall not attempt to argue the absurdity of taking ballots from the same source, numbered by the same hands, and which are proved to be numbered wrongfully, and from these numbers and ballots determine who the illegal voters cast their ballots for. The rule is a safe one; no one is injured by it; it deprives no one of a single legal vote; for when returns are excluded, it is always in the power of the candidate who believes he has a majority of the legal votes to call the voters and prove whom they cast their ballots for.

In the debate it was urged[2] that the officers of the election were not the agents of either party, but were officers of the law, and there was no presumption one way or the other on account of their acts. Legal authorities on this point were adduced.

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[1] By Mr. Thompson, of Massachusetts, Record, p. 2843.

[2] Submitted by Mr. William R. Brown, of Kansas.

909. The case of Le Moyne v. Farwell, continued.

Illustration of a vague and uncertain specification in a notice of contest, which was nevertheless considered.

Discussion by a divided committee as to the status of paupers at a poorhouse with reference to question of residence.

Discussion as to the evidence required to reject votes of alleged paupers received and counted by the election officers.

The House declined to be bound by a decision of a State court on an analogous question, but not the identical question of qualification of voters.

(2) The majority report thus sets forth a question as to the residence of certain alleged paupers:

> Norwood Park: At this precinct the contestee received 51 and contestant 94 votes.
>
> The contestee, in his answer, charges:
>
> "Third. That a large number of illegal voters, to wit, over one hundred, who temporarily were inmates of the poorhouse in the town of Norwood Park, and who were not legal voters of said town, were allowed to cast their votes for you, which were counted and returned for you."
>
> This charge is very vague and uncertain, and leaves the reader in ignorance of any other objection to these voters than the simple fact that they are paupers. But as the law of Illinois allows paupers to vote, it is evident that the objection, as disclosed by the testimony and the brief of the contestee, is to the residence of these supposed paupers.

The report criticises the evidence presented to prove that these were paupers as negative and not the best evidence when the law of Illinois required a list of persons admitted to the poorhouse to be kept as a public document.

The votes of the alleged paupers were received in accordance with all the precautions of the law as to challenges. Therefore the majority report argues:

> No fraud being proved, or attempted to be proved, in the officers who received the votes, the question recurs, what degree of proof, as to the illegality of these voters, ought to obtain to justify this committee in excluding votes thus received, counted, and duly certified?
>
> In the celebrated New Jersey cases (1 Bart., p. 25) the committee say:
>
> "It is not sufficient that there should exist a doubt as to whether the vote is lawful or not, but conviction of its illegality should be reached to the exclusion of all reasonable doubt before the committee are authorized to deduct it from the party for whom it was received at the polls."
>
> In Rogers's Law and Practice of Election Committees, page 116, it is said:
>
> "So in petitions against candidates on the ground of want of sufficient qualification, although a negative is to be proved, it is the usage of Parliament that the party attacking the qualification is bound to disprove it."
>
> So run all the authorities, that a vote once legally cast can not be set aside except upon proof so strong as to produce the certain moral conviction that the said vote was illegal. The burden of proof is on the party assailing the vote. See Cessna *v.* Myers (McCrary, p. 426), wherein Judge Hoar, in behalf of the committee, says, "The burden of proof, when either party insists that a vote should be deducted from those cast and returned for his competitor, is upon that party to show the person whose vote is in question voted, and that he voted for his competitor, and that he lacked some one of the qualifications to constitute him a voter."
>
> Admit, for the argument, that the law of Illinois disqualifies paupers from voting in that State, is the testimony in this case sufficient to satisfy the judgment that those "employees," as they were called, were paupers? We think not, though, secondarily, the weight of evidence is that they were a class employed by the superintendent of the poorhouse by order of the board to do work upon the county farm an about the premises, and to receive their clothing and food as a compensation. We know the human heart revolts at being called a pauper, and that there are many, many poor persons in

every county who would gladly work the remainder of their days for their food and clothing rather than be called paupers. To this class, it seems to your committee, these voters belong. Therefore, in the light of the authorities and the evidence, your committee could not strike off these votes, even if the law prohibited paupers from voting. But the law of Illinois does allow paupers to vote, and the contestee attacks, in his evidence and the brief of his very learned and able counsel, the residence of these parties. This brings us to consider the law of residence within the meaning of the constitution of Illinois so as to allow the exercise of the election franchise.

No question has been more discussed and to less purpose than the definitions of "residence" and "domicile." No two authors precisely agree in their attempt to define them. But all agree upon the universal principle that every man must have a domicile. We can well understand why a strict rule should apply in the definitions of these terms, as has ever been and will be, in regard to domicile where the rights of property, the law of descent and distribution, the law of the duty of the citizen or the subject to his government, are involved. We can as readily see, in regard to suffrage, why the strictness of the rule should not apply in our Government. While the extent to which suffrage may be carried is under the control of the law power of the several States, conferred by their constitutions, yet suffrage in some form is inherent in our Government and forms its very basis. Without the free and legitimate exercise of this right, we can have no republican government; and all laws passed by the States requiring its exercise in particular localities and requiring a residence are not to abridge the sacred right, but to guard and protect it from abuse and violation.

The report then goes on to quote Vattel, Story, the American Cyclopedia, Bouvier, and the House cases of Monroe *v.* Jackson, Covode *v.* Foster, Taylor *v.* Reading, and Cessna *v.* Myers, and concludes:

Upon this brief summary of these cases, it is evident that the weight of authority is to the point that paupers at a poorhouse do acquire there a residence within the meaning of the election laws prescribing a residence as a requisite to suffrage.

There had been in Illinois decisions of the court (Paine *v.* The Town of Durham, 29 Ill., 125; Freeport *v.* Supervisors, 41 Ill., 41) that paupers did not lose their residence in the towns from which they went, nor did they acquire a residence at the poorhouse. The report calls attention to the fact that the law of Illinois allowed the towns to take care of their own poor or to have them cared for at a county poorhouse. It was therefore evident that had the court authorized the contrary doctrine, the town where the county poorhouse was located would become responsible for all the county paupers. The report points out that these decisions have reference to a police matter merely and have "no reference or bearing upon the constitutional provision in regard to suffrage." Therefore the majority of the committee decline to be bound by the decisions of the court.

The report quotes the constitution of Illinois:

Every person having resided in this State one year, in the county ninety days, and the election district thirty days shall be entitled to vote.

A law passed by the legislature also provided as quoted and commented on in the report:

"A permanent abode is necessary to constitute a residence within the meaning of the preceding section."

Certainly it will not be contended that the legislature had a right to change the constitution, or so to construe it as to enlarge or restrict the right of voting. It can do neither, and their act on the subject of residence is null and void; and we must decide this question as if it had never passed, and look alone to the constitution for our guide. By that constitution we find "every person having resided," etc. This is certainly putting the question of residence in its mildest form, and rebuts the presumption that the constitution means that a man, before he can vote in Illinois, must have a domicile in the sense of the old

and strict construction of that word when applied to contracts, distribution, etc. In the opinion of your committee, "having resided" simply means that a man shall, in good faith, have lived in Illinois for twelve months, not as a mere itinerant or visitor, but that he shall have been substantially engaged in business there during that time. Given the construction contended for by contestee, then there is a very large class in that State who do not dwell in poorhouses who would be disfranchised. The law of Illinois is rather singular in this. It requires the relatives of a poor person, if they are able, first to support them, in the following order: First, children shall support their parents; next, parents support their children; next, brothers and sisters; next, grandchildren; next, grandparents. And it is made the duty of the State's attorney for the county to apply to the court for judgment and award of execution such relative for the support of his pauper kinsman; for the statute recognizes all persons as paupers who are not able to support themselves. Will it be contended that these poor persons, living in the family of their relatives, do not acquire a home, a residence there, because they are placed there in obedience to the law? Surely not. If so, we would witness the painful spectacle of disabled soldiers and some of the most intelligent citizens disfranchised because of poverty and because they live in the family of their relatives, away from the town in which they had previously lived.

This is as much their poorhouse under the law as the county building is the poorhouse of those who have no relatives within the degree able to support them. If the home of the family in which he lives is not his, then he has none—no home on earth. So with the pauper at the poorhouse. It is his home, his residence; he has none other. It is idle to say his residence is a restrained one. It is not. He can leave when he pleases. He is there for no offense; paying the penalty of no violated law. His only crime is poverty, and he is there to receive the bounty of his county or his town, as the most convenient place. It is a necessity that compels him to go there, but it is not the necessity of duress which deprives him of his volition and his intent. Unlike the lunatic, the infant, and feme covert, he is a free agent, to think and act for himself, except so far as he is restrained by poverty. The humblest citizen in his little hut, living perhaps on one meal a day, is restrained by poverty, yet he is a freeman and a voter. That necessity which compelled them to go to the poorhouse will compel them to remain; and if there be one class above another whose homes, whose residences, are fixed, it is this class of persons. We presume but few go animo revertendi, but they go with the expectation of spending the remainder of their days there. Then admitting these persons to be paupers, which we do not, in the opinion of this committee, their home, their residence, their permanent abiding place is at the poorhouse, and they have a right to vote in the Norwood Park precinct, in which the poorhouse is.

The minority views combat the above argument:

Norwood Park is a small country precinct, casting outside the poor farm only eighty-four votes. In such a precinct every man knows and is acquainted with his neighbor, and especially is this true of the officers and business men in such a place; and when these come up and testify that they do not know these men, and have never known them there, the evidence seems to us very conclusive. In speaking of this class of testimony Mr. McCray says (American Law of Elections, sec. 356):

"This kind of evidence is admissible for what it is worth, but it is manifest its value must depend upon circumstances. If the district or territory within which the voter resides is large or very populous, and the witness has not an intimate and extensive acquaintance with the inhabitants, the evidence will be of little value, and, standing alone, will avail nothing. But on the other hand, if such district or territory be not large or populous, and if the witness shows his acquaintance with the inhabitants is such that he could scarcely fail to know any person who may have resided therein long enough to become a voter, his evidence may be quite satisfactory, especially if it further appears that soon after the election the alleged nonresident voter could not be found in the district within the limits of which all voters must reside. Proof of this character must at least be regarded sufficient to shift the burden upon the party claiming that the vote of such alleged nonresident be counted and require him to show affirmatively that he is a bona fide resident."

The evidence in this case of Winship, justice of the peace; Corse, town clerk; Pennoyer, an old resident of ten years; Ball, who had lived in the town since it was organized and had been through it three times within two years in assessing and collecting taxes, and of Stockwell, certainly is sufficient to change the burden of proof and throw upon Mr. Le Moyne the duty of showing such prior residence. But instead of attempting this, Mr. Kimberly, the warden of the poor farm, and Mr. Le Moyne's only witness, directly testifies that he does not know that these men had been residents of Norwood Park, and if cor-

roborative evidence was necessary that they had no residence in the town except at the poor farm, it is found in the fact that John Walsh, deputy warden of the poor farm, signs all the affidavits as witness, showing in itself that the men were not acquainted in the town. Now, if these men had no prior residence at Norwood Park could they have obtained one by being inmates of the poorhouse? To us the answer is plain—that as employees they could; as paupers they could not

The minority then examines the authorities, after which they consider the status of the alleged paupers, coming to the following conclusions:

We believe every rule of evidence would require us to come to the conclusion that the seventeen men whom Mr. Kimberly will not attempt to prove to be employees were paupers; for certainly their place of residence, their appearance, the manner in which they were brought to the polls, and the manner in which they were voted would raise that presumption, and, in the language of Mr. McCrary, at least shift the burden of proof upon the contestant.

Were the others not also paupers? Mr. Kimberly, the warden of the poor farm, testifies that they belonged to a class of employees "to whom, in lieu of money, I allow payment in the way of extra clothing, board, and accommodation and liberties"—persons who were not on the pay rolls, but employed as "assistants in the bakery, cooks in the kitchen, men in the washhouse and soup house, men in care of the wards of the almshouse, nurses, teamsters, men in care of the stock, and men on the farm—gardeners." They are paid in "extra board, accommodations, clothing, and are allowed small perquisites, liberty." The same witness stated that he could not state where the men came from, but presumes "most of them were convalescent patients from the hospital, and that they came on physicians' certificates in the city, and that, as a general thing, they came to the institution as paupers;" that, "generally, this extra employment was given to the inmates of the institution." He also states the regular corps of employees consisted of twenty-one men and twenty-three women. We submit that this evidence of Mr. Kimberly is conclusive that these men were paupers, and came there mostly from the city. The manner in which such institutions are usually conducted is, to have a regular force of persons hired and paid to take charge, and that the assistants are always paupers; that the very object of having such an institution on a farm is to furnish such employment as the inmates may be capable of performing, so that they may, in part, make the institution self-supporting; and we do not understand that the mere fact that paupers labor, that a system of rewards is established to encourage them to labor, that thereby their status is changed. The very evidence of Kimberly calling their pay "extras" shows that without this employment they would receive ordinary fare. Notice his language: "Extra board," "extra clothing," "privileges at first table," "extra diet,' "in the winter time an extra meal," "extra allowance of clothing," "privilege of selecting their own ward," "small perquisites." The evidence is so convincing that we hardly feel that we need go beyond Kimberly's testimony to show that these employees were paupers from the city; but we have, besides, conclusive evidence as to their status. Comparing the lists we have made of persons who called themselves paupers and those whom Kimberly calls employees, we find that the names of Thomas Sage, Hugh Gallagher, Daniel McFarland, I. A. Hipwell, John Campbell, Daniel Boyle, and M. A. Kinsella appear on both lists, showing that these men did not conceive these extras changed their status, and that they were not paupers, supported by the county, as they stated they were. If ever a witness was contradicted, Mr. Kimberly is, by the very facts he testifies to, and by the statements of the very men whom he claims as his employees. The conclusion, to our mind, is irresistible, that these persons were never residents of Norwood Park, and were paupers; and we reject the votes of each and all of the forty-seven voters named on our two lists.

910. The case of Le Moyne v. Farwell, continued.

A return made up "irregu1arly from ballots that had not been properly kept" was rejected.

Affidavits given by nonregistered voters need not be signed; but the jurat must appear or the votes are rejected.

(3) The report rejects the returns from the third precinct of the Eighteenth Ward of Chicago "as wanting in regularity and certainty." After the election

had closed the ballot box, ballots, and all papers pertaining to the election were taken to a saloon and left over-night in inadequate custody of one who was not an officer of election or authorized to have care of the ballot box under the law. On the day after the election some of the election officers with others unauthorized took charge of the box and papers, made a count, and drew up a return, which was claimed to be an official return.

(4) The report further says as to another precinct:

> Contestee objects to a number of affidavits furnished by nonregistered voters, because of their not being signed by the affiants, though properly certified to by the officer taking the same. We hold that said affidavits are clearly sufficient. In this precinct contestant objects to seven affidavits furnished by voters for contestee, upon the ground that they do not appear to have been sworn to before any officer. There is no jurat thereto; it is agreed that the same are fatally defective, and 6 votes therefore should be deducted from contestee.

As a result of their reasonings the majority report finds contestant elected by a majority of 106 votes, and presents resolutions unseating sitting Member and seating contestant.

The report was fully debated in the House for three days, and on May 3 [1] resolutions declaring sitting Member entitled to the seat offered by the minority as a substitute, were disagreed to, yeas 89, nays 129. Then the resolutions of the majority, seating contestant, were agreed to without division.

911. The Minnesota election case of Cox v. Strait, in the Forty-fourth Congress.

The State legislature having included a county within a Congressional district, the House did not examine whether or not it was technically entitled to be so included.

County commissioners having established election districts at a special meeting when the law specified a stated meeting, the action was void.

The election district having been illegally constituted, the votes cast therein were rejected.

On April 12, 1876, [2] Mr. John Harris, of Virginia, from the Committee on Elections, submitted a report in the case of Cox *v.* Strait, from the Second district of Minnesota. The election in question was held on November 3, 1874, and the official canvass showed a majority of 221 votes for sitting Member. The contestant sought to prove sufficient fraud and irregularities to overturn this result. The questions examined were:

(1) In the vote of the Second district was included that of Kandiyohe County, to which the legislature had in 1870 added what had formerly been Monongalia County. And as the districting act had left to the Third district all counties not specifically enumerated as in the First or Second district, and as Monongalia County was not especially mentioned as in the First or Second district, it was urged by contestant that contestee was not entitled to the majority of 188 votes returned for him from the territory of Monongalia County. The ground of the contestant for

[1] Journal, pp. 910–912; Record, pp. 2834, 2885, 2918–2922.

[2] First session Forty-fourth Congress, House Report No. 391; Smith, p. 428; Rowell's Digest, p. 309.

making this claim was that the consolidation of the two counties was unconstitutional and void. The report says:

Section 1, article 11, constitution of Minnesota, is as follows:

"The legislature may from time to time establish and organize new counties, but no new county shall contain less than four hundred [square] miles; nor shall any county be reduced below that amount; and all laws changing county lines in counties already organized, or for removing county seats, shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of such electors. Counties now established may be enlarged, but not reduced below four hundred square miles."

The contestant claims that the clause which prohibits the reducing of the counties then existing below 400 square miles, and the provision that counties then existing may be enlarged, but not reduced below 400 square miles, prohibit the extinguishing of the county of Monongalia by consolidating it with the county of Kandiyohi, and that the act of the legislature of Minnesota consolidating those counties is unconstitutional and void, and that Monongalia is now in fact a county, and not being included by name in either the First or Second district, belongs to the Third district instead of the Second. It appears that the object sought to be accomplished by that section of the constitution is to prevent the reducing of the original counties below 400 square miles, and the formation of new counties with a less amount of territory than 400 square miles, and to prevent the changing of county lines in counties then organized without the consent of the electors of the counties to be affected thereby. The legislature certainly has the right to consolidate counties formed subsequent to the adoption of the constitution. There is no direct prohibition to the consolidating of original counties, and thereby forming a new county. The only direct prohibition is that the county so formed shall not contain less than 400 square miles. The power to form new counties without specifying the territory out of which they may be formed certainly gives the right to form a new county by consolidating counties, whether original or otherwise, unless the prohibition relative to reducing the original counties below 400 square miles shall be held to forbid the extinguishment of a county by consolidating it with another county. This does not seem to be the mischief designed to be remedied. In fact, the consolidating of counties might be a remedy for the evil and in manifest futherance of the object of this constitutional provision, viz, to avoid the existence of small counties. Constitutional restriction upon legislation must be plain and certain. A State legislature has supreme power of legislating except where it is restricted by the constitution, and everything will be presumed in favor of the power of the legislature. The courts will not declare an act unconstitutional unless it is clearly made so by an express provision of the constitution. Your committee are strongly of the opinion that the act consolidating those counties is constitutional, but have not deemed it necessary to decide that question in this case. The real question is, What territory was included in the Second district? The representative districts are formed of contiguous territory. In 1872 the legislature of Minnesota set off a certain amount of territory as the First district, a certain amount of territory for the Second district, and then enacted that all the territory of the State not included within the First and Second districts should compose the Third district. The legislature designated the territory to be comprised in the Second district by in naming the counties to be included in it, and it must be assumed that it included the territory which the legislature itself had determined belonged to said counties. The legislature passed the act of 1870 consolidating Monongalia and Kandiyohi counties, and the same was made effectual by the methods provided in the act. The consolidation of the counties was recognized in the division of the State into senatorial and representative districts in 1871 (chap. 20), and it is plain that the legislature when it designated the county of Kandiyohi as a part of the Second district designated it as it was formed by itself and did include in it the territory which formerly composed the county of Monongalia. Your committee, therefore, find that the majority of 188 votes canvassed for the sitting Member was rightly canvassed, and ought not to be deducted from his majority of 221.

(2) As to the illegality of certain voting precincts, the report says:

Second. It is provided (p. 220, Stat. L., see. 19) that the board of commissioners shall meet at the county seat of their respective counties, for the purpose of transacting such business as may devolve upon or be brought before them, on the first Tuesday of January and September in each year, and may

hold such extra sessions as they deem necessary for the interest of the county; such extra sessions shall be called by a majority of the board, and the clerk shall give at least ten days' notice thereof to the commissioners, but no regular session shall continue longer than six days, and no extra session longer than three days.

Page 233, section 31: The commissioners of such county (any county not divided into towns) shall, at their stated meetings in January and September, upon the petition of not less than 10 legal voters not residing within 10 miles of any established election district, create and establish within said county an election district at such point as will be most convenient for the persons so petitioning; but no place of holding elections shall be located in said election districts within 10 miles of any other place of holding elections previously established, nor shall the commissioners create any election district except at the time of their stated meetings, and then only in compliance with the request of 10 or more legal voters residing not less than 10 miles from any established election district. The election districts of Southeast, Blaen Avon, Michigan, South, Ceresco, East, and Northeast were not established at a stated meeting of the county commissioners, but at a special meeting holden October 5, 1874 (pp. 50, 51, record), and were therefore not legally established. The action of the county commissioners was without authority of law, and null and void, and no legal election could be held at either of said districts; therefore 111 votes must be deducted from the majority reported for the contestee—that being the majority he received in said districts which was wrongfully canvassed for him.

912. The case of Cox v. Strait, continued.

Although election officers left the ballot box unguarded while adjourned for dinner, the returns were not rejected in the absence of evidence of fraud.

Although de facto officers presided and returns were transmitted unsealed by an unauthorized person, the House did not reject the return.

As to the evidence required to establish a charge of bribery.

Irregularities unaccompanied by fraud do not vitiate the return.

(3) In the town of West Newton the election judges closed the polls for about an hour while they took dinner, the ballot box being left in the election room, which adjoined that in which the dinner was taken. After quoting the evidence, the report holds:

Your committee regard the conduct of the judges of election at this place in leaving the ballot box for the space of an hour unsealed and unguarded as highly reprehensible. It is of the highest importance that the ballot box should be guarded and protected in the most careful manner; that all the provisions of law made for the security of the ballot should be strictly obeyed. There should not be the least opportunity for tampering with the ballots. It is certainly a serious question whether such an irregularity as this ought not to vitiate the election; but your committee under all the circumstances have not felt compelled to reject this entire poll, there being no evidence that the ballot box was actually tampered with, but, on the contrary, there is some negative testimony showing that it was not tampered with. Your committee would, were there any facts tending to show that the ballot box had been tampered with, have decided to reject the returns from this poll. The adjournment for dinner has frequently been decided not to be sufficient to vitiate an election. The law of the State of Minnesota provides that no election returns shall be refused where there has been a substantial compliance with the law.

Section 40, election law of Minnesota:

"Sec. 40. No election returns shall be refused by any auditor for the reason that the same are returned or delivered to him in any other than the manner directed herein; nor shall the canvassing board of the county refuse to include any returns in their estimate of votes for any informality in holding any election or making returns thereof, but all returns shall be received and the votes canvassed by such canvassing board and included in the abstracts, provided there is a substantial compliance with the provisions of this chapter."

The fact ought also to be considered, in determining what should be done with the votes at this

place, that the contestant did not in his notice of contest claim that the ballot box was tampered with, or even left unguarded, but rested his claim to have the vote excluded upon the sole and untenable ground of the adjournment of the judges of election for an hour at noon.

(4) As to West Newton precinct certain questions were settled thus:

It does not appear from the evidence that the ballot box was not all of the time in sight of some one of the election officers during the adjournment for dinner, and we apply the same rule here as in the case of the town of West Newton. It does not appear that any unnaturalized person voted, and the officers who presided at the election were de facto officers, and there is nothing shown which so impeaches their action as to vitiate the poll on that account. The returns should have been conveyed to the county auditor by one of the judges of the election sealed, but were conveyed by the witness, an unauthorized person, and were unsealed. This is a grave irregularity, but the evidence is that he delivered the returns to the county auditor just as he received them from the town canvassers, and this testimony is not impeached. The committee do not, therefore, reject the returns from this town.

(5) As to a charge of bribery:

Sixth. The contestant claims that 200 votes given for the contestee should be deducted for bribery. The evidence shows that Ph. Stelzer received a check for $25 in a letter which purported to be from the contestee, and requesting Stelzer to use his influence in the election for the contestee (pp. 38, 39). Also Julius Christianson received $2 from one J. B. Sackett the day before election, and was promised $2 on election day, "to peddle Republican tickets with H. B. Strait's name on." The $2 promised was paid the day after election. A. J. Lamberton testified that "common report was that J. B. Sackett and William Beckel were distributing a great deal of money for the purpose of buying and influencing votes for H. B. Strait for Member of Congress." But he had no personal knowledge of a dollar having been spent for that purpose. Your committee find the evidence wholly insufficient to establish the charge of bribery.

(6) As to irregularities not accompanied by charges of fraud:

The contestee makes counter charges, alleging irregularities in a large number of voting precincts which gave a majority for the contestant. These voting precincts are in the counties of Carver, Le Sueur, Sibley, and Dakota, but the irregularities, where any are shown to exist, relate to the manner of returning the votes, the swearing of the election officers, and adjournment for dinner, and are not of that nature and character and extent which, unaccompanied with fraud, will vitiate the returns.

In conclusion the committee found:

The committee do not make any deductions from the votes of the contestant, and only deduct from the contestee the majority of 111 votes which were canvassed for him in those precincts in Lyon County which were not legal voting precincts. The returns as corrected give Horace B. Strait 110 majority, instead of 221. Your committee find that he was elected by that majority, and recommend the passage of the following resolution:

Resolved, That Horace B. Strait was duly elected, and is entitled to retain the seat which he now holds from the Second Congressional district of Minnesota.

On June 23 [1] the resolution of the committee was agreed to in the House without debate or division.

913. The Louisiana election case of Spencer v. Morey.

The making of essential tally-lists by unsworn volunteers, combined with other irregularities, caused the rejection of return, although no fraud was shown.

The record of a trial in a State court as to a title to a State office is not competent evidence in an election case, although relating to the election in question.

[1] Journal, p. 1143; Record, p. 4076.

On April 27, 1876,[1] Mr. John F. House, of Tennessee, from the Committee on Elections, submitted the report of the majority of the committee in the Louisiana case of Spencer *v.* Morey. It was admitted that the result was not impeached in any parts of the district except in the precincts of Carroll Parish and in the Fifth precinct of Concordia Parish. Outside of this contested territory Mr. Spencer, the contestant, received a majority of 1,396 votes. Therefore the sitting Member's majority depended on the disposition of the questions relating to the disputed territory. The examination of the case is naturally divided into two main branches:

(1) As to the fifth precinct of Concordia Parish.

The law of the State provided:

That immediately upon the close of the polls on the day of election, the commissioners of the election at each poll or voting place shall proceed to count the votes. * * * The votes shall be counted by the commissioners at each voting place immediately after closing the election and without moving the boxes from the place where the votes were received, and the counting must be done in the presence of any bystander or citizen who may be present. Tally lists shall be kept of the count, etc.

SEC. 45. *Be it further enacted, &c.,* That any civil officer or other person who shall assume or pretend to act in any capacity as a commissioner or other officer of election to receive or count votes, to receive returns or ballot boxes, or to do any other act toward the holding or conducting of elections, or the making returns thereof, in violation of or contrary to the provisions of this act, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term not to exceed three years nor less than one year, and by a fine not exceeding three hundred dollars nor less than one hundred dollars.

Of the conduct of the commissioners of the parish the majority report says:

In view of the specific requirements of the law upon the subject, it must be admitted that the conduct of the commissioners in totally disregarding its plain provisions is somewhat extraordinary. The law required them not to remove the ballot box from the place where the election was held until they had counted every vote in it in, the presence of such of the voters as saw fit to be present and witness the counting. This counting they were required to commence immediately on the close of the polls, and their returns were to be made out and delivered to the supervisor of registration within twenty-four hours after the voting ceased.

Instead of doing this, after the close of the election, between 6 and 7 o'clock in the evening, they took the ballot box and started with it to Vidalia, the parish site, a distance of some 16 miles from the voting place. Dameron, one of the commissioners, who is sworn by both parties, in his testimony says when the polls were closed the box was locked, and he took the key and gave the box to Robert H. Columbus, another commissioner. They started to Vidalia on horseback, and when they arrived at the store of one Witherspoon, the suggestion was made that Dameron should get into a buggy with one Irvine and take the ballot box in the buggy with him. They then proceeded to Vidalia, one of the commissioners riding in front and the other in rear of the buggy, on horseback. They reached Vidalia between 11 and 12 o'clock that night, and finding the court-house occupied by the officers of election at Vidalia, they went upstairs into the room of the tax collector, opened the box, and commenced counting the votes. They counted until half past 2 o'clock that night, when, being fatigued, they adjourned for the night. When the box was closed, Dameron says he locked it and gave the key to Columbus, and took the box himself with him to the hotel, where he and William C. Yorger, United States supervisor, occupied the same room for the balance of the night. The box was placed under the bed during the night. The next morning, Dameron says, he took the box with him to the table when he went to breakfast. After breakfast they again met in the upstairs room of the court-house, opened the box, and commenced counting, and after counting there a while went down into the court room. They completed their returns on Wednesday night, November 3, between 10 and 11 o'clock, and made their returns to the supervisor of the parish on the next day, 4th November, between 12 m. and 1 o'clock p.m. Dameron further says

[1] First session Forty-fourth Congress, House Report No. 442; Smith, p. 437; Rowell's Digest, p. 311.

that during the time they were counting the votes in the tax collector's office there were several spectators present; the tax collector's office was considered a public office; says when he went to his meals, during the counting, he left the box in the court room in charge of his co-commissioner Columbus, and took the key himself, and when Columbus went to his meals he took the key, leaving the box in Dameron's custody. Columbus and Jefferson, the other two commissioners, being colored men, did not take their meals at the same place Dameron did.

The minority views call attention to the fact that Dameron, who was most prominent in the action, represented the political party friendly to contestant. The former law had required the election commissioners to go to Vidalia to count the vote, and they appeared to consider the requirement still in force. The minority views continue:

No other presumption can arise out of this evidence than that they supposed and believed the law required them to go to Vidalia, the parish seat, and there count the votes, and that this was done by them in order to conform with the law, as they supposed it to be, and not with the intent to commit fraud in connection with the election; especially when we understand that the election laws of Louisiana, in force at the last election prior to this one, and for some time prior thereto, provided that "at the conclusion of the election, at each poll, the boxes containing the ballots shall be securely locked and sealed, and taken immediately by the commissioners of election to the parish seat, where they shall be counted out by the said commissioners, in the presence of the supervisors of registration and election of the parish." It certainly would be a violent presumption to presume anything else than this from the evidence before us. There is not a scintilla of evidence proving fraud of any kind, nor is any attempt made to prove fraud by contestant, nor was it urged in argument that any fraud was committed; but it was urged that the mere fact of removing the box gave an opportunity for fraud.

The evidence shows that the box was never out of the hands of the lawful custodians until the votes were counted and the returns made. Until the contestant proves some act showing fraud on the part of the commissioners, or some one of them, or some act from which fraud will, be presumed, the law is that their acts must be taken as having been honestly performed. The legal presumption is against fraud on the part of the officers of election, and that nothing but the most unequivocal proof can destroy the credit of official returns. (See Goggin *v.* Gilmore, 1 Bart., 70; Little *v.* Robbins, same; p. 130.) The burden of proof is upon contestant to prove the fraud. We do not deem it necessary to cite authorities to establish this legal proposition. We conclude therefore that, as there is no evidence proving fraud, or any evidence from which fraud can be presumed in connection with this box, the committee will not, in the absence of such proof, conclude that because there was an opportunity for fraud that therefore fraud was committed. Certainly this would be a monstrous violation of the legal presumption in regard to legal acts, viz, that all persons are presumed innocent until proven guilty, that officers are presumed to have performed their duties, and to have performed them honestly, and that the mere opportunity to commit a crime, in the absence of other evidence, will. not be taken as a presumption to establish the fact that a person committed the crime. The evidence regarding this box, taken all together, does not even raise the presumption of fraud.

The majority of the committee say on this point, and on a second question raised as to these returns:

Whatever may be thought as to whether those portions of the law are mandatory or directory which require the votes to be counted at the place where they axe polled, without removing the ballot box, in the presence of such voters as may see fit to witness the count, and the commissioners to make their return to the supervisor of the parish in twenty-four hours after the close of the polls—all of which provisions were intentionally violated or ignorantly disregarded by the commissioners—we assume that there can be no two opinions on the proposition that that part of the law which requires the commissioners to make a correct count of the votes cast is certainly imperative. Before entering upon their duties, as we have seen, they are required to swear that they will "carefully and honestly canvass" the votes. How were the votes at this box counted? How did these commissioners discharge their duty in this respect?

The keeper of the tally list, to all intents and purposes, makes the only record from which the votes can be counted. If his list is correct, the number of votes cast can be correctly ascertained; if his list is erroneous, the returns based on it are necessarily incorrect. The tally keeper is, then, the party who counts the votes. The marks he makes on the paper determine how many votes each candidate has received. It is not pretended, and indeed can not be, that these commissioners had any other mode or means of determining the result of the election than from the tally sheets kept by parties "picked up"—to use Dameron's expression—at random in the court-house to tally the vote. Can sworn commissioners, whom the law places around the ballot box as guardians of its purity, and charges with the duty of "carefully and honestly" canvassing the votes at an election, delegate to unsworn and irresponsible parties the delicate task which the law imposes upon them alone? The law of Louisiana expressly requires tally sheets to be kept; and when properly kept they are authority upon the state of the vote. Says McCrary, in his Law of Elections, section 291:

"In the case last named it was held that the tally sheet kept by the officers of the election is competent evidence, in an election contest, to show the true state of the vote. It is good until impeached, and affords prima facie evidence of the votes cast for such candidate." This gives to the tally sheet kept by officers of the election the same dignity and authority as the returns themselves, and properly so; for the returns are based on the tally sheets, and unless the latter are correct the former can not possibly be so, or import verity. Who were Connell, Joyce, and Nutt, the three parties picked up in the court-house to work upon these tally sheets? All we know of them is their names. They were not officers of the election, and were not sworn to discharge their duties faithfully. By the law of Louisiana it is made a felony for any person not an officer of election to assume to act as such in receiving or counting votes, or doing any other act toward the holding or conducting elections, or making returns thereof; clearly prohibiting all unofficial hands from touching anything connected with holding elections or counting the votes. No legal presumption of correctness attaches to their acts. If the tally sheets kept by them can stand at all, they must stand on extrinsic evidence of their truth, as they can lean on no legal presumption for support. It is no extenuation of such a proceeding as this for witnesses to swear, as Dameron does, that the election was all fair. Of what avail is a fair election with a dishonest or uncertain count of the votes?

But, in addition to the absence of any legal presumption to support such a count, Dameron says, in positive disparagement of the manner in which the tally sheets were kept, "I don't think the tally lists were very regularly kept, as we had no regular tally keepers, and had to pick them up as we could get them. I believe the tally lists were kept as correctly as they could have been kept under the circumstances." Not "very regularly kept," but "I believe" they were "as correctly kept as they could have been kept under the circumstances!" The law required him and his cocommissioners to keep them regularly. They had been sworn to do so, and they were required to know of their own personal knowledge that they were correctly kept, and yet this sworn officer admits they were not very regularly kept, but excuses the irregular manner in which they were kept by saying the commissioners had to pick up such persons as they could get to keep them. Why did they have to pick up anybody to discharge a duty which the law imposed on them and them alone?

The minority [1] thus answer the above argument:

It is further urged by contestant, however, that the fact that the tally keepers were not sworn officers throws suspicion upon the count. All the evidence on this subject is as follows: Dameron says: "I do not think the tally lists were very regularly kept, as we had no regular tally keepers, and had to take them about as we could get them. I believe the tally lists were kept as correctly as they could have been kept under the circumstances." It can not be urged that this statement would throw suspicion upon or impeach the returns, for Dameron swears that they proceeded to make out the returns, and tally lists in accordance with law. The law of Louisiana requires that the election returns shall be sworn to by the commissioners, and Dameron and the other commissioners took and subscribed to the following oath: "Personally appeared before me, the undersigned authority, duly appointed and qualified, commissioners of election of poll No.—, election precinct of the parish of—, for the general election held November 2, 1874, who, being duly sworn, depose and say that they received the ballots cast at the said poll of the said precinct, and that the above is a true return of the vote cast at the said poll on the said day.

[1] Minority views were submitted by Mr. G. Wiley Wells, of Mississippi.

It is not presumed that Mr. Dameron would be willing to swear and subscribe to that which was untrue. And it is a conclusive legal presumption that he was satisfied at the time when the return was made that it contained a correct statement, as he swore. Nor does Mr. Dameron swear that the return is not correct, nor is there any evidence tending to disprove the return. The return, therefore, stands, taking all the evidence in regard to it, as unimpeached. The law is well established, and this House has repeatedly held that the introduction of persons who were not sworn to assist in holding the election will not of itself vitiate the return of the officers, without evidence of fraud. (Eggleston *v.* Strader, 2 Bart., 897.) The evidence in this case proves that all the officers were regularly appointed and sworn, but that the commissioners requested some bystanders to assist in keeping tally lists while counting the vote. It can not be maintained for one moment that, in the absence of any proof of fraud or irregularities, the legal returns should be rejected for this reason. There remains but one other ground that can be urged against the receiving and counting of these returns from this box, viz, the removing of the box from the poll before the vote was counted. Taking the evidence altogether, we are of the opinion that it established only an irregularity, and the only question to be determined in regard to this poll is whether the ballots cast at this poll shall be thrown out on account of the votes not having been counted at the poll before it was removed.

The minority further call attention to the fact that the supreme court of Louisiana (case of Burton et al. v. Hicks et al.) had declared the Louisiana law providing the regulations as to the manner of conducting and holding an election as directory merely. The minority say also:

Even without the opinion of the supreme court, we are satisfied that the law in contested elections sustains us in asserting that these clauses are directory and not mandatory, and must be interpreted, in view of the evidence, as directory in this particular case, for the reason that the evidence does not tend to show that the actual merits of the election were affected by a noncompliance with their provisions.

But the majority of the committee say:

The commissioners disregarded an imperative provision of the law without the observance of which there can be no safety or certainty in elections.

The integrity of their returns and their prima facie character are therefore destroyed. There being no proof outside of the returns of the vote of this ward or poll, it must be excluded from the count.

(2) The second branch of the case referred to the election in various precincts of Carroll parish. The law of Louisiana provided that at each polling place after the close of the polls the commissioners should count the votes—

and after they shall have so counted the votes and made a list of the names of all the persons voted for, and the offices for which they were voted for, and the number of votes received by each, the number of ballots contained in the box, and the number rejected, and the reasons therefor, duplicates of such lists shall be made out, signed, and sworn, to by the commissioners of election of each poll, and such duplicate lists shall be delivered, one to the supervisor of registration of the parish, and one to the clerk of the district court of the parish, and in the parish of Orleans to the secretary of state, by one or all such commissioners in person, within twenty-four hours after the closing of the polls. It shall be the duty of the supervisors of registration, within twenty-four hours after the receipt of all the returns for the different polling places, to consolidate such returns to be certified as correct by the clerk of the district court, and forward the consolidated returns with the originals received by him to the returning officers provided for in section two of this act, the said report and returns to be inclosed in an envelope of strong paper or cloth, securely sealed, and forwarded by mail. He shall forward a copy of any statement as to violence or disturbance, bribery or corruption, or other offenses specified in section twenty-six of this act, if any there be, together with all memoranda and tally lists used in making the count and statement of the vote.

If the returns, poll lists, etc., were deposited with the parish clerk as required they nevertheless were not found there, and had disappeared in some way. The testimony was conflicting as to whether they were ever brought there.

A question of evidence is thus discussed by the majority:

Contestant offers in evidence in this cause a record in the cause of Burton et al. *v.* Hick et al., a proceeding instituted by certain parties who were voted for, the State or county officers, at the election in Carroll Parish on November 2, 1874, to test the validity of said election. To this suit neither contestant nor contestee is a party. Contestee objects to the introduction of said record in this cause because it is res inter alios acta. It is true the validity of the same election at which contestant and contestee were voted for is involved in the cause, yet neither of them being parties to the same can be bound thereby. We therefore sustain the objection to the introduction of the record, and exclude it as evidence in this case.

The minority views say on this point:

We think it will need no argument to satisfy the committee that this evidence should be excluded. We are of the opinion that it should be excluded on the grounds assigned by contestee, that it is "res inter alios acta" (p. 331, record).

914. The case of Spencer v. Morey, continued.

An election officer being detected in fraudulent acts, a return in due form signed by him and two unimpeached associates was not accepted as evidence of the vote cast.

Returns having been lost or destroyed, testimony of election officers being conflicting, and the voters not having been called, the vote was not counted.

The election (distinguished from the return) was set aside when the best obtainable evidence showed the vote only approximately.

The returns of a decisive portion of the district having been lost and the vote not being proven aliunde, the House declined to declare the seat vacant or examine further before seating contestant.

The legal returns of the parish not being available, questions arose as to the votes of several precincts:

(*a*) From the precinct of the First Ward the returns were missing with all the others from the clerk's office. The majority report says:

The only returns produced of the election at this poll is a paper purporting to be signed and sworn to by the three commissioners, David Jackson, T. B. Rhodes, and E. M. Spann. This paper is produced by the witness, R. K. Anderson, on his examination, who seems to have been a commissioner of election at Ward 3, in Carroll Parish, and to have had no connection whatever with Ward No. 1. Says he received it from the clerk of the court. How the clerk came to give it to him, how long he had it in his custody, are questions on which Mr. Anderson furnishes no information, and on which, strange to say, neither the contestant nor contestee asks him to furnish any.

After discussing the testimony, the majority report continues:

The paper produced by Anderson seems on its face to be in due and proper form as a return. The names of the persons voted for, the number of votes received by each, the position for which each was supported, the whole number of votes cast, the number rejected, and the reasons given therefore, are all stated, and, as before shown, the paper duly signed and sworn to by the three commissioners. The depositions of Spann, Rhodes, and Jackson, the commissioners, are taken, the paper produced by Anderson exhibited to them, and they all swear positively that the paper shown them is the original of one of the duplicate returns made out and sworn to by them after the election, and that it contains a true statement of the result of that election.

The question arises, Can this paper be received and treated as a legal return of the election held at this ward on the facts disclosed in the record, some of which have been already adverted to, and some of which will be noticed hereafter?

If we assume, according to the statement of Spann, that the ballot box and election papers were properly deposited in the office of the clerk, it would seem a hardship to make the candidates for office suffer the consequences of a loss by fraud, in which they had no agency, and for which they are not, therefore, responsible. On the other hand, it might appear dangerous to allow a paper to stand as a valid return which comes from the pocket of a party not entitled to its custody, his possession of it unexplained, and the paper unaccompanied by its legal companions, the ballots, tally sheets, etc., and no account given of their whereabouts, or how they happened to disappear entirely, while the returns are permitted to see the light when an election contest comes up. The law, as before shown, requires that after the ballots are counted they shall be replaced in the box, and the returns and the ballot box shall be deposited in the clerk's office. By the ballots the truth of the returns can be tested and their correctness verified. A paper purporting to be the returns comes to light unexpectedly from a depository unauthorized by law, but the written evidence provided by law to test its accuracy, in case of a dispute or a contest, is missing. But there are other infirmative considerations which enter into the question as to whether this paper shall be received and treated as a legal return.

Burton, the ex-sheriff of Carroll Parish, swears that he detected David Jackson, the commissioner who received the ballots from the voters on the day of election, changing the votes handed him by the electors for others which he put into the box instead of the ballots of the voters. He says he charged him with it and complained to him of its unfairness. "He (Jackson) tried to bluff me out of it, but I showed him the tickets he had dropped lying on the floor." On cross-examination, Burton says he could not swear to more than one ticket, which he saw Jackson change, but there was another on the floor in the same position, but he does not know that this one was changed. Jackson is not recalled, nor did contestee offer to recall him to deny this statement.

Caesar Jones and Noah Lane both swear that they saw Jackson hand greenbacks out at the window to voters. Lane says he saw him do it several times. Jones says he saw him pass money out to voters several times with their registration tickets as they were returned. Jackson denies having handed out any money to voters, and swears he would not believe Caesar Jones on oath.

David Jackson, the commissioner of election in the First Ward precinct, was also the clerk of the parish, one Galbraith being his deputy in charge of the office. The majority conclude that Jackson's honesty is impeached by the testimony and by the disappearance of the returns from his office, to the extent that no confidence can be placed in the returns which had been in his custody. The majority further say:

It may be said that the names of the other two commissioners being to the return makes it sufficient and valid as a return. It is true, as a general rule, when the law requires a certificate to be made by a board of officers composed of three or more persons, it is sufficient if a majority of such board join in the certificate; but this rule was never intended to be applied, nor could it be properly applied, to a case where one of them had been guilty of fraudulent acts. Who can tell how far the fraudulent acts of Jackson entered into that election? It is impossible to tell; just as impossible as it would be, if poison were dropped into a basin of water, to select the drops infected from those that remained pure. The good faith of the other two commissioners can not purge the ballot box of Jackson's fraud. It is for this reason that the law holds, and wisely and justly holds, that fraud vitiates everything into which it enters. It is for this reason that McCrary says that no confidence can be placed in the contents of a ballot box which has been in the custody of an officer detected in the perpetration of a deliberate fraud. This position is strengthened in this case from the fact that the ballot box, for a great portion of the day, was placed in a room through the window of which the votes were received. This window was 6 feet from the ground. The weight of proof shows that the voter could not see what became of his ballot when he reached it up to the window to the commissioner with his hand or on the end of a stick, nor could the commissioners see the voter. The law required that the commissioner should put the ballot in the box in plain view of the voter. The object of this provision was to prevent just such fraud as Jackson was detected in perpetrating. The law further gives the voter the right to deposit his ballot in the box with his own hand. This box was placed beyond his reach, and he was practically denied thereby this right.

And finally the majority conclude:

Upon the whole, we conclude that the paper produced by Anderson can not be received as a valid return, and therefore reject it as such. There being no proof aliunde of the vote at this poll, it must be excluded.

The minority consider the evidence conclusive that the ballots were properly deposited in the clerk's office, and explain their disappearance by the fact that no law required their preservation beyond the term of the district court and by the further fact that the grand jury actually did investigate the election in Carroll Parish and found nothing to require their action.

The minority put full confidence in the return, and say:

We therefore have the actual return made, which is the best evidence of the vote cast at this poll. But the return is supported by three witnesses. Contestant has wholly failed to show any legal reason why this return should be rejected.

It may be argued that because the return was found in the possession of an unauthorized person therefore it should be rejected. This certainly can not be urged or supported upon any legal principle governing contested elections. The officers discharged their duties, made their returns, and deposited them in compliance with law. It certainly would not be contended, if a thief had invaded the office of the clerk and abstracted the returns, and they were found afterwards in the possession of some person unauthorized, that it would be as much a return as before it was stolen, provided the officers who made the return should swear to its identity. But, further, on pages 111 and 112 of record, E. M. Spann, the Democratic commissioner, on November 23, 1874, makes an affidavit in which he gives the actual vote cast, and in that affidavit he states that Morey received 569 and Spencer 33 votes, corroborating in every particular the return, as well as the parol evidence of Jackson and Rhodes. But the evidence before us does not leave us in any doubt as to where this return came from. R.K. Anderson (p. 49, record) swears that he received this return from the clerk of the court, and Galbraith, as before stated, certifies to that fact. The return, the moment that it is fully identified as one of the originals made by the board, becomes the highest evidence that can be adduced as to the result, and must be received as such until impeached by evidence. We therefore accept the return as giving the correct result at poll No. 1, Carroll Parish, of the votes cast for Members of Congress.

The minority contend that the evidence fails to show that the election was not lawful, or that there were any irregularities in pursuance of an intention to defraud in the conduct of the voting, and find that the returns should be accepted as true.

(*b*) As to the second precinct of Carroll Parish, the minority views present a statement of the case and the contention of sitting Member:

It is admitted by both parties—contestant and contestee—that as to this ward there are no official returns, ballots, or ballot box to be found, except a poll list. They have been either abstracted or destroyed.

The first question to be determined is, What evidence is necessary to establish the vote cast at this poll? We are of the opinion that the best evidence to establish the actual vote cast at this poll is the evidence of the commissioners of election, and if it can not be established by them, then by such other evidence as can be procured, and we are clearly of the opinion that the commissioners' evidence as to the vote cast at this poll is competent. We are sustained in this opinion by the action of this House in the case of Adams *v.* Wilson, Clark and Hall, 375, decided December 8, 1823, wherein the committee and the House held "that the testimony of the board of inspectors is competent and ought to be received to correct any mistakes that may have occurred in returning the votes given at said election." If the commissioners' evidence is competent to alter or change the returns certainly their evidence is competent to establish what the returns were at the poll. The best evidence, viz, the returns, having been lost or destroyed, secondary evidence is then admissible to establish what were the contents of the written instrument, viz, the returns. We understand the rule governing the admissibility of secondary evidence with respect to documents to be that proof of their contents may be

established by secondary evidence, fast, when the original writing is lost or destroyed; secondly, when its production is a physical impossibility, or at least highly inconvenient. Before, however, secondary evidence can be introduced there must be evidence showing that the documents once existed and are lost or destroyed. In this case the proof establishes the fact that a search for the returns has been made where, by law, they ought to have been found and that the search has been unsuccessfully made. This evidence was introduced by contestant, and the testimony of Galbraith, deputy clerk, shows that the returns from Carroll Parish, poll 2, are not on file in the clerk's office, the legal depository of them. Taylor, in his excellent work on evidence, says (sec. 401): "If the instrument ought to have been deposited in a public office or other particular place it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have access to it." Again (sec. 405): "The law does not require that the search should have been recent or made for the purposes of the cause and therefore where a search was made among the proper papers three years before the trial this was held sufficient." But in this case Galbraith's testimony (p. 28, record) is as follows:

"Q. Have you not been the principal deputy clerk of the court, and as such having the entire control of the said office during your occupancy?—A. I have, since July 26, 1873."

This election was held November 2, 1874. This evidence was given April 27, 1875. In answer, whether any of the tally sheets, returns, ballot boxes, or other legal documents relating to the election had been on file or were on deposit at that time in the clerk's office, he says:

"There have been none, except the tally sheet handed me by the commissioner for the other ward, which tally sheet was afterwards taken out of my office and carried away."

The next interrogatory propounded to the witness is to this effect:

"Q. Has diligent search been made for these ballot boxes by yourself and others?—A. There has been.

"Q. Do you know where these ballot boxes and papers are?—A. I do not."

The minority regard it proven that proper search was made for the returns, and that not being found it was proper to proceed to secondary evidence. The minority produce the poll lists of the commissioners as evidence of the act of voting, and this is primary evidence as to who voted, the commissioners having duly certified the list. The minority views continue:

There is no evidence contradicting this poll list, but it stands as admitted evidence of the number of votes cast at this poll, which was 713. It is not contended by contestant that a single man upon this list who voted was not a legally qualified elector, nor has any testimony been adduced tending to prove that these 713 persons did not vote on November 2, 1874, at poll No. 2, in Carroll Parish. We understand that the elections are simply the method whereby the citizens of the country may manifest their choice or preferences, and when they have proceeded in accordance with law, and manifested through legal forms their choice or preference by the ballot box, their right and privilege so to do will not be taken away from them as long as their preference or choice can be ascertained. Did these 713 electors, at poll 2, Carroll Parish, November 2, 1874, in accordance with law, express their choice or preference? Secondly, can that choice or preference be ascertained by the evidence before us? The law governing this subject, as laid down by all writers, is "that to set aside the returns of an election is one thing; to set aside the election itself is another and a very different thing. The returns from a given precinct being set aside, the duty still remains to let the election stand. The return is only to be set aside, as we have seen, when it is so tainted with fraud or with the misconduct of the election officers that the truth can not be adduced from it. The election is only to be set aside when it is impossible, from any evidence within reach, to ascertain the true result; when neither from the returns nor from other proof, nor from all together, can the truth be determined. It is important to keep this distinction in mind."

In support of this view the minority cite, from Brightley the cases of Chadwick *v.* Meldin, and State *v.* Steers; from Brewster's reports the case of Weaver *v.* Given; and of House cases Flanders *v.* Hahn, McHenry *v.* Yeaman, Covode *v.* Foster, Blair *v.* Barrett, Barnes *v.* Adams.

The minority then say:

As to the first proposition, viz: "Did these 713 electors of Carroll Parish, on November 2, 1874, express their choice or preference for Member of Congress?" the evidence of both contestant and contestee proves that they did. There can be no dispute on this point. It remains, then, to answer the second proposition, viz: "Can that choice or preference be ascertained from the evidence before us?" And, thirdly, was the election free and fair? Assuming that the evidence of the commissioners and those employed in holding and conducting the election is competent, we now proceed to present all the evidence, both of contestant and contestee, as to the number of votes polled.

After citing testimony to show how the vote was divided, the minority views continue:

By an examination of all the testimony introduced it will be observed that all the evidence as to the actual vote cast at this poll, with the exception of that of one witness, was introduced by contestee. Montgomery, contestant's witness, swears that he signed all the papers that he believed were necessary according to law. He swears positively that he signed the poll list, heretofore commented upon, and nowhere is this poll list contradicted. We, therefore, have the evidence uncontradicted that 713 persons did vote at this poll. The highest number of votes which contestant can possibly claim by the evidence is 65, which is sworn to by W. A. Blount, the United States supervisor at that poll, who says that he took a memorandum of the vote for Spencer at that poll, and that the vote was 65. This witness is contradicted by three other witnesses, to wit, Benham, one of the commissioners, who swears that he counted all the votes, says that Spencer's vote was 49 or 50; and is corroborated by W. B. Dickey, appointed by the commissioners to keep the tallies (as Montgomery testifies), Dickey swearing positively that Spencer received 49 votes at this poll; and B. H. Lanier swears that Spencer's vote was 49 or 50. It certainly cannot be claimed by contestant that he is entitled to any more votes than the highest number that he has proven. Notwithstanding this witness, who testifies that Spencer received 65 votes, is contradicted by three other witnesses, we concede contestant 65 votes. Benham swears that there were 4 blank votes cast. Adding the 4 blank votes to the 65 votes conceded to Spencer, we have 69 votes to be deducted from 713, which leaves the number sworn to and admitted by contestant's evidence, viz, 644, the lowest number which can possibly, from the evidence, be counted for Morey. Contestant does not attempt to disprove that these votes, 644, were cast for Morey.

The minority then examine the evidence as to the fairness of the election of this ward, and find in favor of its fairness on the question of fact.

The majority of the committee decline to count the vote of the precinct, for the reason that "there are no reliable data from which the result can be ascertained." The majority regard the evidence as showing that the commissioners at this poll failed to sign any returns at all, a certain return presented before the board of State canvassers being a forgery. The authenticity and regularity of the poll list is admitted; and the majority say that the voters should be called to show how they voted. As to the evidence relied on by the minority, the majority say:

Although not differing very widely in their figures, no two of the witnesses agree as to the number of votes cast or the number received by each candidate. The uncertain memory of two or three witnesses as to the result of an election six months after it took place cannot be permitted to take the place of the testimony of the voters themselves, and in this case, to the frailty of memory are added the uncertainty and unreliability of the source from which the facts to be remembered were derived. Montgomery says W. B. Dickey, M. A. Sweet, J. D. Therrell, and S. T. Austin kept the tally list, by consent and request of the commissioners, alternately, while keeping the lists to relieve each other. The habit of officers of election in calling in unsworn bystanders to keep tally lists, and thus virtually to count the vote has been already alluded to and animadverted upon in considering the vote at poll 5, Concordia Parish, and need not be here repeated. Benham, who is contradicted in several essential particulars in the testimony given in this cause, and who is shown to be the author of the forged returns that were delivered to the State board, occupied the important position of calling out the votes from the tickets to

unsworn tally keepers, and it is from this source that Dickey and other witnesses who speak of the result of the election get their information. There are other objections made to the vote at this poll, but as enough has already been stated to show that there are no reliable data from which the result can be ascertained, it is deemed unnecessary to further prolong the examination. The vote can not therefore be counted.

(*c*) As to the third precinct the minority find no frauds or irregularities, and the same general conditions as in preceding precincts. The minority views say:

As to the vote cast, one of the commissioners, R. K. Anderson, testifies that there were 550 votes cast in all. There were 7 votes cast for Spencer for Member of Congress, and 2 blanks, the balance for Morey. This evidence stands unimpeached. Spencer can not claim that he received more than 7 votes. He nowhere attempts to contradict the evidence of Anderson.

The majority decline to accept such testimony as conclusive, and hold that the vote cannot be counted.

(*d*) The majority find the votes of the Fourth and Fifth wards satisfactorily shown and count them.

In conclusion the majority find:

We have already seen that, excluding the contested territory, Spencer had, by agreement of the parties, a majority of 1,396. The Fifth Ward of Concordia Parish, and the First, Second, and Third wards of Carroll Parish, being excluded by this report, that majority still stands, to be affected only by the vote at the Fourth and Fifth wards of Carroll Parish. Adding to the majority (1,396) with which Spencer entered the contested territory, the majority of 12, which he received at the Fifth Ward, would make his majority 1,408, from which is to be deducted 93 votes, the majority received by Morey at the Fourth Ward, thus electing Spencer by a majority of 1,315 votes.

The committee therefore recommend the adoption of the following resolutions:

Resolved, That Frank Morey was not elected and is not entitled to a seat in the House of Representatives of the Forty-fourth Congress from the Fifth district of Louisiana.

Resolved, That William B. Spencer was elected and is entitled to a seat in the House of Representatives of the Forty-fourth Congress from the Fifth district of Louisiana.

Four of the minority favored resolutions confirming the title of sitting Member, but Mr. John H. Baker, of Indiana, preferred that the seat should be declared vacant. The minority views also contend for declaring the seat vacant if it should be found that sitting Member was not elected:

If the House, after having considered all the evidence in this case, are willing to adopt the rule that a minority candidate can by some frivolous pretext obtain a seat to which he is not entitled or elected by rejecting the suffrages of electors after the election had been fairly held, the votes counted, and the returns made, because these votes and returns have been abstracted, they will place it in the power of all malicious and evil-disposed persons to destroy the evidences of an election, and by that means defeat the will of the majority. Nowhere has Mr. Spencer introduced an iota of evidence tending to establish the fact that on account of the irregularities mentioned in the evidence was he deprived of a single vote, nor does he in his notice contend that on account of these irregularities mentioned in his notice he would have received a greater vote in the fifth precinct of Concordia Parish or in Carroll Parish; but the entire evidence establishes the fact that of the actual votes cast (and it is admitted by contestant) Morey received a majority. It is further conceded by contestant that, if the actual vote polled in the fifth precinct of Concordia Parish and in Carroll Parish is counted, Morey unquestionably is elected. Therefore, admitting that he (Spencer) is the minority candidate, we contend that if the committee should arrive at the conclusion that the fifth precinct of Concordia Parish and the whole of Carroll Parish are to be rejected under the rule governing contested elections, established by this House, the seat cannot be awarded to Mr. Spencer, but the election will have to be remanded again to the people, and both Morey's and Spencer's claims are to be rejected.

The report was debated at length on May 24 and 31, 1876.[1] On the latter date Mr. George W. McCrary, of Iowa, proposed a resolution to recommit the report with instructions that the poll of Concordia Parish be counted, that the time for taking testimony be extended sixty days, within which time testimony should be taken as to the election in the first, second, and third precincts of Carroll Parish. This resolution was disagreed to, yeas 76, nays 101.

The first resolution of the minority, declaring Mr. Spencer, the contestant, not elected, was disagreed to, yeas 74, nays 99. The second resolution of the minority, declaring sitting Member entitled to his seat, was disagreed to without division.

Then the resolutions of the majority were agreed to without division, and so the contestant was seated.

915. The election case of Fenn v. Bennett, from the Territory of Idaho, in the Forty-fourth Congress.

The use of the prefix "Hon." with the name of a candidate does not justify rejection of the ballot.

The canvassing of votes by an illegal board, while important to returning officers, does not prevent the House ascertaining the result from precinct returns.

The vote is not vitiated by failure to observe a directory law as to method of tabulation of returns.

On June 5, 1876,[2] Mr. John F. House, of Tennessee, from the Committee on Elections, submitted the report of the committee in the case of Fenn *v.* Bennett, from the Territory of Idaho. Three questions were involved in this report:

(1) The report says:

> The reason alleged by the Territorial board of canvassers for rejecting 246 votes for S. S. Fenn in the county of Oneida is that there was the prefix "Hon." to said votes. The sitting Member, at the hearing, waived the objection to the counting of those votes from Oneida County, and they are accordingly counted for the claimant.

(2) The report further says:

> The returns from the county of Nez Perces were rejected by the Territorial canvassers for the reason that the votes of the county were canvassed under the law of 1864, which gave the canvassing of the votes to the clerk of the county commissioners, and two county officers to be selected by the clerk, and not under the act of 1869, which gives the county commissioners jurisdiction to canvass the votes of the several precincts of the county. Although the question as to the proper board to canvass the precinct returns is a very important one for the Territorial canvassers to consider, your committee do not regard it of much importance in coming to a decision in this case, as the question for the House to consider is, who, in fact, received the highest number of votes, and the precinct returns are proved, which very clearly show that the actual vote cast in this county was 423 for S. S. Fenn and 37 for T. W. Bennett; and although the Territorial canvassers acted rightfully in rejecting the returns from this county, as they were not canvassed by the county commissioners, your committee, from the precinct returns, find that 423 were, in fact, given for S. S. Fenn, and should now be counted for him, and 87 votes were, in fact, given for T. W. Bennett, and should be counted for him.

(3) The report also says:

> The vote of Idaho County was rejected on the ground that the returns for the Delegate to Congress were not on a separate sheet of paper. The law of the Territory * * * provides that the clerk of

[1] Journal, pp. 1034–1037; Record, pp. 3294, 3423–3442.

[2] First session Forty-fourth Congress, House Report No. 624; Smith, p. 592; Rowell's Digest, p. 314.

the county commissioners shall make an abstract of the votes for Delegate to Congress on one sheet, the abstract of votes for members of the legislative assembly on one sheet, and the abstract of votes for district officers on one sheet, and the abstract of votes for county and precinct officers on another sheet. The returns from this county had all of the votes for the several officers voted for on the same sheet; but your committee regard the law in this matter as merely directory, and do not find that the vote is thereby vitiated, but count the votes from this county for the parties for whom they were cast.

On June 23 [1] the House, without debate or division, agreed to the report, which seated the contestant on the finding that he had a plurality of 105 votes.

916. The Massachusetts election case of Abbott v. Frost, in the Forty-fourth Congress.

There being evidence raising a suspicion of fraud the House rejected a return made in disregard of the requirements of law and by the hands of unauthorized persons.

Discussion as to whether or not a law was directory or mandatory.

On June 10, 1876,[2] Mr. Early F. Poppleton, of Ohio, from the Committee on Elections, submitted the report of the majority of the committee in the Massachusetts case of Abbott *v.* Frost. The sitting Member was returned by an official majority of 210 votes.

In the debate Mr. Poppleton insisted mainly on one point in the case, the rejection of the returns of the Fourth Ward of Chelsea. As sitting Member received in that ward a majority of 470 votes it is evident that this decision was decisive of the case.

The sixth specification of contestant's notice was:

Sixth. That the votes and check list, and the result of the counting of the votes in Ward 4, in said city of Chelsea, at said election, were not returned forthwith by the warden of said ward to the clerk of said city of Chelsea by any constable in attendance at said election, or by any ward officer, as required by law, and, in fact, were not returned to said city clerk until the morning following the election.

The majority report thus states the requirements of the Massachusetts law:

All the laws of the State of Massachusetts on this subject are embraced in sections 40 to 43 of chapter 376 of acts of 1874, viz:

"SEC. 40. In all elections in cities, whether the same be for United States, State, county, city, or ward officer, it shall be the duty of the warden, or other presiding officers, to cause all ballots which shall have been given in by the qualified voters of the ward in which such election has been held, and after the same shall have been sorted, counted, declared, and recorded, to be secured in an envelope, in open ward meeting, and sealed with a seal provided for the purpose; and the warden, clerk, and a majority of the inspectors of the ward shall indorse upon the envelopes for what officer, and in what ward the ballots have been received, the date of the election, and their certificate that all the ballots given in by the voters of the ward, and none other, are contained in said envelope.

"SEC. 41. The warden, or other presiding officer, shall forthwith transmit the ballots, sealed as aforesaid, to the city clerk, by the constable in attendance at said election, or by one of the ward officers other than the clerk; and the clerk shall retain the custody of the seal, and deliver the same, together with the records of the ward and other documents, to his successor in office."

Section 42 provides for the preservation of the ballots for a specified time, and authorizes a recount of them by the board of aldermen.

Section 43 provides for the preservation of the check lists.

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[1] Journal, p. 1142; Record, p. 4076.

[2] First session Forty-fourth Congress, House Report No. 653; Smith, p. 594; Rowell's Digest, p. 314.

This statute seems to have been enacted the same year the election took place, and, as is to be presumed, the object was to render more certain and reliable the returns of the officers of elections generally in the cities of the State, and no one can doubt for a single moment that a strict observance of all of its provisions and directions would render frauds, by tampering with the check lists and ballots after the closing of the polls (a most convenient mode, and often resorted to for the perpetration of the greatest frauds) almost impossible.

After quoting testimony the report summarizes thus:

This testimony, we think, clearly shows that very many of the plainest and most important provisions of the law were recklessly disregarded if not purposely disobeyed by the officers having in charge said election. The votes of Ward 4 were not returned to the city clerk forthwith, as was required by the law, but were, upon being sealed and indorsed by the officials, placed in the hands of a police officer, an official unknown to the election statute, and by him taken and placed in the hands of a night watchman, away from the polling place, and at an entirely different locality from the city clerk's office, he being a person in no way authorized by the law to hold or have the custody of the votes for a single moment, in whose possession they remained until about 7 o'clock the next morning—a period of some seven hours—when the votes again passed into the possession of the policeman, who, accompanied by the clerk of the ward, which is strictly forbidden by the statute, arrived at the office of the city clerk and deposited with him the envelopes containing the votes, which were afterwards counted by the board of aldermen, and by them certified as the vote of the Fourth Ward, Chelsea, upon which the governor and council of the State acted officially. We are clearly of the opinion that the provisions of the statute, which have been so totally and unblushingly disregarded in this case, are not merely formal and directory, but vital and essential, in order to render the election fair and free from fraud, or the suspicion of fraud; for we hold it to be the duty of election officers to so conduct the election, and everything thereunto appertaining, as to as carefully guard against suspicion of or opportunity for fraud as fraud itself. Nothing short of this will satisfy either the spirit or letter of a statute made and enacted to protect and maintain the purity of elections, as was the unquestioned purpose of the law under consideration.

This principle is most fully recognized in the case of Chaves *v.* Clever (2 Bartlett, 467), and in the case of Gooding *v.* Wilson, decided in the Forty-second Congress, it is held that no recount of votes should be allowed unless the forms of the law for the preservation of the ballots, etc., have been strictly followed. In this case, in order to retain the vote of the Fourth Ward of Chelsea, it is necessary to approve of a recount made by the board of aldermen some four days after the day of election, and that, too, when there is no pretense that the provisions of the law have been followed as to the management of the votes, their legal custody, etc., during the night succeeding the election.

Your committee are fully of the opinion that this ought not to be done, and that we would be establishing a dangerous precedent, opening the door wide to the perpetration of fraud, were we to give our approval to a recount of votes under such circumstances. In this opinion we are strongly supported by the authorities.

The majority report also finds that the evidence gives "serious reasons for suspecting that actual fraud was committed in favor of the returned Member in this ward." After quoting testimony tending to show that suspicion might be raised by the delay of the returns, the report says:

When the votes and returns are out of the legal and proper custody, it must be proven that while illegally held they were not tampered with. Notwithstanding this well-recognized rule of law, Daniels, the night watchman in whose custody the votes and check lists were during the night after the election, is not called, and no reason is assigned for the omission to call him. He, of all other persons, best knew whether the clerk or any other person or persons meddled with the votes, or opened the bundle, or had anything to do with them during his illegal custody. Neither was the warden, whose duty it was to seal up the ballots, called, nor either of the three inspectors; and we are therefore left to guess as to the extent of their information and knowledge of the subject under examination. There being no proof aliunde of the vote at Ward 4, Chelsea, your committee is of opinion that the entire vote must be excluded from the count.

The minority views, presented by Mr. John H. Baker, of Indiana, after examining the testimony, say:

The most that can be claimed for this testimony is that it tends to prove that the ballots and check list were not returned so promptly as they might have been, and that they were brought by a police officer to the office of the city clerk, instead of by a constable. The provisions of the statute above quoted must be construed as directory under the precedents of this House and the decisions of the courts. A slight delay in the return of the ballots and check list, or their being carried by a police officer instead of a constable, would not of itself vitiate the poll. The returns of the election appear to have been constantly in the custody of the clerk of the election, their rightful custodian, from the time they were made out until they were delivered to the city clerk. No suspicion is cast upon the returns, and we have them before us. They corroborate the testimony of the witness, Bassett, in proving that the packages containing the ballots and check list had not been tampered with. On a recount they agreed with the returns.

The testimony of the witnesses examined by the contestee, James A. Dinning and Jeremiah Norris, fully establish the fact that the ballots, check list, and returns were not tampered with, and that they were delivered to the city clerk in the identical condition in which they left the hands of the officers who held the election, and without unnecessary delay.

In the debate Mr. Baker urged that the returns were in the custody of an officer "invested with the power and authority" of a constable, but gave no authority in support thereof.

917. The case of Abbott v. Frost, continued.

Unnecessary employment of men in a navy-yard preceding election, some on recommendation of a candidate, was held a condition on which to predicate a rejection of votes for bribery.

Employment for the purpose of controlling a vote, such object being known and acquiesced in by the voter, throws on the party naturally profiting the onus of proving that the vote was not influenced.

If an elector enters into an express or implied agreement as to his vote, the presumption is created that he votes in accordance with the agreement.

Discussion of the evidence required to prove charges of bribery.

A specification in notice of contest defective in specifying the number of illegal votes and where they were cast was, nevertheless, regarded.

Certain other questions were discussed and determined, although apparently not vital if the rejection of the Chelsea vote should be sustained.

(1) As to alleged bribery the report of the majority says:

The third specification charges "That many votes were cast and counted at said election for you in said Fourth Congressional district by persons who were induced to cast said votes by paying, giving, and bestowing upon such voters gifts and rewards, and by promising to pay, give, and bestow to and upon such voters gifts and rewards." All of which is denied by the contestee. The statutes relating to the offense charged in this specification are as follows:

"Whoever, by bribery, or threatening to discharge from his employment, or to reduce the wages of, or by a promise to give employment or higher wages to a person, attempts to influence a qualified voter to give or withhold his vote in an election, shall be punished by a fine not exceeding three hundred dollars, or by imprisonment in the county jail or house of correction for a term not exceeding one year, or both, at the discretion of the court." (Mass. Gen. St., ch. 7, see. 31.)

"If any person shall pay, give, or bestow, or directly or indirectly promise, any gift or reward to secure the vote or ballot of any person for any officer to be voted for at any national, State, or municipal election, the person so offending, upon conviction before the court having jurisdiction of such offense, shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the

house of correction not less than sixty days nor more than six months, or by both, at the discretion of the court." (Mass. Acts, 1874, ch. 356, sec. 2.)

The charges in this specification relate to the giving of employment to a large number of voters in the United States navy-yard at Boston, formerly Charlestown, for the purpose of inducing them to vote for the sitting Member. The question is new and very important in its character; it touches the very foundation stone of representative government; of the free and uncontrolled exercise of the elective franchise and the counting of votes influenced. by a consideration. The rules of law which we think should govern in the consideration of this case are embodied in the following declarations:

1. If the giving of employment to the voters immediately prior to the election was for the purpose of inducing them to vote for the contestee, and such object was in any manner made known to the voter, and he accepted or continued in such employment after obtaining such information, he thereby became a party to the transaction, accepted its terms, and the onus of showing that he did not carry it out in good faith is on the contestee.

If it be shown that an elector enters into an agreement or understanding, direct or indirect, for a consideration to vote a specified party ticket or for a particular candidate, it is fair to presume that he casts his ballot in accordance with such agreement or understanding, and unless the contrary be made to appear such presumption becomes conclusive.

Ballots thus obtained we hold to be illegal and ought to be disregarded. To count them in the general canvass is to place them on the same footing with the votes cast by the honest, free, and independent voter. To seat a Member upon majorities obtained through such influences is to defeat the very object for which the statute was created.

The punishment of the briber and the bribed avails nothing toward purifying the ballot box; the vote is there all the same, whether punishment be inflicted or not, and if counted, the fraudulent and corrupt purpose for which it was cast is obtained, and the candidate thus securing success is foisted upon the country contrary to the wishes of the legal electors of the district.

The only remedy against such illegal votes is to throw them out and disregard them in the general count or canvass. The establishment of any other rule would render it useless to contest the seat of a sitting Member, even in the most flagrant cases of bribery.

The report cites in support of this view the following cases: Malcolm *v.* Parry (Law Reports, 9 C. P., 610), King *v.* Isherwood (2 Kenyon, 202), Felton *v.* Easthorpe (Rogers' Law and Practice of Elections 221), and continues:

The doctrine that the bribing of voters by the agent or those managing or controlling the election in the interest of a candidate will render his election void is clearly recognized in 3d Douglass, Election Cases, page 157.

Admitting the foregoing propositions of law to be correct, the only remaining question is, to determine whether the evidence is sufficient to lead the mind to the conclusion that these electors, or any number of them, were given employment for the purpose of influencing their votes.

In a great majority of cases it is impossible to prove a charge of bribery by direct and positive testimony.

From the very nature of the case the only sources from which such testimony can come is from the briber and the bribed, both of whom are criminals. Although in this case we must depend to some extent upon circumstantial evidence, yet it is so strong in itself, so strengthened and corroborated by declarations of confederates in the fraud, as to exclude all other reasonable theories than that of guilt.

It is established by the evidence that immediately prior to the election in 1874 an increase of more than 300 voters from the Fourth Congressional district in Massachusetts was added to the force employed in the navy-yard at Boston.

It is clearly shown, by the correspondence here inserted, that the object of the Navy Department at Washington, and Hanscom, Chief of Bureau of Construction, was to secure a sufficient number of votes to insure the election of the sitting Member.

After quoting the letters, the report goes on:

It is evident from this extraordinary correspondence that the Department at Washington knew of no proper or legitimate reason for the increase, otherwise the inquiry of Hanscom, of date December 2, 1874, as to the cause of the increase, would have been unnecessary. There can be no doubt that the

political influence of those high in authority was brought to bear to cause the additional employment of men, and that the avowed purpose was thereby to secure the election of the contestee.

It was made against the protest of the commandant at the navy-yard, and every effort on his part to prevent this corrupt increase "was frustrated by some outside influence more powerful than his own." It must be observed that the source from which this influence emanated was the honorable Secretary of the Navy and the Chief of the Bureau of Construction.

Again, it appears that the committeemen and managers of the election in Boston entered heartily into the conspiracy, and exerted all their influence in soliciting and recommending men for employment in the navy-yard, the sitting Member himself recommending a large proportion.

In fact, with one or two exceptions, all the persons recommending men for employment were active politicians, who, during the campaign, worked earnestly for the election of the contestee.

The report then quotes correspondence and evidence to show that political managers of sitting Member's party were active in recommending men for employment; that the increase of force began immediately prior to the election; that more men were employed than there was work for; that a reduction began the day after election; that an enlisted man of the navy was active in distributing tickets to employees at the polls; that the check lists showed that the employees voted; and concludes that 300 votes should be deducted from sitting Member's poll, saying:

From all the testimony in this case, the committee are forced irresistibly to the conclusion that employment was given to those men as part consideration and that they entered into and accepted such employment with the full understanding that they were to vote for the contestee, and, by the application of the rules of law heretofore laid down, the votes of all such must be disregarded.

It is a species of bribery. If tolerated and encouraged, strikes at the foundation of republican government and poisons the very sources from whence all legitimate authority flows. No system of government can long endure where public opinion tolerates such conduct. Its general prevalence must lead to anarchy and bloodshed and loosen the very ligaments binding society together. It strikes a fatal blow at the social compact. It overturns all just distinctions between honesty and corruption in the delegation of authority to the representatives of the people.

The minority assail the majority's conclusions in two ways:

(*a*) On the pleadings:

The only portion of the notice of contest under which any question can arise as to the vote of the employees in the navy-yard is the third specification. It is in these words:

"Third. That many votes were cast and counted at said election for you (the returned Member) in said Fourth Congressional district by persons who were induced to cast said votes by paying, giving, and bestowing upon such voters gifts and rewards, and by promising to pay, give, and bestow to and upon such voters gifts and rewards."

The act of Congress to prescribe the mode of obtaining evidence in cases of contested elections provides, among other things, that the contestant shall, "within thirty days after said election, give notice in writing to the Member whose seat he intends to contest, and in such notice shall specify particularly the grounds on which he relies in such contest." Much discussion has arisen as to what is to be understood by the words, "shall specify particularly the grounds of contest on which he relies." It may be doubted whether any definition can be formulated which will accurately fix the limits of these words so as to determine by such definition whether the ground of contest is in substantial conformity to the statute or not. It is evident that it was the purpose of the framers of the law to require the averments in the notice of contest to be as certain and definite as the facts of the case would permit. The notice ought to be sufficiently specific as to the time, place, and nature of the charge, to put the returned Member on notice and enable him to prepare his defense and thus prevent any surprise.

In Amer. Law of Elec., section 344, it is said:

"It seems settled by the decisions of the House of Representatives that a notice is good under the law if it specify the number of illegal votes polled, for whom polled, when and where polled, without

specifying the names of the illegal voters. (Wright *v.* Fuller, I Bartlett, 152; Vallandigham *v.* Campbell, 1 Bartlett, 223; Ottero *v.* Gallegos, 1 Bartlett, 177.)"

This author declares that it is settled as the law of this House that such notice must at least specify the following facts to be good:

1. The number of illegal votes polled.
2. For whom they were polled.
3. When and where they were polled.

(*a*) The notice in this case does not specify the number of votes which were procured by paying, giving, and bestowing gifts and rewards upon such voters. It simply alleges that "many votes were cast and counted" which were thus procured. "Such an allegation may mean 5 or 10, or 20, or 500; it is uncertain and not particular. This point was expressly ruled in the case of Lelar, sheriff of Philadelphia, in 1846. The courts say they will require of the party complaining of illegal votes to state the number, for instance, thus: 20 voted under age; 15 voted who were unnaturalized foreigners; 10 who were nonresidents, etc. This particularity the courts of Pennsylvania say they will require, because otherwise they would be converted into a mere election board for the purpose of counting disputed ballots. They do not require the names of the illegal voters to be given." (See Wright *v.* Fuller, supra, p. 161.) We think no reputable lawyer will be found who will contend that the averment "that many votes were cast" is sufficient to raise any issue. The authorities, it is believed, are all one way. As well contend that a declaration by A alleging that B owed him "many dollars" would be good. Such averments are always treated as nugatory. In this case we can treat it as a "sufficiently particular statement" only by overruling the statute and running against the current of all the authorities.

As to the second point, the allegation as to "whom they were polled" is admitted to be sufficient; but as to "when and where they were polled" the notice was criticised as defective as to the place, since not one of the 13 voting precincts of the district was specified particularly as the place.

The insufficiency of the notice is dwelt on at length. The sitting Member could not obtain from it the information needed for his defense. The parties might not waive objection to this defect, since the returned Member could not waive the rights the people have in the contest; nor could the House, with due regard to the public interests, permit a contestant to disregard utterly a plain requirement of law so necessary to a proper trial.

The majority of the committee, while not specifically, meeting this question, disregarded it by sustaining the objections of the contestant.

(*b*) As to the question of bribery, the minority say:

The statute of this Commonwealth touching bribery is as follows:

"If any person shall pay, give, or bestow, or directly or indirectly promise, any gift or reward to secure the vote or ballot of any person for any officer to be voted for at any national, State, or municipal election, the person so offending, upon conviction before the court having jurisdiction of such offense, shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the house of correction not less than sixty days nor more than six months, or by both, at the discretion of the court." (Mass. Acts, 1874, chap. 356, sec. 2.)

The rule is well settled that penal statutes are to be strictly construed. This statute neither disqualifies the voter to vote nor the person voted for to hold the office, even if convicted of bribery in a judicial tribunal. The supreme court of Pennsylvania, in Commonwealth *v.* Shaver (3 Watts. & Serg., 338), thoroughly examined the question of bribery by a candidate as affecting his qualification to hold office. Their unanimous judgment was: "That the trial and conviction of a sheriff of the offense of bribing a voter, previously to his election to the office, does not constitutionally disqualify him from exercising the duties thereof."

We believe the true rule is this: Where a voter is shown to have been bribed by a candidate, or by a duly authorized agent, to vote for him, and he has so voted, that such vote ought to be struck from the ballots cast for such candidate.

The minority then quote at length the English case "In re Boston Election Petition, Malcolm *v.* Parry Law Reports, 9 C., p. 610), and concludes:

The only ground upon which the charge of bribery rests is that Mr. Frost and his political friends gave recommendations to a number of voters, asking the proper officers in the navy-yard to give such persons labor. It appears that persons who were not voters were employed. No questions were asked and no conditions imposed on the persons who entered the service. It is abundantly proven that no influence, no inducement, no suggestion, even, was held out by Mr. Frost or any other person to affect or influence any elector in giving his vote. If any elector had been influenced, coerced, or even a suggestion had been made to him as to his vote, the contestant could have shown it. The law required him to prove it. The fact that he did not venture to enter upon this line of proof clearly shows that he knew it would prove unavailing, because his charge was untrue. He fails to show that one solitary elector from the force employed in the navy-yard was improperly or illegally induced or influenced to vote for Mr. Frost. He fails to show that a single person from that force cast an illegal ballot for the returned Member. No man's opinion or vote is shown to have been changed or influenced by the circumstance of his employment in that yard. There is not one word of evidence in the record to show that of that increased force a single man actually voted for Mr. Frost. The probabilities are that the most of the applicants for labor belonged to the party who had the labor in its gift. This presumption runs into every department of the Government. The contestant is the last man to object to the application of that standard canon of the Democratic confession of faith: "To the victors belong the spoils." We admit that the maxim is odious in principle and demoralizing in practice. But who ever before seriously contended that a voter who asked the influence of a Member or candidate for Congress to aid him in obtaining Government employment was thereby disqualified to vote? Who ever before claimed that it came within the prohibition of the statute of bribery? The fair presumption is that the employees of the navy-yard were Republicans—were employed because they were Republicans, and that they voted uninfluenced, according to their convictions. We believe the law is undoubted that the contestant is bound to show that in consequence of this increased force he lost votes which he otherwise would have received, or that Mr. Frost received votes which he otherwise would not have received. This he has not done nor even attempted to do. A certain number of men, legal residents of the Fourth Congressional district, were employed in the navy-yard between the 1st of September and the day of the election. It is not shown how these men voted. Nay, it is not shown that they voted at all. It is shown that they were legal voters, and that no influence, inducement, or dictation was used upon any voter; and it is not shown that a single one of them voted contrary to his free and uninfluenced convictions. The contestant does not prove that a single one of this increased force in the navy-yard was bribed by Mr. Frost or anyone acting on his behalf to vote for him. He does not prove that anyone of this increased force in the navy-yard actually voted at all at that election. He does not attempt to show how anyone of this increased force in said navy-yard voted. He asks the House to infer that every man of this increased force was bribed, because they were recommended and employed by Republicans; that they voted, and that their votes were cast for the returned Member. No rule of law can be found which will justify the indulgence of such presumptions to disfranchise electors otherwise duly qualified.

918. The case of Abbott v. Frost, continued.

In determining qualifications of voters the House follows the strict letter of the law, and not local usage in disregard of law.

There being no doubt for whom votes were intended, the House did not reject ballots bearing very imperfect names.

(2) The committee unanimously agreed that two votes cast for the sitting Member in the town of Winthrop should be deducted as illegal. The minority set forth their views at length on this point:

The contestant contests the legality of the votes cast by Charles A. Stevens and Frank Tuckerman at the election in the town of Winthrop. The law of Massachusetts (Stat. 1874, chap. 376, sec. 6) permits a person who is not assessed on the 1st day of May of any year to be assessed upon presenting to the

assessors, on or before the 15th day of September, a written application, containing a true statement of his taxables, and satisfying them that he was on the 1st of May liable to be assessed in the town in which he makes the application. The list of persons thus assessed must, by the same statute, be deposited with the city or town clerk on or before the 1st day of October. In order to be a legal voter at any election, a person must, in addition to possessing the other legal qualifications of an elector, have paid a poll tax, legally assessed upon him, in the State within two years previous to the election at which he claims to vote.

The right of these two men to vote was challenged on the grounds (1) that they were not residents of the State and town where they offered to vote, as required by law; (2) that they had not paid any poll tax legally assessed upon them in the time and manner provided by law within the two years next preceding the election at which they offered to vote. They took the required oath and each was permitted to and did vote for the returned Member. In our judgment there is no sufficient evidence to overcome their declarations on oath, when challenged, that they were residents of the town of Winthrop, so as to be eligible to vote if otherwise qualified. They were young unmarried men. Their residence was largely a matter of intention. It seems to us that there is no evidence which rebuts their sworn declarations on the question of residence.

The other question is one which involves no inquiry into intention. Their application for assessment was made upon the 2d of November, 1874, and they were both assessed upon that day and not before. Their names were put upon the list of voters when they presented themselves to vote. To hold that such assessment and payment of poll tax were a substantial compliance with the statute, would operate to defeat its obvious purpose. It is suggested that these votes ought not to be struck off, because they were allowed to vote in accordance with the universal usage in that town, permitting persons to be assessed, pay the tax, and vote, as these two men did. The sufficient answer is that it is our duty to ascertain and apply the law as we find it. If the usage exists and its wisdom commends it to the legislature of that Commonwealth, it will doubtless be enacted into law. Then only can it be successfully invoked as a rule for our decision. For this reason we agree with the majority in striking off the votes of these two men.

(3) The full name and residence of sitting Member was "Rufus S. Frost, of Chelsea." Certain votes were offered bearing the names: "Benjamin Frost, of Chelsea," "Rufus S. Frost," "Frost, of Chelsea," "Rufus S. Frost, of Boston," and "R. S. Frost, of Chelsea." The full name and residence of contestant was "Josiah G. Abbott, of Boston," and certain votes were cast for "Judge Abbott," "Josiah G. Abbott," "Josiah G. Abbott, of Chelsea," "Abbott, of Chelsea," "P. G. Abbott," "J. G. Abbott," "Abbott," "J. G. Abbott, of Chelsea." The committee unanimously agreed that these votes, which were relatively few and of no effect on the result, should be counted for sitting Member and contestant, respectively.

The minority say:

It is admitted that Josiah G. Abbott, of Boston, and Rufus S. Frost, of Chelsea, were the only persons who were candidates for election to Congress in this district at the election held in November, 1874. There can be no serious doubt that the votes above referred to were intended to be cast for them. It was not claimed by either party on the argument that those votes should be excluded from the count in settling the contest in this case. We therefore agree with the majority of the committee that the 23 votes above mentioned should be counted for Josiah G. Abbott, of Boston, and the 8 votes above mentioned should be counted for Rufus S. Frost, of Chelsea.

(4) The committee unanimously cast out fraudulent and illegal votes cast for sitting Member in Ward 5, of Boston.

The majority of the committee found, as the results of the application of the law which they contended for, that contestant had a majority of 712 and presented resolutions giving to him the seat.

On July 14 [1] the report was debated in the House, and on that day a substitute proposed by the minority confirming the title of sitting Member to the seat was disagreed to, yeas 79, nays 102.

The resolutions of the majority, seating contestant, were then agreed to without division.

919. The Louisiana election case of Breaux v. Darrall in the Forty-fourth Congress.—On July 12, 1876,[2] Mr. John T. Harris, of Virginia, from the Committee on Elections, to whom was referred the contested-election case of Breaux *v.* Darrall, of Louisiana, reported a resolution declaring Mr. Darrall entitled to the seat. This was agreed to without debate or division.

920. The South Carolina election case of Buttz v. Mackey in the Forty-fourth Congress.

Gross frauds perpetrated in such a way as to show connivance of election officers caused rejection of the returns of all the precincts of a city.

One-third of the votes of a district being rejected, the House did not seat contestant, but declared the seat vacant.

Both parties having proceeded under misapprehension of the law, the evidence was admitted.

On July 13,1876,[3] Mr. Charles P. Thompson, of Massachusetts, from the Committee on Elections, submitted the report in the South Carolina case of Buttz *v.* Mackey. The official returns gave sitting Member a majority of 2,537. The report thus states the case:

> The city of Charleston gave 10,404 votes, 7,976 of which were for the contestee and 2,428 for the contestant, making a majority for the contestee of 5,548. The contestant alleges in his notice of contest that frauds were committed in most of the voting precincts of the city of Charleston, and at the hearing before the committee he, without objection, introduced evidence that frauds were committed in all of the voting precincts of that city by the partisans of the contestee through an organized system of repeating, and that persons entitled to vote and desiring to vote for the contestant were prevented from voting for him by violence and threats and induced to vote for the contestee; also that a large number of persons, through bribery, were induced to vote for the contestee, and that this was done with the approval of the managers of the election. The contestee denies all the material allegations of the contestant, and alleges that many of the allegations are irrelevant and immaterial. Although there are allegations of irregularities at other precincts than those in the city of Charleston, your committee have not thought it necessary to consider them, as the decision they have arrived at with reference to the vote of the city of Charleston is conclusive of this case.
>
> The evidence clearly shows that most gross frauds were perpetrated at the voting precincts in the city of Charleston through repeating, bribery, intimidation, and violence, and that the same were carried on under such circumstances as to satisfy the committee that they must have been done with the knowledge and assent of the officers of the election.

This evidence showed that repeaters were taken from poll to poll and voted in large numbers. After quoting from the testimony the report says:

> The whole evidence, of which the above is a fair specimen, clearly shows the character of the election in the city of Charleston, and must, we think, satisfy the House that such an election ought not to be sanctioned or tolerated. To allow the returns from such voting precincts to be canvassed is to encourage fraud and corruption, and your committee have unanimously come to the conclusion that the whole vote

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[1] Journal, pp. 1267–1270; Record, pp. 4589–4598.

[2] First session Forty-fourth Congress, Journal, p. 1252; Record, p. 4516.

[3] First session Forty-fourth Congress, House Report No. 758; Smith, p. 683; Rowell's Digest, p. 320.

of the city of Charleston must be rejected, as fraud was committed by, or assented to by, the managers of the election as well as by other parties, and it is impossible to ascertain how many legal votes were cast. Your committee have had not a little difficulty in determining what ought to be done under the circumstances of the case. The district outside of the city of Charleston gives a large majority for the contestant. Still we are of opinion that he ought not to be declared elected, as it is impossible to determine who received a majority of the legal votes of the district. And the votes of so large a proportion of the district have been rejected and the people thereby disfranchised that justice to the district requires that a new election shall be had and an opportunity given the legal voters to hold an election to determine who shall represent the district.

The total vote of the district was 30,965, and the vote of the city of Charleston was 10,404.

A preliminary question as to evidence was thus determined:

The contestee claims that all the evidence taken by the contestant after the 18th of February, 1875, should be stricken out, as the forty days from the time of the serving of the answer of the contestee expired on that day. It appears that both parties proceeded in ignorance of the act of 1873 concerning contested elections, and the contestant gave notice and took evidence under the law as it existed prior to that date. And your committee are of opinion, as both parties proceeded under a mutual misapprehension of the law, that neither ought to take any advantage of the other on that account, but that the evidence must be regarded as having been taken by mutual consent, waiving the provisions of law, and that this rule will apply until one party or the other declined to proceed under this arrangement. It appears that no objection was made to this mode of proceeding until March 1, 1875, during the taking of the evidence of one Henry P. Dart, who appears to have been the first witness examined on that day. Your committee have, therefore, not considered any of the evidence taken subsequent to that of Dart's (p. 47). The contestee, although having full opportunity to take evidence, declined to take any evidence, and your committee are compelled to pass upon this case upon the evidence of the contestant alone.

The committee recommended this resolution:

Resolved, That neither C. W. Buttz nor E. W. M. Mackey was lawfully elected to the Forty-fourth Congress from the Second Congressional district of South Carolina, nor is either of them entitled to a seat in said Congress.

On July 19,[1] after short debate, the House agreed to the resolution without division.

921. The Virginia election case of Platt v. Goode, in the Forty-fourth Congress.

Overruling its committee, the House declined to deduct proportionately from the two candidates unidentified votes cast by disqualified persons.

Contestant having neglected to show for whom votes impeached by him were cast, they were deducted from his poll.

While State canvassers are justified in requiring returns to be technically perfect, the House in judging final right looks rather to the substance.

On July 17, 1876,[2] Mr. William R. Brown, of Kansas, from the Committee on Elections, submitted the report of a bare majority of the committee in the Virginia case of Platt *v.* Goode. The official returns had given the sitting Member a majority of 131 votes over contestant.

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[1] Journal, p. 1293; Record, pp. 4734–4742.

[2] First session Forty-fourth Congress, House Report No. 762; Smith, p. 650; Rowell's Digest, p. 318.

A number of questions arose in the determination of this case:

(1) The returns from Prince George County were rejected by the State board of canvassers because they lacked the attestation of the county clerk. That is, the words "Attest, Robert Gilliam, clerk," were omitted.[1] The majority report state the case, with copies of the full returns, as follows:

The returns before the State board were as follows:

"Abstract of votes of the election held in the county of Prince George, on the third day of November, one thousand eight hundred and seventy-four, for a Representative from the Second Congressional district of Virginia, in the Forty-fourth Congress of the United States of America.

"James H. Platt, jr., received nine hundred and eighty-seven (987) votes.

"John Goode, jr., received five hundred and sixty-two (562) votes.

"Given under our hands this fifth day of November, one thousand eight hundred and seventy-four.

"B. J. PEEBLES,
"T. A. LEATH,
"WM. D. TEMPLE,
"CHARLES T. ROBERTSON,
"Commissioners.

"STATE OF VIRGINIA,

"County of Prince George, to wit:

"I, Robert Gilliam, sr., clerk of the county court of Prince George, in the State of Virginia, do certify the foregoing to be a true copy of the return of the election for a Representative from the Second Congressional district of Virginia to the Forty-fourth Congress of the United States.

"In testimony whereof I have hereto set my hand and affixed the seal of the said court this 5th day of November, A. D. 1874, and in the ninety-ninth year of the Independence of the United States.

"[SEAL.]

RO. GILLIAM, SR., *Clk."*

The statute of Virginia, after providing for a board of commissioners to act as county canvassers, provides: "The said commissioners shall determine the persons who have received the greatest number of votes in the county or corporation for the several offices voted for at such election. Such determination shall be reduced to writing and signed by said commissioners, and attested by the clerk, and shall be annexed to the abstract of votes given to such officers, respectively. As soon as the commissioners aforesaid shall have determined the persons who have received the highest number of votes for any office, the clerk shall make out abstracts of the votes in the following manner: * * * which abstracts, being certified and signed by such commissioners and attested by the clerk, shall be deposited in the office of the latter, and certified copies of abstracts, * * * under the official seal of said clerk, shall be placed in separate envelopes * * * and forwarded to the seat of government by mail."

The abstract is a substantial compliance with the requirements of the statute, and, except in lacking the formal attestation of the clerk, is sufficient. And showing as it does that it was the act of the commissioners, by the certificate of the clerk duly attached, it seems to us an arbitrary and unjustifiable course for the State board of canvassers to have rejected it merely because the same officer who had certified to its correctness had failed to make assurance doubly sure by attesting it.

The statute further provides: "If from any county, city, or town no such abstract of votes shall have been received within twelve days next after any election by the secretary of the commonwealth, he shall dispatch a special messenger to obtain a copy of the same from the proper clerk." This he failed to do; and in spite of the fact that the county seat of Prince George County is within three hours' ride of Richmond, and in spite of the fact that Mr. Platt at the time presented a duly attested abstract to them, the State board did not have a messenger sent, and adjourn over till his return, but rejected the abstract and gave Mr. Goode his certificate.

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[1] Record, p. 4872.

The minority views, presented by Mr. J. S. C. Blackburn, of Kentucky, uphold the action of the State canvassers, but do not insist that the House should be bound by the results of the act:

The returns from the county of Prince George were fatally defective. The law required that the returns should be certified by the board of county commissioners and attested by the clerk under his official seal. Neither of these requirements was complied with. We are of opinion that the board of State canvassers acted properly in refusing to take notice of what purported to be the returns from said county of Prince George, as the law only required them, in fact only authorized them, to canvass such returns as might be found in the office of the secretary of the commonwealth, properly certified by the board of county commissioners, their determination reduced to writing, and attested by the clerks of the several counties with their official seal. It will not be necessary to determine whether said board of State canvassers erred in refusing to receive and canvass the amended returns from Prince George County. We, in the exercise of the power belonging to the House of going behind the action of all boards, State or county, and even behind the returns of the election officers, are convinced that the returns from the precincts of Bland and Rives, in the county of Prince George, should be rejected.

The minority, whose views prevailed, counted all of this county except the Bland and Rives precincts.

922. The case of Platt v. Goode, continued.

As to whether the House should count ballots illegally but not fraudulently cast and properly rejected by the election officers.

As to whether an unnaturalized foreigner may be a de facto election officer.

Question as to whether or not a law requiring returns to be transmitted sealed should be considered mandatory or directory.

It is presumed that elections officers who are partisan of the objecting party have not intentionally erred against his interest.

(2) In Nansemond County certain returns were rejected, as described in the minority views:

As to the 206 votes cast for contestant in Nansemond County, and rejected by board of county commissioners, 193 of them had printed upon them the name of contestant and the words "Against constitutional amendments;" 13 of said ballots had each a second ballot folded within them, upon which were printed the words "Against constitutional amendments." Under the general election law of Virginia and the act of assembly providing for the taking of the sense of the people upon the constitutional amendments submitted for their ratification, it is clear that such ballots were not cast as required by law. The county commissioners for Nansemond County, in our judgment, did not err in rejecting and refusing to count said ballots, which, under the law, they were not permitted to receive; but we do not feel that this committee or the House should be restricted to such a rigid observance of the technical requirements of the statute as will do violence to the equities involved. We therefore feel disposed to go behind the action of the board of county commissioners of Nansemond County and allow to contestant the 206 votes deducted from his count.

The majority report that the statutes of Virginia with regard to casting of ballots were directory, and that the words "deposit a ticket or ballot" as applied to the constitutional amendment did not necessarily mean that the ballot must be separated from the general ticket. The fact that 13 detached tickets on the constitutional amendment were folded into tickets for Mr. Platt and voted in the same box showed an evident mistake. The law did not require separate ballot boxes and no claim was made that illegal votes were cast.

(3) The majority report discusses Bland and Rives townships:

These two townships, in Prince George County, gave Mr. Platt 408 majority. The allegation of Mr. Goode in reference to them is as follows:

"Seventh. I shall maintain and insist that the entire vote cast at the precincts or voting places in Rives and Bland townships, in the county of Prince George, should be rejected as illegal and void, because the poll books and ballots at said precincts were not sealed and were not returned to the clerk's office, as the law directs; because, at the precinct in Bland Township, one John Palmer acted as clerk of election, he being at the time a subject of Great Britain, and not a naturalized citizen of the United States, and because a large number of colored persons, at least one hundred, whose names are unknown to me, were imported into the said townships in the said county of Prince George from Petersburgh and other places in the adjoining district, and allowed to deposit their ballots for you at the said election, thus placing upon the polls at the said precincts such a taint of illegality and fraud that the result can not be clearly ascertained."

In reference to the charges, except upon the point the poll books and ballots were not sealed, the evidence is totally insufficient. Even if it were true that John Palmer was a foreigner and unnaturalized, it could make no difference, as we have always decided. If not de jure he was a de facto officer, and his acts valid. C. T. Robinson, a judge of election in Rives Township, a Conservative, testifies that the election was fairly, faithfully, and honestly conducted, and that to his knowledge no man was allowed to vote who was not entitled to. Robert B. Batte, one of the Conservative judges in Bland Township, says that the judges of election did their duty as far as they could. Robert E. Bland, who was at Bland Township, swears that he does not think the election was conducted as the law directs, but saw nothing that looked like corruption, criminality, and bad intent. One man voted illegally in Bland Township and one in Rives, and this is the whole testimony. The poll books and ballots were returned unsealed, and this is the only irregularity we need to consider.

The report further says:

The evidence shows that five out of the six judges of election in these two precincts were Democrats. Both judges who carried in the returns were Democrats, and the county clerk to whom they were delivered was a Democrat; and it will be noticed that in his brief the sitting Member claims no irregularity, except that "several colored persons" illegally voted, and this leaves but the one question, Was the failure to seal the poll book and ballots fatal? Mr. Goode correctly quotes the law in his brief above quoted, and it will be noticed that no negative words are used making the election invalid unless the judges sealed the returns.

The report quotes McCrary's Law of Elections at length in support of this view, and declares that there is neither proof nor suspicion of fraud. The election officers were partisans of Mr. Goode, and the report says:

In the case of Farwell *v.* Le Moyne the majority of the committee went to the length of deciding that where fraud is proved it must be presumed as having been committed in favor of the party controlling the polls. We still hold to the doctrine to the length that the presumption is that Democrats will not intentionally commit frauds to help Republican , nor vice versa.

The minority views take issue as to the poll of these precincts:

The statute of Virginia requires that one of the poll books of election shall be put under cover and seal and sent to the county or corporation court clerk, together with the ballots, inclosed and sealed. There can be no question as to the mandatory character of this statute. Its object is to prevent fraud in tampering with the ballots or alteration of returns. In these two precincts the law in this regard was wholly ignored and violated. The rule laid down and supported by a number of adjudicated cases and applied in several instances by this House does not require that positive proof shall be adduced showing that the ballots have been tampered with. It is sufficient to show that opportunity for such tampering has been afforded. The burden of proving that this has not been done devolves upon the party insisting upon the count. We can not but conclude, in the light of the testimony, under the application of the law, as stated, that the vote of Bland and Rives townships, in the county of Prince George, should be rejected.

In the debate, however, Mr. J. Randolph Tucker, of Virginia, speaking in favor of sitting Member, Mr. Goode, said as to these two precincts, "We yield all claim to them, and based his argument on other features of the case." [1]

923. the case of Platt v. Goode, continued.

Bribed votes being given, but their separation being impossible, the whole poll was rejected.

Employment for the purpose of controlling a vote, such object being knowingly acquiesced in by the voter, throws on the party naturally profiting the onus of proving that the vote was not influenced.

If an elector enters into an express or implied agreement as to his vote, the presumption is created that he votes in accordance with the agreement.

(4) A question as to votes cast by persons alleged to have been illegally registered, and the method of purging the poll of such votes, were discussed by the majority, and the rule set out in the case of Finley *v.* Walls, that in the absence of fraud the illegal votes were to be divided proportionately between the candidates in accordance with the vote received by each, was approved:

The statute of Virginia provides for registration of voters as follows: "Ten days previous to the November election the registrar shall sit one day for the purpose of amending and correcting the lists." And this is the last time provided by statute for registering prior to an election, and registration is prerequisite to having a right to vote. The evidence shows illegal registration and voting in several precincts, as follows: At Sussex Court-House Township, in Sussex County, 13. Here the vote stood, Platt 293, Goode 83, which, dividing proportionately, makes the vote stand Goode 3, Platt 10. At Stony Creek precinct 26 persons registered and voted for the first time on the day of the election. The statute provides—

"Whenever a voter changes his place of residence from one voting precinct to another, it shall be lawful for him to apply for in person or in writing, and it shall be the duty of the registrar of his former voting district at any time, whether it be in a township, ward, or voting place, to furnish a certificate that he was duly registered, and that his name has since his removal been erased from the registration books of said voting district, which shall be sufficient evidence to entitle him to register; and the name of every such person shall be entered upon the registration book of the township, ward, or voting precinct to which he has removed, by the registrar at any time, or by one of the judges on the day of election: *Provided,* That in cities or towns containing over 2,000 inhabitants the name of such person shall only be entered by the registrar on the days provided in the ninth section of this chapter."

The evidence shows that 25 of these 26 voters were registered on the day of election on transfers, as provided in this section, and that the judges were satisfied that they had resided in the election district three months. We find, therefore, that but one of these votes was illegal, which we subtract from Mr. Platt.

In Jamestown Township, James City County, 16 illegal votes were cast. The vote stood, Platt 136, Goode 78; dividing in the same proportion gives Platt 10, Goode 6. In Bruton Township 3 illegal votes are proved. The vote stood, Platt 203, Goode 88; and dividing in the same proportion gives Platt 2, Goode 1. In Guilford Township the evidence shows that about 20 persons illegally registered the Saturday before election. Eight only are identified by the witness, and these 8 voted and were illegal voters. Because a man illegally registers on the Saturday before an election is no evidence that he voted on the Tuesday following; hence, we can only consider 8 as illegal. The vote stood, Platt 265, Goode 189; and divided in same proportion gives Platt 5, Goode 3. In Nelson Township, York County, 15 illegal votes were cast. The vote stood, Goode 49, Platt 160, Norton 189; dividing in same proportion the illegal votes would stand, Platt 2, Goode 6, Norton 7. Six illegal votes are also proved in different

[1] Record, p. 4900.

townships, one or two in a place; being unable to divide, as in most if not all of the precincts Mr. Platt got more votes than Mr. Goode, we subtract all from Mr. Platt, which would make the illegal vote stand, Platt 40, Goode 15.

This conclusion of the majority is combatted by the minority:

Under the law of Virginia no man is a legal voter who has not been duly registered, and such registration must be had ten days before the election. The testimony shows that at all the precincts named persons were registered on the day of election, or within the ten days next preceding the election. There can be no doubt of the validity of a statute requiring the registration of voters. McCrary says (American Law of Elections, p. 12):

"It being conceded that the power to enact a registry law is within the power to regulate the exercise of the elective franchise and preserve the purity of the ballot, it follows that an election held in disregard of the provisions of a registry law must be held void."

This rule has been repeatedly applied by this House. (See Howard *v.* Cooper, Contested Election Cases, p. 275; also, Reed *v.* Julian, p. 822; Myers *v.* Moffitt, p. 564, and many others.) It is not to be objected that the honest voter should not be disfranchised by reason of the mistakes or misconduct of election officers. Every candidate has the right to bring forward and prove the legality of every vote cast at a precinct which has been appealed.

At Sussex Court-House Township precinct there were 13 illegal votes cast—8 white and 5 colored. At Stony Creek Township there were 18 illegal votes cast—2 white and 16 colored. At Jamestown Township, in James City County, there were 16 illegal votes cast—1 white and 15 colored. At Guilford Township precinct, in Surry County, there were about 20 illegal votes cast, principally colored. At Nelson Township precinct, in York County, there were 15 illegal votes cast—2 white and 13 colored. At Bruton Township precinct, in York County, there were 2 illegal votes cast. At Rives Township, in Prince George County, there was 1 illegal vote cast—colored. At Bland Township, in Prince George County, there was 1 illegal vote cast—colored—exclusive of those voting at Bland and Rives precincts brought from other precincts and other counties, of which several are proven in the record. At Blackwater Township, in Prince George County, there was 1 illegal vote cast—colored. At Sherman's Cross-Roads precinct, in Prince George County, there was 1 illegal vote cast—colored. At Brandon Township precinct, in Prince George County, there was 1 illegal vote cast—colored. At Suffolk precinct, in Nansemond County, there were 2 illegal votes cast—both colored-making an aggregate, at all the precincts named, of 90 illegal votes. What is to be done with these illegal and fraudulent votes?

The rule in certain cases is to divide the fraudulent or illegal votes between the candidates in proportion to the whole vote received by each; but on page 225, American Law of Elections, it is held:

"Let it be understood that we are here referring to a case where it is found to be impossible, by the use of due diligence, to show for whom the illegal votes were cast. If in any given case it be shown that the proof was within the reach of the party whose duty it was to produce it, and that he neglected to produce it, then he may well be held answerable for his neglect, and because it was his duty to show for whom the illegal votes were cast, and because he might, by the use of reasonable diligence, have made this showing, it may very properly be said that he should himself suffer the loss occasioned by deducting them from his own vote."

We see no reason why this fair and well-established rule should not be applied in this case. Contestant had the opportunity to make this proof and failed to do so or to attempt it. The eighty days allowed both contestant and contestee for taking testimony in chief had expired before these illegal and fraudulent votes were discovered to be upon the several polls; but, after such discovery, contestant then had by law ten days in which to take testimony in rebuttal. These polls and the legality of the votes cast thereat having been put in issue by the answer of contestee, such testimony might have been competent; at any rate, the contestant might have relieved himself of the burden of proof imposed by the law by an effort in these remaining ten days of his time to show for whom these illegal votes were given.

It clearly appears from the record that, should this rule be not applied, but these illegal votes deducted from both candidates in proportion to the whole number of votes received by each at the several polls, the majority of contestee would be still further increased beyond the final summary hereafter given; but as such action would not change or affect the final result of the contest, we do not deem it necessary to state the exact number to be taken from each.

In debate [1] Mr. Tucker argued against the rule proposed by the majority of the committee, saying:

> The question is how those illegal votes which are found in the ballot box, without its being known for which candidate they were cast, are to be disposed of. And I would say that at these several precincts the evidence shows, in the aggregate, that Mr. Platt gets a majority of some 400 to 600.

After quoting the passage of McCrary cited by the minority, he contended that the onus was on contestant to show that the 92 illegal votes did not go to constitute his majority of 500, and as he had not proven this they should be stricken from his majority. To use the proportionate rule was merely guessing at the result. The rule was arbitrary and not founded on reason. It appeared further on that Mr. Tucker was influenced by the fact that the proportionate rule would require the assumption that a certain number of colored voters had cast their ballots for Mr. Goode, an assumption which in this case he seemed to consider against reason. Mr. Tucker held that the disposition of the 92 illegal votes in the way advocated by him showed the election of Mr. Goode, and was really decisive.

(5) Certain charges of corruption were made as to the use of navy-yard influence at Norfolk in behalf of contestant. The majority report of the committee did not consider that the exclusion of three affected precincts, where contestant's majority was 441, could overcome the majority which they found him entitled to in the district, and so did not enter fully into the discussion. The majority report says:

> The evidence is vague and indefinite. No effort was made by the sitting Member to particularize. He acted in reference to this matter as in reference to others, that where illegal votes are proved, be they few or many, the effect was to vitiate the whole election, and he endeavors, both in his proof and argument, to make us determine that some illegal votes were cast, so that we may exclude the returns of entire precincts. We believe that bribery can be committed in the employment of voters in a navy-yard, but the mere fact of employment alone does not prove bribery. If employment is given to make men vote contrary to what they would do, it would be bribery, but there must be proof, first, that men were employed in order to cause them to change their politics, and, second, that they voted and voted in favor of the party giving the employment. The presumption is in public service that Republicans employ Republicans, that Democrats employ Democrats. The presumption is almost conclusive that men obtaining employment in places controlled by Democrats are Democrats and in places controlled by Republicans are Republicans, and the employment does not change their politics. If any presumption arises when a man obtains employment in a navy-yard it is that he is a Republican, and if that be so, the employment does not affect either his vote or the result. Here the employment is the whole evidence of bribery, and is extremely weak—only a link in the chain to prove the charge. Our duty is to act on evidence, not on surmises; to seek fixed data, not make wild guesses, and hence we decline to throw out any portion of the navy-yard vote.

Two members of the committee, who sustained generally the majority report, Messrs. Charles P. Thompson and John F. House, dissented from the conclusion as to the navy-yard precincts and believed they should be rejected. Thus an actual majority of the committee were against the report in this particular.

The minority views found that large numbers of men had been employed in the yard for partisan purposes, on condition that they should vote the ticket of contestant's party, and that espionage was resorted to to make sure that the employees voted in accordance with the arrangement. The minority views contend that the presumption was that the voter complied with his obligation and executed his contract by giving his vote as promised. The onus of proving the contrary

[1] Record, p. 4900.

rested on the contestant in this case, as it was in his interest that the acts were done. Therefore the minority views (and evidently a majority of the committee actually sustained them) hold:

> These bribed votes should not be counted. The record furnishes no method for their elimination. Their acceptance can only be avoided by applying the rule of law, so well known and of such general adoption that it need scarcely be repeated here, that when illegal or fraudulent votes have been proven, and the poll can not be purged with reasonable certainty, the whole vote must be rejected. Such, we think, is the case in these three precincts, viz, Third and Fourth wards of Portsmouth, and Hall's Corner precinct, in Norfolk County.

The majority report counted the Prince George vote, added 200 Nansemond votes and 12 Norfolk votes for Platt, and deducted from him 40 illegal votes and 15 illegal votes from Goode. This left a majority of 487 for Platt in the district.

Therefore the majority reported resolutions giving the seat to contestant.

The two dissenters from the majority report subtracted the navy-yard precincts and also 64 illegal votes from Platt and 29 from Norton, leaving Platt a plurality of 24 in the district.

The minority views added the Prince George and Nansemond votes, but excluded Rives and Bland precincts, and rejected the navy-yard precincts. This gave sitting Member 349 majority. This summary "waived the question of illegal voting by reason of fraudulent or unlawful registration," on which Mr. Tucker had laid so much stress, and rejected the Bland and Rives precincts, which he had waived. The minority views conclude that Mr. Goode is entitled to his seat.

The case was debated at length on July 25, 26, and 28,[1] and on the last day the minority resolution was substituted for the majority proposition by a vote of yeas 105, nays 98. The majority resolutions as amended were then agreed to, yeas 107, nays 95. So the majority of the committee were overruled and the sitting Member retained the seat.

924. The Louisiana election case of Acklen v. Darrall in the Forty-fifth Congress.

The House, respecting a written agreement of the parties, counted a return which State canvassers had rejected as forged.

Form of agreement between parties in an election case as to counting certain votes.

A poll unauthorized by law, taken at a place different from the legally appointed place under control of partisan officers, was rejected.

A recount honestly made of ballots preserved inviolate is valid, although circumstances rendered impossible a technical compliance with law.

Instance wherein the House in an election case accepted its own historic knowledge in lieu of evidence.

An honest recount of ballots kept inviolate was sustained, although the authority which ordered it was questioned.

At the organization of the House on October 15, 1877,[2] the name of Mr. C. B. Darrall, of Louisiana, was on the roll of Members-elect presented by the Clerk.

[1] Journal, pp. 1343–1345; Record, pp. 4871, 4879, 4887, 4900, 4931–4938.

[2] First session Forty-fifth Congress, Journal, p. 20.

When Mr. Darrall was about to take the oath, he was challenged; but in October 16 the House voted that he be sworn in and that the credentials and papers of J. H. Acklen, a contestant, be referred to the Committee on Elections.

On February 8, 1878,[1] Mr. John T. Harris, of Virginia, from the committee, presented the report in the case of Acklen *v.* Darrall.

The preliminary facts as to this election are thus set forth in minority views submitted by Mr. Hiram Price, of Iowa:

On the 7th day of November, 1876, an election was held in this Congressional district for a Member of the Forty-fifth Congress, and after the election, and after the votes at the polls at all the parishes had been counted by the legally authorized officers, and the returns made as required by law, the following certificate of election was issued:

"STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,

"Third District of Louisiana, New Orleans, December 28, 1876.

"Be it known that at an election begun and held on the 7th day of November, A. D. 1876, for Members of Congress, Chester B. Darrall received 15,626 votes, and Joseph H. Acklen received 13,533 votes.

"Now, therefore, I, William Pitt Kellogg, governor of the State of Louisiana, do hereby certify that Chester B. Darrall received a majority of the votes cast at said election, and is duly and lawfully elected to represent the Third Congressional district of the State of Louisiana in the Forty-fifth Congress of the United States.

"Given under my hand and the seal of the State this 28th day of December, A. D. 1876, and of the Independence of the United States the one hundred and first.

"WM. P. KELLOGG.

"By the governor:

"[SEAL.] P. G. DESLONDE,

"*Secretary of State.*"

From which it appears that Chester P. Darrall was legally elected as a Representative to the Forty-fifth Congress from the said Third district of Louisiana.

Subsequent to this, and after the inauguration of the Nicholls government, a law was passed creating a new returning board, and this new board, created under a new law, proceeded to a recanvass of the same returns for the same office for the same district, and after a full canvass, Governor Nicholls issued the following certificate of election:

"UNITED STATES OR AMERICA,

"EXECUTIVE DEPARTMENT, STATE OF LOUISIANA.

"This is to certify that at general election begun and held in the State of Louisiana, and in the Third Congressional district of said State, on the 7th day of November, 1876, it being the first Tuesday after the first Monday in said month, and the day prescribed by the laws of the United States and the said State of Louisiana for the election of Representatives in Congress from the said State, C. B. Darrall and Joseph H. Acklen appear from the returns of said election, filed in the office of the secretary of state, within and for said State, to have been the only persons voted for in the Third Congressional district of said State for Representative in the Forty-fifth Congress of the United States from said State; and that it further appears from said returns on file and of record in said office that C. B. Darrall received 15,786 votes and Joseph H. Acklen received 14,692 votes for Representative as aforesaid in said district; and that C. B. Darrall having received a majority of the votes cast for Representative from the Third district in said State of Louisiana, in the Forty-fifth Congress of the United States of America at said election, has been duly, lawfully, and regularly elected to represent said Third district of said State in the aforesaid Congress of the United States, in accordance with the laws of the United States and of the State of Louisiana.

FRANCIS T. NICHOLLS,

"Governor of the State of Louisiana.

[1] Second session Forty-fifth Congress, House Report No. 147; 1st Ellsworth, p. 124.

"We, Francis T. Nicholls, governor of the State of Louisiana, and Oscar Arroys, assistant secretary of state of said State, do hereby certify that the above and foregoing declaration of the result of the election begun and held in the Third Congressional district of the State of Louisiana on the 7th day of November, 1876, is a true copy of the original certificate, as recorded in the office of the secretary of state of the State of Louisiana, by the secretary of state, and signed by the governor.

"Witness our hands and the seal of the State of Louisiana, at the city of New Orleans, this 27th day of February, 1877.

"FRANCIS T. NICHOLLS,
"Governor of the State of Louisiana.

"OSCAR ARROYS,
"Assistant Secretary of State."

From which it appears that Chester B. Darrall, the same man for the same office, was elected.

By the Kellogg returning board Darrall's majority is 2,093, and by the Nicholls returning board it is 1,094.

The majority of the committee disregarded the return of the Kellogg board, and the minority practically did the same, the consideration of the case being based on the computation of the Nicholls board. Speaking of the latter board, the majority report says:

They adopt the count of the votes as declared by the present legal board of canvassers in all the parishes except those of St. Martin, Lafourche, and Iberville. That board counted the vote actually cast, and returned it without the exercise of judicial powers and without disfranchising any portion of the people. It is composed of men of high character, Republicans and Democrats, and there is every reason to give full faith and credit to its official acts.

The Nicholls board omitted from the count the vote of St. Martin's Parish, holding the returns to have been forged. The committee found no proof of that fact, and counted that return in accordance with the following agreement:

Great Seal In testimony whereof I have hereunto set my hand, and caused to be affixed—E

JOSEPH H. ACKLEN

v. Before the Committee on Elections, House of Representatives.

CHESTER B. DARRALL.

It is hereby stipulated and agreed by and between the parties contestant and contestee that, in the consideration and determination of the above-entitled case, the committee shall allow to the contestant 1,027 votes as having been lawfully cast, counted, and returned for him in the parish of St. Martin, in the State of Louisiana, and to the contestee 1,095 votes as having been lawfully cast, counted, and returned for him in said parish, and that said parties respectively lawfully received, and are entitled to the benefit of, the number of votes aforesaid on account of said parish.

J. H. ACKLEN.
C. B. DARRALL.

In Lafourche Parish the whole committee united in rejecting the poll of precinct No. 17, where sitting Member had 86 votes and contestant none, the majority report thus setting forth the reasons:

The evidence, however, goes to show that the vote of poll 17, where 86 Republican votes were cast and not one Democratic vote, which was held at a place unauthorized by law, and about 1 mile from the place legally appointed, with no Democratic commissioners present, and appears to have been so held for the express purpose of preventing any Democrats from voting there, should be rejected and not counted.

The report quotes the decision of the supreme court of Louisiana on this poll:

We have been unable to find, and have been referred to no case, where votes cast under similar circumstances have been counted to determine an election.

These questions disposed of, only the parish of Iberville is left. Without Iberville the result was very close. Contestant had a majority of 63 votes in all the other parishes. The returns of Iberville Parish, both in the Kellogg and the Nicholls canvass, gave Darrall, the sitting Member, a majority of 992. So it is plain that Iberville Parish is decisive.

The returns of 5 of the 11 precincts in Iberville are not impeached. These 5 gave Darrall 677 votes, and Acklen 430 votes, or a majority of 247 for Darrall. This overcame Acklen's majority of 63 in the remainder of the parishes, and gave Darrall a net majority of 184 in the entire district except the 6 impeached precincts of Iberville.

The Nicholls canvass gave in the 6 impeached precincts a majority of 745 votes for Darrall.

But a recount was made at the instance of contestant, and the result of this was to destroy the 745 majority for Darrall and substitute a majority of 292 for contestant. This result would overcome sitting Member's majority of 184 in the rest of the district, and leave a final majority of 108 for contestant in the entire district.

It is evident, then, that the recount is decisive.

The law of Louisiana provided as to custody of ballots:

> The votes shall be counted by the commissioners at each voting place immediately after closing the election and without moving the boxes from the place where the votes were received, and the counting must be done in the presence of any bystander or citizen who may be present. Tally lists shall be kept of the count, and after the count the ballots counted shall be put back into the box and preserved until after the next term of the criminal or district court, as the case may be; and in the parishes, except Orleans, the commissioners of election, or any one of them selected for that purpose, shall carry the box and deliver it to the clerk of the district court, who shall preserve the same as above required; and in the parish of Orleans the box shall be delivered to the clerk of the first district court for the parish of Orleans, and be kept by him as above directed. (Act 98, 1872, p. 174.)

The following certificate was given to show when the next term of court met:

> STATE OF LOUISIANA, *Parish of Iberville.*
>
> CLERK'S OFFICE, FIFTH JUDICIAL DISTRICT COURT.
>
> I, Charles H. Gordon, clerk of the fifth judicial district court of Louisiana, in and for the parish of lberville, do hereby certify that the first term of said district court for the present year was held in Iberville Parish on Tuesday, the 2d day of January, A. D. 1877, as the first Monday was the 1st and a dies non, his honor James L. Cole presiding.
>
> Witness my hand officially and the impress of the seal of said court at the parish of Iberville this 8th day of May, A. D. 1877.
>
> [SEAL.]
>
> C. H. GORDON, *Clerk.*

The recount was made March 6, 1877, after the date of the session of the court, as given by the clerk's certificate.

Several questions arose as to this recount:

(*a*) As to the legal preservation of the boxes.

The majority report says:

> Another objection to the consideration of the recount urged by contestee is that the time between the election and the recount was some four months, and that the time for the preservation of the boxes by the clerk, under the laws of Louisiana, had expired. Section 13 provided in substance that the clerk of the court should safely keep the ballot boxes, after delivery to him by the officers of election, until after the next regular term of the district or criminal court for said parish. Contestee urges that the next regular term of the district or criminal court for the parish of Iberville was in January, 1877,

two months after the election, and that after the lapse of said term, the law no longer obligating the clerk to safely keep the ballot boxes, a recount of such boxes or their contents was illegal. The facts are that the time for holding the term of the regular district court was in January, but no court was held. There were two claimants to the office of district judge. One of these claimants (and the one, too, who was afterwards declared not to be the judge) went through the form of holding court; but no business whatever was transacted, and no regular term of court was held until the month of April. But, granting the fact that the term of court had elapsed between the time of the election and the recount, would that fact abridge the power of Congress in determining the rights of claimants to seats in its body to take the ballot boxes, no matter what might be the lapse of time; and if satisfied that the boxes had not been tampered with, and that the ballots contained in them were the identical ballots cast at the election, to open the boxes, count the ballots, and decide in accordance with the result of said recount? But the committee find, after thorough examination, that contestant could not have obtained the recount at a date earlier than it was effected. The election took place November 7, but the Wells-Anderson returning board did not declare any result until nearly two months afterwards. After that declaration the contestant gave notice of contest, which was given within the time required by law. During this time, and until the Nicholls government was established in Louisiana, the state of affairs was such that few or no courts transacted business, and it was not until the month of February that the board of canvassers under the Nicholls government declared any results. And thus awaiting final action of these two boards of canvassers were any proceedings by contestant delayed; and, further, the answer of the contestee to notice of contest bears date "Washington, D. C., January 20, 1877," and appears to have been served some time thereafter. Thus the recount, which took place early within the first forty days, granted the contestant by law was effected at as early a date as the case permitted.

In the course of the debate it was admitted that the fact as to Judge Cole being an usurper, and in fact holding no real court, was known rather "from the general knowledge of the condition of affairs in Louisiana" than from any evidence in the record of the case.[1]

The minority views, presented by Mr. J. N. Thornburgh, of Tennessee, said:

The annexed certificate from the clerk of the district court shows that the first term of court was held January 1, and the said recount was not had till March. After that the clerk is not responsible for safe-keeping of either boxes or ballots, and no law requires that the ballots shall be longer preserved, and it is no offense to tamper with or change the ballots after that time.

In the debate[2] this question was discussed at considerable length, it being urged on behalf of the majority that the object of the law was not to keep the ballots until a certain date; but until they could be examined if need be at a session of court. The minority insisted that it must be concluded that after the date set the clerk would not feel himself responsible for the safe-keeping of the ballots.

(*b*) As to the authority by which the recount was ordered.

The minority views say:

This recount was ordered to be made by James Crowell, parish judge of Iberville, on an application made to him by contestant in an oral argument, as contestant says in his brief. It was had against the protest of the contestee's representative, and the judge gave his authority for so ordering the recount, section 123, Revised Statutes of the United States. Neither that section or any other law of the United States or of the State of Louisiana authorizes this recount.

This point was further discussed in the debate[3] the authority of the judge to order the recount being denied by the minority. The majority contented them-

[1] Speech of Mr. Clarkson N. Potter, of New York, Record, p. 1226.

[2] Record, p. 1219.

[3] Record, pp. 1218, 1219.

selves with holding that the conduct of the recount was unquestioned, whatever might be the authority to order it.

(*c*) As to the custody of the ballots preceding the recount.

The majority report, after discussing the evidence, concludes:

> The rules of law governing recounts of ballots are plain and positive. Before courts or legislative bodies will give weight to results of recounts of ballots it must be shown absolutely that the ballot boxes containing such ballots had been safely kept; that the ballots were undoubtedly the identical ballots cast at the election; and when these facts are established beyond all reasonable doubt, then full force and effect are given to the developments of the recount. After full examination of the evidence your committee found no difficulty whatever in arriving at the conclusion that in this case the ballot boxes had been preserved; that they had never been tampered with, and that the ballots found in them were the identical ballots cast at the November election.
>
> Suffice it to say that the evidence is conclusive that the ballot boxes had been safely kept, and had not been tampered with between the time of the election and that of the recount.
>
> Such being the case, the presumption follows that the ballots found in the boxes when the recount was made were the identical ballots cast at the election.

The minority deny that the evidence shows conclusively that the boxes were properly kept.

(*d*) While both parties were represented on the election boards in the various precincts, it would seem impossible that the official count could be so far wrong as the recount showed. This was explained by the fact that a member of sitting Member's party who controlled the distribution of many tickets put forth a deceptive ballot containing either contestant's name or a blank, and that many of these tickets were counted as straight tickets.

As a result of their conclusions, the majority of the committee reported resolutions seating contestant. The minority held that sitting Member should retain the seat.

The report was debated at length on February 19 and 20, 1878[1] and on the latter day a motion to substitute the proposition of the minority was disagreed to, yeas 115, nays 139. Then the resolutions of the majority were agreed to without division. Mr. Acklen, the contestant, thereupon took the oath.

925. The South Carolina election case of Richardson v. Rainey in the Forty-fifth Congress.

Irregularities found to be infractions of directory provisions of law do not justify rejection of the poll.

Discussion as to whether the distribution of United States soldiers in the neighborhood of the polls justified rejections of returns for intimidation.

Discussion as to whether or not undue influence must be shown to have affected the result materially to justify rejection of the returns.

Discussion of social, business, and religious influences as forms of intimidation in elections.

Over half the vote being rejected because of undue influence, the committee, in an inconclusive case, favored declaring the seat vacant.

On October 15, 1877,[2] at the organization of the House, objection was made to

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[1] Record, pp. 1173, 1211–1229; Journal, pp. 475–477.

[2] First session Forty-fifth Congress, Journal, pp. 12, 13, 15.

the administration of the oath of office to Mr. Joseph H. Rainey, of South Carolina; but on October 16 the House voted that Mr. Rainey be sworn in, and he accordingly took the oath.

On May 18, 1878,[1] Mr. E. John Ellis, of Louisiana, from the Committee on Elections, submitted the report of the majority of the committee in the case of Richardson *v.* Rainey.

Sitting Member had been returned by an official majority of 1,528 votes. Contestant made various allegations, from which the following questions arose for the consideration of the committee:

(1) Numerous objections to the counting of various polls. The majority report thus enumerates and discusses them:

> A failure of one or more precinct officers to take the oath of office prescribed by law; a failure of one or more of the precinct officers to file the official oath in the office of the secretary of state; a failure to appoint a clerk of election according to law; a failure of the precinct officers to organize as a board; a failure to keep a poll list according to law; a failure to open the polls at the hour fixed by law; a failure of the clerk to take the oath of office prescribed by law; the fact that a ballot box contained more than one opening; the circumstance that but one United States supervisor attended the election; an adjournment of the polls during the day; a failure to keep a tally list; a failure to count the ballots immediately after the close of the poll; a failure to administer the oath prescribed by law to the electors; the fact that the poll list, ballot boxes, and statements of results were not delivered to the county canvassers by the chairmen of the precinct boards; the refusal of the county canvassers to entertain and decide upon protests presented by electors; the fact that the election was conducted by two instead of three precinct officers, and the fact that the county canvassers opened the ballot boxes when they canvassed the votes.
>
> These objections are most elaborately set forth and discussed by the contestant and the counsel for contestee. It will be observed that most of the objections relate to violations of the election law that are purely directory in their character. Their violation, if no fraud be shown to have resulted therefrom, can not vitiate an election. It is wholly different when mandatory provisions of an election law are violated. In the latter case the election is void.
>
> But the voter is not to be deprived of his right, and the citizens are not to lose the result of an election fairly held because of some unimportant omission of form, or of the neglect, carelessness, or ignorance of some election officer, or the failure to carry out some unimportant direction of the law. (Vide McCrary's Law of Elections; Cooley, Const. Limitations; Botts *v.* Jones, 1 Bartlett, 73; People *v.* Cook, 4 Selden, 67; Taylor *v.* Taylor, 10 Minn., 107; People *v.* Cook, 14 Barbour, 259; Barnes *v.* Adams, 2 Bartlett, 764; Blair *v.* Barrett, 1 Bartlett, 313; Cox *v.* Strait, decided in Forty-fourth Congress, and other authorities.)
>
> Your committee find that the irregularities complained of, even if true in every particular, are infractions of directory provisions of the law and are unaccompanied by proof of fraud, and ought not, therefore, to vitiate the election of themselves.

(2) It was objected that the presence of United States soldiers at the polls had prevented a free, fair, and peaceable election.

The governor of South Carolina had, on October 7, 1876, preceding the election which was held on November 7, 1876, issued a proclamation declaring certain irregular military organizations unlawful and commanding them to "abstain from all unlawful interference with the rights of citizens and from all violations of the public peace," and commanding them to disband. On October 17, 1876, the President of the United States issued a proclamation reciting that whereas it had been shown that "insurrection and domestic violence exist in several counties;" and

[1] Second session Forty-fifth Congress, House Report No. 806; 1 Ellsworth, p. 224.

whereas the executive of the State had made application for Federal aid, and that, therefore, he commanded all persons engaged in such unlawful and insurrectionary proceedings to disperse. Later the following order was issued:

WAR DEPARTMENT,
Washington City, October 17, 1876.

GEN. W. T. SHERMAN,

Commanding United States Army.

SIR: In view of the existing condition of affairs in South Carolina, there is a possibility that the proclamation of the President of this date may be disregarded. To provide against such a contingency, you will immediately order all the available force in the Military Division of the Atlantic to report to General Ruger, commanding at Columbia, S.C., and instruct that officer to station his troops in such localities that they may be most speedily and effectually used in case of any resistance to the authority of the United States. It is hoped that a collision may thus be avoided, but you will instruct General Ruger to let it be known that it is the fixed purpose of the Government to carry out the spirit of the proclamation, and to sustain it by the military force of the General Government, supplemented, if necessary, by the militia of the various States.

Very respectfully, your obedient servant,

J. D. CAMERON,
Secretary of War.

The majority of the committee cite much evidence to show that the presence of these soldiers, distributed at various points through the district, had the effect of preventing many colored voters from supporting contestant. The majority say:

There can not remain a doubt in the impartial mind that the sending of the troops of the United States into South Carolina and the uses made of their presence did produce a marked and controlling effect upon the result of the election, amply sufficient of itself to justify your committee in declaring the election null and void.

But even had no effect been proven, we are not prepared to say but that their very presence at the polling places, the mere fact of their being sent, without proof of effect, would of itself be sufficient to set aside and annul the election. Our English ancestors, from whom our laws and ideas of constitutional freedom are derived, have been wisely jealous of the slightest tampering or interference with an election by the Government, and especially through its armed forces.

The report then quotes the English statute, 100 years old, requiring troops to be moved out of any place where an election was to be held, cites Blackstone's Commentaries also to the same effect, and refers to a precedent of Parliament:

At an election held for member of Parliament for Westminster, over one hundred and thirty years ago, by order of three magistrates a body of English troops were marched up and halted in the churchyard of St. Paul, Covent Garden, very near the polls, where the balloting was proceeding. Upon being informed of this fact by the Speaker, the House of Commons passed unanimously the following resolution:

"That the presence of a regular body of armed soldiers at an election of members to serve in Parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this Kingdom."

And by the order of the House the three offending magistrates were arrested and brought to its bar and compelled to kneel, in which position they were reprimanded by the Speaker for the breach of English liberty in daring to procure the presence of troops at an election for member of Parliament.

The majority further say in their report:

But we are asked by contestee's counsel to go into a critical examination of the testimony and to endeavor to ascertain the exact results of the intimidating influences. He contends that undue influence in an election must be shown to have affected the result materially. In this he is in the main correct. In the entire district over 34,000 votes were polled. Only about 500 witnesses were examined, and many of these in regard to facts other than the subject of intimidation. It is impossible to tell the exact change produced by the intimidating influences, nor is it essential. It is sufficient that 300 witnesses,

white and colored, Democratic and Republican, and some of them men of the highest character, swear positively to the general widespread and powerful influence and change produced by the intimidating influences. McCrary's Law of Elections lays down the rule, page 326, which we regard as correct: "If the violence and intimidation have been so extensive and general as to render it certain that there has been no free and fair expression by the great body of electors, then the election must be set aside, notwithstanding the fact that in some of the precincts or counties there was a peaceable election." And in the Canada case, already quoted from, Justice Ritchie said, in delivering his opinion: "And though I have no means of computing or ascertaining the exact extent of the terror or undue influences, it was still, in my opinion, such and so great an interference with the freedom of the elections as demands that the election should be annulled." That these undue influences were general and powerful and caused the greatest change is admitted by the counsel for contestee, himself a Carolinian and a gentleman of great attainments.

The minority [1] deny that the Federal troops were a source of intimidation.

It is not claimed that the troops coerced, intimidated, or persuaded; that an officer or soldier did or said aught indicating a personal preference for one side or the other.

They were stationed usually, so far as the evidence discloses, out of sight, and in no case immediately at the polls; 250 or 400 yards are given as their nearest approach to the polls.

An officer and 29 men were divided between Sumter Court-House and Lynchburg, places 10 miles apart, in Sumter County.

As we have already stated, it is not alleged the soldiers did anything to influence the election; that is, committed any overt act. Located as aforesaid, it appears they were silent and passive spectators of the scenes, without expressing preference in the result of the election. And it is claimed these men coerced the colored voters to a support of the Republican ticket.

We grant their presence emboldened the theretofore despairing black man to dare to exercise a freedman's right and vote his choice.

The majority report advises us there was no violence before the troops came. We grant there was none, because terrorism had stamped out resistance, threatened starvation had crushed the souls of these men, and when the Federal soldiers appeared upon the scene, and it was understood the rifle clubs and saber clubs, while they would valiantly frighten negroes, did not want a conflict with Federal authorities, we assert, these freedmen to a great extent took courage to enjoy their highest privilege and right.

The proposition of the majority is, a police force detailed by the Federal authorities, that simply enables the citizen to enjoy his rights, is illegal, and renders that enjoyment illegal and void.

The proposition of the majority is, that a community terrorized into a course of involuntary action, or subjugated to the extent of being unable, through fear of violence, to take their lawful part in an election, if from the presence of troops they are relieved of their apprehension, and exercise their rights as electors, such exercise is illegal and void.

The minority also cite the law and the Constitution to show that the troops were properly sent to the State.

(3) It was objected by contestant that the colored militia of the State and the religious and social organizations of the colored people were also agencies of intimidation. The majority report charges that the process of intimidation—

by Republican organizations against colored Democrats was to be effected, first, by threatening, intimidating, and maltreating them, and terrorizing them by means of armed colored organizations, and, secondly, by bringing to bear upon them the fear of social and religious ostracism.

After condemning such modes of electioneering as against the principles of free institutions, and after citations from McCreary and Cooley, the majority continue:

The laws of the States and of the United States, the spirit of popular government, the laws and precedents of England and English courts all tend to the principle that the elector shall vote and vote

[1] The minority views were presented by Mr. Frank Hiscock, of New York.

according to the dictates of his judgment, untrammeled and uninfluenced by any improper influences. Not only has intimidation by violence and threats, or the presence of armed troops at or near the polls, or of armed men other than troops, and bribery, the promise of advancement, the treating of electors to influence their votes been held as causes that interfered with the freedom and purity of elections, but most of the States have laws which forbid courts to be held, or process served on election day, or militia musters to take place, accounting that these might be used as means of intimidation or of improper influence. A great English lawyer, who is standard authority upon the common law, has written that "it is essential to the very existence of Parliament that elections should be free; wherefore all undue influences on electors are illegal." (1 Blackstone, p. 177.) And in a recent case which arose in Canada Mr. Justice Ritchie said:

"The rights of individual electors are the rights of the public. The public policy of all free constitutional governments in which the electoral principle is a leading element (at any rate in the British constitution) is to secure freedom of election. * * * A violation of this principle is equally at variance with good government and subversive of popular rights and liberties." (Brassard et al *v.* Langevin, Supreme Court, Canada. Decided January, 1877.)

This case was one of controverted election. It arose from the county of Charlevoix, in which an election for member of the Canadian Parliament was held in January, 1876. The respondent was declared elected. His election was contested upon the ground that "undue" spiritual or religious influence had been exercised by the priests of certain parishes in the county, under the ninety-fifth section of the election act of 1874. The section is as follows:

"SEC. 95. Every person who, directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of, any force, violence, or restraint, or inflicts or threatens the infliction, by himself or by or through any other person, of any injury, damage, harm, or loss, or in any manner practices intimidation upon or against any person, in order to induce or compel such person to vote or to refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who by abduction, duress, or any fraudulent devise or contrivance impedes, prevents, or otherwise interferes with the free exercise of the franchise of any voter, or thereby compels, induces, or prevails upon any voter to give or refrain from giving his vote at any election, shall be deemed to have committed the offense of undue influence."

The proof was that the respondent was supported by all the priests of the Roman Catholic Church, and that from their pulpits one priest had declared that to vote against respondent and for his opponent "was a grave sin, a matter of conscience." Another priest characterized such a vote as a "mortal sin." Another said that with "that party (the party opposed to respondent) in power, we would wade in the blood of priests; that the horrors of the French revolution would be reenacted; that, to prevent these misfortunes, liberalism must be crushed by the people and the clergy." Another declared to his flock "that it was a sin to vote for the liberal party, and that at the hour of death those who voted for that party would regret it." Another said, "Whoever votes for Mr. Tremblay (the opponent of respondent) would be guilty of a grave sin, and if he died after so voting he would not be entitled to the services of a priest." There was no proof that respondent had incited these sermons. But the court had no difficulty in determining the question of agency, and said:

"Decisions in England, the election law of which is identical with ours, and those rendered in Ontario and Quebec, lay down the principle that every person who, in good faith, takes part in an election for a candidate with his consent, becomes ipso facto an agent of the candidate. Upon that point there can be no doubt; and the election of a prominent member of Parliament was annulled in consequence of the excessive zeal of his agents.

"All these sermons [said the court], accompanied by threats and declarations of cases of conscience, were of a nature to produce in the mind of a large number of electors of the county, compelled to hear these things during several consecutive Sundays, a serious dread of committing a grievous sin and that of being deprived of the sacraments. There is here an exerting of undue influence of the worst kind, inasmuch as these threats and declarations fell from the lips of the priest speaking from the pulpit in the name of religion, and were addressed to persons of little instruction, and generally well disposed to follow the counsels of their cure's. I can conceive that these sermons may have had no influence whatever on the intelligent and instructed portion of the hearers; nevertheless, I have no doubt but these sermons must have influenced the majority of persons void of instruction, notwithstanding that by reason of the secrecy

in voting by ballot it has not been possible to point out more than 6 or 8 voters as having been influenced to the extent of affecting their will. According to the testimony of over 15 witnesses, a very large number changed their opinion in consequence of this undue influence. I may here state that in like cases, to annual an election a large number of cases of undue influence by a candidate, or an agent, is not required and that one single case, well proved, suffices, although the candidate availing himself of it may have had an overwhelming majority."

Taking, the evidence as a whole, it appears clear that a general system of intimidation was practiced; that as a consequence undue influence was exercised and the electors did not consider themselves free in the exercise of their elective franchise. (Vide Mayo election case, 1857; Longford election case; Galway cases; case of county of Bonaventura.)

The principle of all the decisions in all these cases is that the priest must not appeal to the fears of his hearers, nor say that the elector who votes for such a candidate will commit a sin or incur ecclesiastical censures or be deprived of the sacraments. And the court annulled the election and declared it void.

The committee have quoted extensively from the decision in this case, inasmuch as the principle it lays down, as well as the principle of the authorities it cites, is applicable to some extent to the case at bar.

The majority report then goes on to say that the colored militia organizations were agencies for intimidation:

The evidence is clear that throughout the district, and in nearly every precinct of the district, these organizations existed. They were armed with the State arms for the most part, but many had private arms. They went to their political meetings with arms in their hands, and at many of the polling places they appeared on election day in organized force.

So intolerant were they against individuals of their own race who differed with them politically that they uttered against them the most terrible threats, and, in some cases, resorted to actual violence. They denied the right of free speech; they tore tickets from the hands of voters and substituted others; they interfered with the domestic peace of colored Democrats by persuading their wives to leave them, and left no device that could intimidate unemployed to coerce men of their own color into voting the Republican ticket. Evidence clear and indisputable is found in the record of this state of facts, and of the widespread influence which this mode of electioneering produced in the minds of the colored voters.

It will not suffice to meet these facts by saying that both sides resorted to this system of tactics. The record does not sustain the charge of intimidation generally against the Democratic party of South Carolina. The proof is clear that they pursued the policy of conciliation for the most part. Especially was this the course that characterized the campaign of contestant.

The report further cites evidence to show that the religious and social organizations of the colored people joined in this course of intimidation. The preachers threatened to turn out of the church those who voted for contestant. Social ostracism was also invoked.

The minority, after examining the evidence, say in their views:

There is nothing in the record to show either social ostracism or fear was preventing the colored voters from supporting Hampton. On the contrary, the "policy" we have described, according to the evidence of General Hampton, according to all the witnesses called by the contestant, according to the majority report, was "conciliating" them, and they were promising to support the Democratic candidates until Governor Chamberlain's proclamation appeared.

It is true that there were some members of the State militia still in possession of State arms, but there is nothing in the case evidencing, an improper use of them.

We submit there is nothing in this case to justify the expulsion of Mr. Rainey upon the score of intimidation or social ostracism.

The minority further call attention to the following:

The Democratic committee called upon the supporters of General Hampton to adopt the following pledges:

"SUMTER, S. C., *October 25, 1876.*

"The Democratic executive committee recommend the adoption of the following pledge:

"J. D. BLANDING,
Chairman Democratic Executive Committee.

"A. W. SUDER, *Secretary.*

"We, the undersigned, citizens of Sumter County, hereby pledge ourselves (each for himself) that we will not assist or extend any favor to any person of either race or color who shall vote for the Republican State or county ticket at the election on 7th November next; and that we will, in all business transactions, give the preference to such persons as shall vote the Democratic State and county ticket at said election."

"EXHIBIT A."

"DARLINGTON COUNTY,———TOWNSHIP:

"We hereby pledge ourselves to each other that we will not rent or let lands or houses, nor advance supplies on credit, to any person who shall vote the Radical ticket at the election to be held on the 7th of November next; nor will we employ as a mechanic any person who shall so vote at said election, or keep in his employment those who do so vote; nor will we employ in any capacity such persons as may be designated by the executive committee of the Democratic party for this county, in a list to be furnished by said committee."

This, in the opinion of the minority of the committee, was sufficient when coupled with the fact that armed bands of contestant's supporters were riding about the country, to justify intolerance among colored men toward their fellows who supported the oppressors of their race.

(4) The majority report thus disposes of the claim of contestant that he should be declared elected:

But contestant, whose pacific and manly course during the election, as shown by the record, and whose consummate ability in the management of his cause, or rather the cause of his people, has won the highest respect and sympathy of the committee, sets forth and shows that the intimidating influences set on foot by the Republicans did not reach or affect the entire district; that troops were sent into but four of the eight counties that constitute the district, and he contends that the intimidated counties and precincts should be thrown out and the peaceful counties and precincts counted, which, being done, would elect him and entitle him to the seat. And he cites the cases of Wallace *v.* Simpson, Sheldon *v.* Hunt, Sypher *v.* St. Martin, Darrall *v.* Bailey, 2d Bartlett, pp. 699 to 754.

It is very true that these cases were decided by a Republican Congress. They do lay down the doctrine contended for by the contestant. Party expediency might now suggest that the Republican party that made these precedents ought to be bound by them. If we should treat these decisions as containing the true doctrine of elections, if we could regard them as other than expressions of partisan intolerance, there would be no difficulty in reporting a resolution awarding the seat in contest to the contestant.

But in the first place the undue and illegal influences exercised by the Republican upon the colored people through their social, religious, and semimilitary organizations extended nearly throughout the entire district; and in the next place we find troops sent into four counties the aggregate vote of which is 21,691, while in the other four weaker counties, where there were no troops, the vote was but 12,987. To exclude 21,691 votes out of a total of 34,678 votes and count the residue and declare a result would be to permit an election by a minority. This is admissible, it is true, where the election was fair, and all had an opportunity to vote as they chose and failed only through apathy. Such is not the case here where 34,678 voters cast their ballots. But a very large portion of these, sufficient to have changed the result, cast their ballots under such undue and illegal influences as to utterly destroy the fairness and freedom of the election. Under such circumstances we can not admit that it would be right to permit a minority to elect. In the case of Sypher, cited above, the report of the committee which laid down the doctrine of minority elections was expressly overruled, vide McCrary's Law of Elections, pp. 324, 325, 326.

The true rule in such cases seems to your committee to be, that a minority can only elect where the majority, with full opportunity and facility to vote as they choose, unrestrained and untrammeled by undue influence, refrained through apathy or neglect from voting. But when undue influence, terrorism, intimidation, or illegal influences have been brought to bear upon the great mass of the voters, and they have been influenced, and have voted subject to these influences, although the full and accurate extent of such influence can not be arrived at, the entire election should be voided, although a minority may have voted, free from such influences, and for this reason: The entire people in such case evinced a desire to vote. The right of the majority to rule is fundamental. In such a case the will of the majority is defeated, not from apathy, but from undue influence. The true remedy is to void the election, remove the undue influences, and give the majority that opportunity to rule which is its undoubted right.

In accordance with the reasoning of their report the majority of the committee recommend the following:

Resolved, That there was no free, fair, and peaceable election in the first Congressional district of South Carolina in November, 1876, and that neither Joseph H. Rainey nor John S. Richardson is entitled to the seatr from said district in the Forty-fifth Congress by virtue of said election, and that said seat is hereby declared vacant.

The minority favored resolutions confirming the title of sitting Member to the seat.

On June 13[1] the report was called up, but the House refused to consider it. Again, on June 17, the House refused to consider—yeas 103, nays 126. So Mr. Rainey remained in possession of the seat.

926. The South Carolina election case of Tillman *v.* Smalls in the Forty-fifth Congress.

The removal of the poll from the place prescribed by law was a violation of a mandatory provision justifying its rejection.

Discussion as to whether or not the mere presence of United States troops near the polls constituted undue influence justifying rejection of the return.

Nearly half the votes of a district being rejected, the Elections Committee, in an inconclusive case, favored a declaration that the seat was vacant.

On June 8, 1878,[2] Mr. Thomas R. Cobb, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the South Carolina case of Tillman *v.* Smalls.

The sitting Member had been returned by an official majority of 1,438 votes, but the correction of an admitted error increased this to 1,738 votes.

Contestant attacked this election on the same general grounds urged by the contestant in the case of Richardson *v.* Rainey.

Certain peculiarities in this case may be noticed, however:

(1) "At one precinct," says the majority report, "the law in its mandatory provisions was clearly violated by the removal of the voting place a half mile from the place where it had been fixed by the commissioners of election under the law. And this was done by the two Republican commissioners without the consent of the other member of the board, who was a Democrat. The legal notice of the election had been published for about two weeks in the county newspapers, informing

[1] Journal, pp. 1285, 1286.

[2] Second session Forty-fifth Congress, House Report No 916.

the public that Edgefield, box No. 2, would be held at the county treasurer's office. The Democratic manager and supervisor of the election at box No. 2 had no notice of the removal until the night before the election. This illegal act upon the part of Republican election officers was done, as the evidence shows, for the fraudulent purpose of enabling colored Republicans to repeat their votes. This poll should be thrown out." The majority base this conclusion on section 114 of McCrary's Law of Elections.

The minority views, presented by Mr. John T. Wait, of Connecticut, denied that the voting place had been changed without proper notice.

(2) The majority report quotes the report of the adjutant-general of the Army to show that Federal troops were stationed at polling places where were cast an aggregate of 15,622 votes, or nearly one-half of the entire number of votes polled in the district. The majority say:

> Your committee believe that under the rules of law to which we have referred, and the principles which should govern in the decision of such cases, that the election at these 22 precincts where troops were at or near the polls on the day of election should be declared void. * * * If your committee is correct in its conclusions, and the votes of these 22 precincts are thrown out, no one will contend that this election ought to stand. It will not be insisted, we presume, that when nearly one-half of the votes cast at an election for a Member of Congress are thrown out for the causes herein alleged, that the remainder of the votes should be looked into and the election determined by them. For, as in this case, when the evidence shows that a large class of the voting population which voted at other precincts in said district than those at which troops were stationed were more or less influenced by the presence of said troops within the county where they so voted, there is no way by which you can determine the will of a majority of the voters. Therefore the entire election should be set aside.

The minority of the committee call attention to the fact that the exclusion of all the precincts where troops were stationed would still leave a majority of 452 votes to sitting Member. But the minority decline to admit that the returns of the precincts in question should be thrown out, saying:

> Circumstantial evidence tending to show intimidation would be competent, and evidence that troops were stationed in the vicinity of the polls would be competent as tending to show intimidation; and where this is shown as one fact tending to prove intimidation, less evidence aliunde will be required to establish the fact that intimidation actually existed. But intimidation and violence to such an extent as to set aside an election can not be presumed in this country from the simple fact of organized bodies of troops being stationed near the polls. But if this evidence was followed by other evidence showing that but a portion of the vote in such precincts was polled, or that a considerable number of the electors did not vote by reason of fear of military interference, a case would be presented where the House, to say the least, would have to carefully consider the question whether the election must be set aside on account of intimidation.

The majority of the committee in this case, as in the case of Richardson *v.* Rainey, reported a resolution declaring the seat vacant; but the case was never reached in the House and Mr. Smalls continued to hold the seat.

927. The California election case of Wiggington v. Pacheco in the Forty-fifth Congress.

State canvassers being a court of record, their signed record, approved by the State courts, gives prima facie title, although at variance with their formal proceedings.

Ex parte affidavits were not admitted to impeach the legal record of canvassing officers in determining prima facie title.

On October 17, 1877,[1] the House decided that Romualdo Pacheco of California, should be sworn in as a Member, and that the papers in his case and that of the contestant should be referred to the Committee of Elections.

On January 31, 1878,[2] Mr. John T. Harris, of Virginia, submitted the report of the majority of the Committee on Elections in the case of Wiggington *v.* Pacheco. The official returns had given to sitting Member a majority of one vote over contestant. Several questions of law arose.

(1) As to the prima facie title: By the law of California the returns of the various voting places were returned to the county clerk at the county seat, where they were required to be canvassed by the board of supervisors. The report says in regard to the functions of this canvassing board:

This board of supervisors is not a board simply created for the purpose of canvassing the returns of an election, and which ceases to exist upon that duty being discharged; but it is an official body of a continuing character, required to keep a record of its proceedings, holding sessions day after day—on one day signing and attesting the proceedings of the day next preceding, etc. Its character is sufficiently shown in the opinion of Mr. Justice Rhodes, at the beginning of that opinion, on page 34, part first, of the record. As to this there can be no doubt, and it is an important fact to be noted.

The duties of this board touching the matter of elections are thus defined by the statute:

"SEC. 4046. Subdivision 3. To establish, abolish, and change election precincts, and to appoint inspectors and judges of elections, canvass all election returns, declare the result, and issue certificates thereof.

"SEC. 4030. Subdivision 1. The clerk of the board must record all the proceedings of the board.

"SEC. 4029. The clerk of the county is ex-officio clerk of the board of supervisors. The records must be signed by the chairman and the clerk. The clerk must be paid such compensation as is provided by law in full for all services as clerk of the board."

This board having this jurisdiction, the statute further provides as to the manner of canvassing the returns in the following sections:

"SEC. 1281. The canvass must be made in public, and by opening the returns and estimating the vote of such county or township for each person voted for, and for and against each proposition voted upon at such election, and declare the result thereof.

"SEC. 1282. The clerk of the board must, as soon as the result is declared, enter on the records of such board a statement of such result, which statement must show—

"1. The whole number of votes cast in the county.

"2. The names of the persons voted for and the proposition voted upon.

"3. The office to fill which each person was voted for.

"4. The number of votes given at each precinct to each of such persons, and for and against each of such propositions.

"5. The number of votes given in the county to each of such persons, and for and against each of such propositions."

Here, then, we have an official board, having a jurisdiction defined by law, required to keep a record, which is to be signed by its chairman and the clerk.

The supreme court of California, in the litigation over this very case, said of this record thus made (see p. 34 of the record in this case):

"A record kept and authenticated in the manner provided by those two sections (4030, 4029) is the evidence of the proceedings of the board, and is the only evidence thereof in cases where the proceedings are required to be entered of record."

Then the statute further provides that this record shall be certified to the secretary of state, as will appear by the following sections:

"SEC. 1344. The clerk of each county, as soon as the statement of the vote of his county at such

[1] First session Forty-fifth Congress, Journal pp. 24, 25.

[2] Second session, House Report No. 118; First Ellsworth, p. 5.

election is made out and entered on the records of the board of supervisors, must make a certified abstract of so much thereof as relates to the vote given for persons for Representative to Congress.

"SEC. 1345. The clerk must seal up such abstract, indorse it 'Congressional Election Returns,' and, without delay, transmit it by mail to the secretary of state."

And from the certified copies or abstracts of these records from the various counties the secretary of state makes his certificate to the governor, showing the person having the highest number of votes in the district.

The contestant claimed that in the county of Monterey the return of the clerk, which gave him 986 votes, should have given him 988 votes. In proof of this the contestant offered certain affidavits which the committee disregarded because they were ex parte.

But there existed as a part of the record in the case an affidavit, introduced by the sitting Member, from the county clerk, wherein that official set forth that the board of canvassers met, tabulated the returns for Congressman, giving contestant a total of 988 votes, ascertained the results for county officers, passed an order directing the clerk to issue certificates to said officers, and then adjourned sine die. About an hour after adjournment, and before the pencil minutes of the result had been transcribed on the records of said board of canvassers, the following occurred, as described in the affidavit of the clerk:

Mr. St. John, a member of said board, returned to the office and stated to me that he thought a mistake had been made in the vote for Congressman; that Mr. Scott and Mr. Carter only had 986 votes for Mr. Wigginton. We looked over the figures which I had made and found that they had been added correctly. I then gave to Mr. St. John a copy of my figures of the vote for Congressman, and suggested to him that he compare the same with the figures of the vote as the same had been kept by Mr. Scott, and said that he would in that way find out where or in which precinct the difference was, and if there was a mistake, we would correct it in the morning.

After supper that night I wrote up the minutes and transcribed the statement made in pencil to the minute book. On the morning of November 14 Mr. J. W. Leigh and myself were in the clerk's office. Mr. St. John came in and stated to me that the difference in the figures was in San Lorenzo precinct. I got the tally list from San Lorenzo precinct, and Mr. St. John, Mr. Leigh, and myself examined the same. We found that Mr. Wigginton had only received 27 votes, whereas the tabulated statement and the minutes, as they stood then, had allotted to Mr. Wigginton 29 votes in said precinct. The tally list was in all respects regular. The 27 was in marks in figures twice and written twice.

We all three felt fully convinced that Mr. Wigginton had received in the precinct only 27 votes, and the clerk had made a mistake in putting down 29. I then and there changed the vote, as entered on the minutes, from 29 to 27, and the total vote from 988 to 986, and thereafter, and on the same day, the chairman of said board signed the minutes.

That on or about the 15th day of November, 1876, I made an abstract of statement of so much of said vote as related to persons voted for for Representatives to Congress, and duly certified the same to the secretary of state of California; that said statement so certified as aforesaid only gave Mr. Wigginton 27 votes in said San Lorenzo precinct, and only gave him 986 in the county; that the minutes of said board, in relation to said vote, have not been changed since the same were signed by the chairman as aforesaid; that said minutes had not been changed since I made and forwarded the abstract as aforesaid; that the minutes of said board now show 27 votes in San Lorenzo precinct and 986 votes in the county for Mr. Wigginton, and that said abstract of statement, so forwarded as aforesaid, contains a full, true, and correct statement of the vote for Representative of Congress, as the same appears entered in the records of said board of supervisors at the present time.

The committee thus discuss the statement of the clerk:

From this it will be seen that the 2 votes in question occurred in putting down the vote of San Lorenzo precinct; that in making a pencil memorandum, to be transcribed to the record, the clerk put down for contestant 29 votes, and afterward changed it to 27 votes in the manner described in the affidavit, and for the reasons therein set forth.

It must be borne in mind that the contestant nowhere attempts to prove, in the manner pointed out by the statute in reference to contested elections, that he received 29 votes in San Lorenzo precinct. He relies upon the evidence disclosed in the mandamus proceedings in the supreme and district courts of California to prove that the count made by the board of supervisors showed that he received 29 votes in that precinct. The president of the board and the clerk having signed a record showing only 986 votes in Monterey County for contestant, and this record having been duly certified to the secretary of state, and the supreme court of California having decided, after a careful examination of all the facts as they appeared in contestee's petition and contestant's answer, that the record thus certified to the secretary of state must stand, under the laws of California, until set aside or shown to be erroneous by a contest, under the statute in such cases made and provided, your committee are of the opinion that the truth or falsity of the clerk's return is not put in issue in this contest, and that the record thus certified by the clerk in the manner required by the law of California must stand. If contestant had felt himself injured by that record it was his duty and privilege to show its falsity in the manner pointed out in the statute.

The committee contend that the record "imports verity," although they say—

We do not contend that the committee or the House can not go behind it and ascertain the real facts; but we do contend that it must be presumed to be correct until the contrary is proven; and it is incumbent on the contestant to prove that it is not correct.

This proof contestant had not submitted in a satisfactory manner. The minority of the committee in their views announce their concurrence in this portion of the report; but Mr. William M. Springer, of Illinois, who signed the report of the majority, filed dissenting views giving reasons why the vote should be counted as actually canvassed rather than as returned by the clerk.

928. The case of Wiggington v. Pacheco, continued.

The vote of a person residing without a precinct was rejected.

As to the degree of evidence required to justify rejection of a vote for disqualification on account of residence.

A person does not acquire a legal residence in a place by being stationed there while in the military service of the United States.

(2) Questions of law arose as to the qualifications of certain persons who voted either for contestant or sitting Member:

(a) The majority of the committee rejected the vote of Charles Gilbert, who they thought undoubtedly voted for sitting Member, because he resided for thirty days preceding the election at Alvah Mitchell's house, and Alvah Mitchell was not allowed to vote in the precinct because he did not live therein. A witness swore that he knew the line and that the Mitchell house was not in the precinct.

The minority quote the testimony, which did not attempt to fix Gilbert's residence except in connection with living in the Mitchell house, and say:

But this is not sufficient to prove residence at Mitchell's house. The rule of law on this subject is this:

"Nor has the mere statement by a witness that a voter was or was not a resident, without giving facts to justify his opinion, been considered sufficient to throw out such a vote. The testimony shows a number of instances where a witness would state positively the residence or nonresidence of a voter on some theory of his own, or some mistake of fact, when other testimony would show with entire clearness that the vote was legal."

What constitutes a legal residence is generally imperfectly understood by witnesses. It is not sufficient for a witness to say that a man resides in this or that place, but facts should be given to show that the place named was the actual legal residence. It is very easy for witnesses to mistake the place

where a man may be staying temporarily for his actual residence; or, in other words, to speak of the place where he may be temporarily at work as his residence, his home, or where he lives. This kind of evidence is not and never should be regarded as sufficient to prove a man an illegal voter, and hence we contend that this evidence is wholly insufficient to prove Gilbert to have been an illegal voter.

(*b*) The majority set forth a second question, as follows:

Charles Waterman voted at Mayfield, Santa Clara County. He was a single man. He lived in Mayfield four or five years. Six or eight months before the election he sold his interest in the hotel business; said, "the people of Mayfield might go to thunder; he wanted nothing more to do with them, and left there. He said, "he left this town for good." He took employment in a circus, and traveled from place to place in California and Oregon. He returned to Mayfield on the morning of the election. His vote was challenged. He swore it in, and left the town on the same day. It is conclusively shown that he voted for Mr. Pacheco. The law of California says, "that place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning." Waterman having left Mayfield "for good," as he declared when he took his departure, if he should afterward conclude to return, he must acquire his residence again the same as if he had never resided in the place. Under the law of California, and by his own declaration, he was not a resident of the precinct in which he voted. His vote must be rejected.

The minority strongly dissent:

There is absolutely nothing to indicate any purpose on his part to change his residence, other than the statement of a witness that he said he left this town "for good" when he went with the circus in the spring. To permit this loose kind of testimony, an attempted repetition of what a person said eighteen months before, to have the effect to disfranchise a voter, and perchance to determine the right to a seat in the House of Representatives, will not do. Such a precedent or rule can only work mischief. Such testimony is considered by courts and authors to be the most unreliable and least worthy of consideration, and for reasons which are too familiar to need to be repeated here. Waterman, as before stated, was challenged as a voter. He was sworn and interrogated touching his right to vote. He knew where his residence was, what his intentions were when he went away with that circus, and upon his sworn statements, coupled with the fact that notoriously he had been a resident there for years, his vote was received. Now it is proposed by the majority to say that that was an illegal vote, with no other evidence to warrant it than the statement of a witness, made eighteen months after he professed to have heard it, that Waterman said about the time he went away with the circus that he was going "for good."

If this man's vote can be held to be illegal, it will be the declaration of a principle that will practically disfranchise hundreds of men who temporarily leave their homes to follow pursuits requiring them to travel from place to place. Such men habitually go home to vote, especially at Presidential elections. They will travel hundreds of miles to exercise that privilege, and are too honest to vote where they can not legally do so. This is manifestly one of this class of cases, and there are others like it which appear in this record.

(*c*) The vote of Moses Atkinson also caused division in the committee, as he divided his residence between a ranch and a hotel, and this raised a question as to the words in the statute as to residence of one who came into a precinct for "temporary purposes only."

(*d*) The law [1] of California provided:

A person must not be held to have gained or lost residence by reason of his presence or absence from a place while employed in the service of the United States or of this State.

F. C. Kelley, in the signal service of the United States Army, came to Campo in March, 1875, in the course of that service, and voted on November 7, 1876.

[1] Art. II, sec. 4, of California Const. of 1879 has a provision like this.

He had never been to California until he went there in the United States service. The report says:

Aside from the statutory provision, the well-recognized rule of law governing in cases of this kind is this: "That the fact that an elector is in the Army does not disqualify him from voting at his place of residence; but he can not acquire a residence so as to quality him as a voter by being stationed at a particular place while in the service of the United States. (People *v.* Riley, 15 Cal., 48; Hunt *v.* Richards, 4 Kans., 549; Biddle *v.* Wing, Clark & Hall, 504; McCrary, see. 41.)

The person in question, having gone to California in the military service of the United States, his legal residence remained at the place of enlistment, and he could not acquire a residence in California while in that service. His vote must be rejected. He testified that he voted for Mr. Pacheco, and upon this point there is no dispute.

The minority did not dissent from this conclusion.

929. The case of Wiggington v. Pacheco, continued.

A person brought to a place. by committal to jail and followed by his family nevertheless did not acquire a voting residence.

Regular naturalization papers, attacked by parol proof that they were obtained by fraud, were held to justify the vote given by the bearer.

As to the degree of evidence required to prove the ballot of a disqualified voter who does not testify to his own vote.

It being impossible to prove how a disqualified voter cast his ballot, the vote was not deducted.

(*e*) A similar principle is invoked in the case of Pedro Parris:

Pedro Parris voted in Ventura precinct, Ventura County. On the 9th day of June, 1876, he was a resident of Ojai or Cañada precinct, in that county. Was there arrested, charged with grand larceny, and on the 14th day of June was committed to the county jail, in default of bail, to await the action of the grand jury. The jail was in Ventura precinct, where he voted. After he was committed to jail his family moved into Ventura precinct. He was released from jail within fifteen days prior to the election. His vote was challenged but sworn in. It is clear that he voted for Mr. Pacheco. The principle must be applied to this person as was applied to Mr. Kelley already referred to.

(*f*) Thomas S. Methvin, a former resident, had moved to Arizona, with his family, and the minority claim, that as he had gone there with no purpose of returning, he had lost his residence and his vote should be rejected. The majority, while admitting doubt as to residence, found doubt also as to how he voted, and declined to reject his vote.

(*g*) contestant asked that the vote of John Peterson be rejected because he was an alien, his naturalization papers having been fraudulently procured. The fact that the papers were fraudulently obtained appeared in testimony given by Peterson himself in the course of this contest. The majority say:

His papers were issued by a court of competent jurisdiction, were regular in every respect, and upon the evidence before the court at the time the court decided rightly. Your committee are of the opinion that papers issued in this manner can not be attacked in a collateral proceeding. And if this could be done, Peterson's oath would have little weight in such a contest, for he either swore falsely before the court or in the contest. He was corroborated before the court, but his evidence in the contest denying his citizenship stands unsupported.

The minority join issue sharply, saying:

Now, here is a clear, palpable case of procuring fraudulent naturalization papers. In the majority report the singular doctrine is asserted that because these papers were issued by a court of competent

jurisdiction and were regular on their face, they can not be "attacked collaterally;" that is to say, if, by means of perjury, a man can commit a fraud upon the court and upon the law, and thereby get his papers, he can get the benefit of that fraud, and when he presents himself as a voter his vote must be received. Just what is meant by the majority by saying that the papers can not be attacked collaterally is not very clear. We can conceive of nothing that can be meant except that somebody would have to go into court and in a direct proceeding set aside the papers for fraud. We can not believe that this House will ever indorse such a preposterous doctrine. The rule of law is stated by McCrary, section 21, just the reverse of what is here ruled by the majority. Parol evidence is competent to prove the fraud, and when it is proven the vote is rejected. This was dearly an illegal vote for Wigginton and must be rejected.

(3) Certain questions arose as to how sundry voters cast their votes, it being essential to determine from whom to deduct the illegal votes.

(*a*) As to Charles Gilbert, a witness testified that Gilbert always said he was a Republican, asked for a Republican ticket, took one, folded it as the law required, and, in witnesses's "honest belief," voted it. The majority say:

In the absence of the voter's own evidence, it would be difficult to prove more certainly than is done in this case for whom a person voted. A person can not be compelled to state for whom he voted; and the Supreme Court of the United States has expressly decided that where a witness can not be compelled to answer he need not be called. (6 Peter's Repts., 352, 367.) But Mr. Pacheco might have called the voter, and if he had not claimed his privilege he could have made it clear for whom he did vote. Mr. Pacheco not having done so, nor having shown his inability to procure his deposition, we may infer that Gilbert, if produced, would have corroborated the witness whose deposition is in the record. Gilbert did not reside in the precinct where he voted, and his vote must be rejected.

The minority dissent.

Again, this evidence does not prove that Gilbert voted for Pacheco. The substance of the evidence is that he associated with Mitchell, a Democrat; that he took a Republican ticket and folded it up, and the witness says he honestly believes he voted, although no witness testifies that he did vote.

The logic of the majority on this subject in respect of this vote is, to say the least, singular. There is an evident feeling that the proof is weak and needs propping to make it stand, and this singular argument is presented: "The contestant could not prove how the voter voted any better, except by calling him as a witness; but if he called him as a witness, he was not bound to testify for whom he cast his vote. If he could not be compelled to answer, he need not be called." Then the majority proceed to say: "But Mr. Pacheco might have called the voter, and if he did not claim his privilege, he could have made it clear for whom he did vote." And not having called him, the inference is drawn that Gilbert would have corroborated the witness whose deposition is in the record. It is unnecessary to comment on this. It is quite as fair to infer that, from the fact that contestant did not call Gilbert, he knew that Gilbert would not corroborate the other testimony as to residence or voting, and it is certainly quite as incumbent on the contestant to produce the voter as a witness as upon the contestee—more so, indeed, for on the contestant rests the onus.

Hence we say that there should not be deducted from Pacheco a vote on account of Charles Gilbert.

(*b*) The minority held that the evidence did not show for whom J. A. Scott voted, and that for this reason, as well as the reason that his residence was established, urged that his vote should not be deducted. He was on the register of voters, and the minority held that the evidence was not sufficient to show that he was not a legal voter.

But the majority held otherwise.

1. He was not a legal voter. It was stated in the evidence that he was a Republican, and was "voted" by those who were working for Mr. Pacheco. Mr. Scott's deposition was taken by Mr. Pacheco's attorney. He was not asked how he voted. The proof that he voted for Mr. Pacheco is sufficient to shift

the burden upon the party seeking to sustain his vote, and inasmuch as the elector was produced and sworn and no effort was made to show for whom he voted, it may be assumed from all the evidence that he voted for the sitting Member. (McCrary, secs. 293, 294; Cushing's American Parliamentary Law, secs. 199, 210.)

(*c*) An issue was joined as to how Jesus Yorba voted. The majority say:

Jesus Yorba voted in San Diego, but was a resident of Los Angeles. It is alleged that he voted for Mr. Wigginton. It is proven that he had not resided in the precinct where he voted thirty days previous to the election. But the evidence is conflicting as to the candidate for whom he voted. Yorba, was a Democrat and went to the polls and voted with one Angle Smith, also a Democrat. Yorba was what is called "a native Californian," and Smith was a half-breed American and Californian. It was proven that the native Californians, as a class voted for Mr. Pacheco, including those who claimed to be Democrats, and were unwilling to acknowledge that they would vote for a Republican. And one witness gave it as his opinion that Jesus Yorba, voted for Mr. Pacheco. In the midst of this conflicting evidence it is not certain for whom he did vote. His vote, although illegal, can not be deducted from the vote of either of the parties. (Record, pp. 99, 100, 101, 104, 107.)

The minority contended:

The proof is that he was a Democrat and was voted by Angle Smith, a strong Democrat, who was actively supporting Wigginton, and electioneered for Wigginton all day. According to all rules on the subject this would be sufficient to establish that he voted for Wigginton. Certainly, according to the ruling of the majority in some of the cases presented by the contestant, it is amply sufficient. The reason given by the majority for holding that the proof will not warrant finding that he voted for Wigginton is that he was a native Californian, and it is asserted that they as a class voted for Pacheco. But that will not suffice, for it does not appear that they as a clam we Democrats. If that were clearly proven, the proposition would not be without some force. But even then it is fully answered by the fact that Angle Smith, who was a Democrat, who voted for Wigginton and electioneered for Wigginton and went to the polls with Yorba, was one of these same natives—a half-breed American and Californian.

This is an illegal vote for Wiggington, and should be deducted.

(*d*) Witnesses testified that Gustave O. Perret, who voted without being naturalized, was in consultation with Democratic leaders just before he cast his ballot, that a distributor of straight Democratic tickets gave him his ballot, but could not swear that he cast that ticket. The minority, without arguing the question, held that this vote should be rejected from among the votes credited to contestant.

The majority report contended that while there was doubt about Perret's right to vote, it was not shown for whom he voted.

930. The case of Wigginton v. Pacheco, continued.

The entry of the fact of challenge on a ballot by election officers was not held to be a distinguishing mark justifying rejection of the ballot.

Discussion as to what constitutes a distinguishing mark when made by the voter on his own ballot.

Violation of a law that no tickets should be folded or exhibited near the polls did not invalidate the election.

A voter may not, by subsequent oral testimony, contradict the plain expression of the ballot, although circumstances corroborate the testimony.

Ex parte affidavits were not admitted, even to prove lost testimony valid in form.

(4) As to distinguishing marks on ballots, certain questions arose.

(*a*) The majority thus set forth a position from which the minority do not dissent:

The law of California on the subject of marked ballots is as follows:

"SEC. 1206. When a ballot found in any ballot box bears upon the outside thereof any impression, device, color, or thing, or is folded in a manner designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected."

There were six ballots voted for Mr. Pacheco upon which the judges of election indorsed the names of the voters and the words "Challenged because not in the precinct thirty days—challenge disallowed," and then signed one or two names of the inspectors of the election. While the strict letter of the law would exclude these ballots, yet the spirit of the law is evidently otherwise. If the voter had placed this indorsement upon the ballot, or any mark whatever by which it could be distinguished from other ballots, they should be rejected. The law was made to protect the voter, and not to disfranchise him.

(b) In a similar case the majority say:

George M. Clark voted for Mr. Wigginton at San Diego. He wrote his own name on the bottom of the ticket with a lead pencil. (Record, pp. 100–105.) The law of California in reference to marked ballots is as follows:

"SEC. 1206. When a ballot found in any ballot box bears upon the outside thereof any impression, device, color, or thing, or is folded in a manner designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected.

"SEC. 1207. When a ballot found in any ballot box bears upon it any impression, device, color, or thing, or is folded in a manner intended to designate or impart knowledge of the person who voted such ballot, it must, with all its contents, be rejected."

These provisions were evidently intended to secure to the voter absolute secrecy as to his ballot, and to place it within his power to vote a ballot which could not be distinguished by the election officials, the challengers, or outsiders from any other ballots that were being voted. Section 1206 relates wholly to marks on the outside of the ballot, and can not be applied to the ballot in question, as it is conceded that this voter wrote his name on the face of the ballot. And it is very doubtful whether the strict letter of the other section (1207) applies to Clark's ballot. There was nothing on the face of the ballot "to designate or impart knowledge of the person who voted such ballot." The inspectors were not authorized to presume that Clark voted this ticket merely because they found his name upon it. If any presumption is to be indulged in, it is this: That the name written on the ballot was intended to be voted for, instead of the printed name next above it. Hence this ballot had nothing on it to designate or impart knowledge of the person who voted it. The person who voted it could identify it, and so could every voter identify his ticket if he had scratched one name and written another upon it. He would recognize his own handwriting. But the statute was not intended to place it out of the power of each voter to recognize his own ballot. It was intended to protect the voter in his right to vote a secret ballot. If there were any doubt as to the letter of the law, there can be none as to the spirit of it. There is no charge or suspicion of fraud, intimidation, or improper influences being exerted over the voter. It would certainly be perfectly legal for the voter to publish how he voted. The evidence in this case fails to disclose what was done by the inspectors with Clark's ballot. Nothing is said as to whether they counted or rejected it.

The minority take issue with this position:

This man wrote his name on his ballot for the express purpose of imparting knowledge of the fact that he voted that particular ballot. It is clear that under the statute of California that ballot should have been rejected. We quote the statute:

"SEC. 1207. When a ballot found in any ballot box bears upon it any impression, device, color, or thing, or is folded in a manner to designate or impart knowledge of the person who voted such ballot, it must, with all its contents, be rejected."

The evidence that he voted for Wigginton is distinct and emphatic. It was a marked ballot, Clark having written his name on it, so that it could be known that he voted it.

The following uncontradicted testimony makes these things clear:

"Q. Do you know George M. Clark, of the first ward?—A. I do.

"Q. Please state whether or not George M. Clark voted at the first ward precinct in this city on the 7th November, 1876.—A. He did.

"Q. For whom did he vote for Congressman?—A. For P. D. Wigginton.

"Q. If there was any mark upon his ballot at the time he voted which would distinguish it from other ballots after it was deposited in the box, please state what that mark was.

"(Objected to by attorney for Wigginton, on the ground that it presumes that the witness knew whether or not the ballot had a private mark on it at the time it was deposited in the ballot box, and on the ground that there has been no evidence offered or given tending to show that the witness possessed any such knowledge or information.)

"A. There was; his name was written on the bottom of the ticket.

"Q. If Clark said anything about it at the time he deposited the ballot, tell what he said.—A. He did. He had come to the polls two or three times to vote, and when near the polls James McCoy took him away; he came again just before the polls closed and voted; he then said that he had written his name on the ticket so that old Jim would know that he had not voted against his wishes.

"Q. If you were acting in any official capacity on that day, please tell what it was.—A. I was; I was one of the judges of election."

Thus it is apparent that this voter put this mark, his name, on the ticket for the express purpose of imparting knowledge of the person who voted it, bringing the case exactly within the provisions of the statute above quoted.

But the majority say that the name was written on the face of the ballot. Now, read again the statute and see if that makes any difference. The statute is, "when a ballot found in any ballot box bears upon it any impression," etc. It makes no kind of difference where that impression is placed. When such a ballot is found it must be rejected. If the device or impression were upon the back, as would seem to be the interpretation of the majority, then the ticket need not find its way into the box because it could be detected or seen before it went in; but it is clear that no matter where it is placed on the ballot, when such ballot is found it is to be rejected.

(5) As to certain irregularities the majority say, apparently with the concurrence of the minority:

The contestant alleges that there were such illegal practices at this precinct as to invalidate the whole poll. The law of California requires that no tickets shall be folded or unfolded or exhibited within 100 feet of the polls. This was done during the whole day at this precinct. But while the parties who violated the law may be punished, the law was not intended to provide that such conduct should invalidate the election. We can not see any good reason for rejecting this poll.

(6) As to the validity of a ballot the majority, apparently with assent of the minority, find as follows:

Pablo Rios voted at Wilmington, Los Angeles County. He arrived at the polls late in the day, and fearing they would soon be closed, took the first ticket he could find. It was a Democratic ticket, but he did not desire to vote for any person on that ticket except for George Hinds for supervisor of the county. He erased all other names on the ticket, and wrote Mr. Pacheco's name on the top at the right-hand side, opposite the names of the Presidential electors, which were erased. The judges returned this ballot as a vote cast for R. Pacheco for Presidential elector, and did not count it for him for Representative in Congress. Rios was called, and testified that he intended to vote for Pacheco for Representative in Congress. The evidence is that the names on the ballot, except that of Hinds, were erased, but there is no evidence that the words "for Presidential electors," or the words "for Representative in Congress," were erased. Upon the face of the ballot, according to the evidence, Mr. Pacheco was voted for for Presidential elector. There is no ambiguity about this. The law of California, in reference to counting obscure ballots, is as follows:

"SEC. 1201. No ballot or part thereof must be rejected by reason of any obscurity therein in relation to the name of the person voted for, or the designation of the office, if the board, from an inspection of the ballot, can determine the person voted for and the office intended."

An inspection of this ballot would show that the name of R. Pacheco appeared after the words "for electors of President and Vice-President of the United States." Can such a ballot be counted for the

contestee for Representative in Congress, or is it admissible for the voter to explain or contradict such ballot by final evidence after it has been cast? Mr. McCrary, in his work on elections (sec. 407), states the rule which should govern in cases of this kind as follows:

"While it is true that evidence aliunde may be received to explain an imperfect or ambiguous ballot it does not by any means follow that such evidence may be received to give a ballot a meaning or effect hostile to what it expresses on its face. The intention of the voter can not be proven to contradict the ballot or when it is opposed to the paper ballot which he has deposited in the ballot box." (See also People *v.* Seaman, 5 Denio, 409; State *v.* Goldthwait, 16 Wis., 552; People *v.* Fegurson, 8 Cowen, 102; People *v.* Cook, 14 Barbour, 259.)

When a ballot clearly designates the office to be filled and the name of the person voted for, no court has ever permitted the voter to contradict his ballot by evidence that he intended to vote for a different person, or for the same person for a different office.

Your committee do not feel at liberty to depart from the unbroken line of precedents in cases of this kind, although it is conceded in this case that the rule works a hardship to the voter. It is sometimes necessary to sacrifice the merits of a case in order to maintain an inflexible legal rule. This ballot seems to present such a contingency.

(7) The report thus disposes of a question of evidence:

The contestant alleges that two persons by the name of Smock and another whose name is not given voted at Bakersfield, Kern County, for Mr. Pacheco, who were not residents of the precinct for thirty days preceding the election. Depositions were taken in regard to these persons, in pursuance of notice in the contest, in due time, attorneys of both parties being present, and such depositions were properly forwarded by mail to the Clerk of the House of Representatives. But these depositions have never been received by the Clerk or any officer of the House. The contestant has obtained the ex parte affidavits of E. E. Calhoun, who was contestant's attorney, and of Samuel L. Cutter, who was contestee's attorney, at the taking of these depositions (Record, pp. 94, 95, and 96), which affidavits, sworn to October 18, 1877, after the assembling of the special session of Congress, set forth the substance of the lost depositions. If we were to consider as legal evidence these ex parte affidavits, one of them made by Mr. Pacheco's attorney, we should be compelled to reject the votes of these three persons. But we are not permitted to consider ex parte affidavits as a part of the evidence in the case.

The report further says that if the lost depositions were essential to the decision of the case, the contestant's remedy would have been to retake the depositions, giving due notice to the opposite party.

Thus this case turned principally on the disposition of 10 votes over which there was a division in the committee. The majority, as a result of their conclusions, found a majority of 4 votes for contestant, and reported that he was entitled to the seat.

The minority [1] found for sitting Member a majority of 6 votes.

The report was debated at length in the House on February 6 and 7, 1878 [2] and on the latter day a proposition of the minority to confirm the title of sitting Member was disagreed to, yeas 126, nays 137.

Then a proposition to declare the seat vacant was disagreed to.

The question recurring on the resolutions of the majority giving the seat to the contestant, they were agreed to, yeas 136, nays 125.

The contestant, Mr. Wigginton, then appeared and took the oath.

931. The Massachusetts election case of Dean v. Field, in the Forty-fifth Congress.

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[1] Minority views filed by Mr. Sohn T. Wait, of Connecticut. The differences over the 10 votes were not on strictly party lines.

[2] Journal, pp. 379, 384–387; Record, pp. 803, 826–837.

There being no doubt for whom the ballots were intended, the word "fourth" instead of "third," in the description of the Congressional district, did not invalidate the votes.

If the count of election officers is to be set aside by a recount, the petition for the recount should set forth specifically the reasons.

Discussion as to whether or not a result corroborated by Federal supervisors might be set aside by a recount by State officials.

Discussion as to the clause of the Constitution under which Federal supervisors of elections acted.

On February 21, 1878,[1] Mr. William M. Springer, of Illinois, submitted the report of the majority of the committee in the contested election case of Dean *v.* Field, of Massachusetts. This report, so far as its reasoning was concerned, was not concurred in by all the majority of the committee, since Mr. John T. Harris, of Virginia, chairman of the committee, and Mr. J. N. Williams, of Alabama, while sustaining the conclusion, expressly withheld assent to all the propositions therein set forth. Their dissent referred especially to the position taken in the report as to Federal supervisors.[2]

Sitting Member had been returned by an official majority of 5 votes over contestant.

As a part of that majority, but not involved in controversy, were 25 ballots thus discussed in the majority report:

> In the Eighteenth Ward of the city 25 ballots were cast designating the Congressional office and candidate as follows:
>
> "For Representative in Congress, Fourth district, Walbridge A. Field, of Boston."
>
> The election was held in the Third district, and Mr. Field resided in the district in which he was a candidate. Ought these ballots to be counted for the sitting Member? The questions involved in this point were ably discussed by counsel on both sides, and the authorities do not agree to such an extent as to leave the question entirely free from doubt. But your committee are of the opinion that a liberal interpretation of the law in the interest of enlarged suffrage and the honest intentions of electors would warrant us in counting these ballots for the candidate for whom they were evidently intended.
>
> The election was in the Third district. The electors of that district had no legal right to vote in the Fourth district, much less to vote in the Third district for a Representative for the Fourth district. We must assume, then, that the persons who cast these ballots intended no violation of law, but that they were acting in good faith and were honestly endeavoring to express a choice for a Representative in Congress in the district in which they were entitled to vote. The office to be filled was that of "Representative in Congress." That is what the voter must have looked to when examining his ballot. The words "Fourth district" do not constitute a part of the legal designation of the office, and in this case we are inclined to regard the erroneous designation of the number of the district as surplusage.

The minority took the same view:

> In the Eighteenth Ward of the city 25 ballots were cast designating the Congressional office and candidate thus:
>
> "For Representative to Congress, Fourth district, Walbridge A. Field, of Boston."
>
> These 25 ballots were counted for Mr. Field as Representative to Congress from the Third district, both by the ward officers and the board of aldermen, and are necessary to the election of Mr. Field. The contestant avers that these votes were improperly and illegally counted for Field. They were legally counted if they clearly indicate the office for which the person is designed, and the intention

[1] Second session Forty-fifth Congress, House Report No. 239; 1st Ellsworth, p. 190.

[2] The minority views were presented by Mr. Milton A. Candler, of Georgia, a member of the majority party in the House.

of the voter as to that person can be ascertained from the ballot. Evidence may not be received to contradict the ballot nor to give it a meaning when it expresses no meaning of itself; but if it be of doubtful import, the circumstances surrounding the election may be given in evidence to explain it and get at the intent of the voter. (McCrary's Law of Elections, p. 299.) The office to be filled was Representative in Congress. The words "Fourth district" constitute no part of the designation of that office. The way it happened that the words "Fourth district" had been printed upon these ballots was explained by the person printing them, that he had neglected to take from his printing press the type containing these words, which had been used for printing ballots for Representative in Congress in the adjoining Fourth district. Walbridge A. Field was the candidate for Congress in the Third district; he resided in that district. There was no other Walbridge A. Field residing in that district or in the city of Boston. The ballots were cast in the Eighteenth Ward and Third district, and by law could only be cast by persons residing in that ward and district. Clearly, then, from these ballots and the evidence showing by whom they were cast, and the circumstances under which cast, it appears that they were cast for Walbridge A. Field, one of the candidates for Congress in the Third district for Representative in Congress from that district. The words "Fourth district" not rendering uncertain the office intended to be designated or the person voted for, we think that these 25 votes were legally counted for Field as Representative to Congress from the said Third district.

The issues in this case arose entirely over a recount of the votes by a committee of the Boston board of aldermen.

The Third district was situated entirely within the city of Boston. On the evening of election day the ballots were counted by the officers of the several wards in accordance with law. The results were then transmitted, with all the ballots and papers, to the city clerk. The majority report says:

These provisions of the law were strictly complied with, and there is no allegation of fraud, illegality, or irregularity of proceedings in conducting the election up to and including the canvass of the votes and transmission of the result by the ward officers. But it is alleged that the ward officers committed errors in making the count, and on account of these alleged errors the contest arises in this case.

There were three counts of the votes cast for Representative in Congress from the district in question. The first count was that made by the ward officers; the second was that made by the United States supervisors of election, appointed in pursuance of sections 2011 and 2012 of the Revised Statutes of the United States; and the third count was made by a committee of the board of aldermen of the city of Boston.

We have already pointed out the manner in which the first count was made. The second count was made by two supervisors of election appointed for each ward by the circuit court of the United States for the circuit in which the city of Boston is situated. These supervisors were appointed upon the recommendation of the respective candidates for Congress, or their friends, and were "of different political parties," as the law of Congress requires. They attended the election in each of the wards and personally supervised the election and the count of the votes, and counted those cast for Representatives in Congress. Section 2017 of the Revised Statutes of the United States makes it the duty of supervisors of elections to attend the election, count the votes, and remain with the ballot boxes until the count is wholly completed. They performed their duty and made return of the result to the chief supervisor of the election, as required by law.

The counts made by the ward officers and the United States supervisors substantially agree.

The count of the ward officers and the United States supervisors gave Dean, the contestant, a majority of 7 votes over Field. The count of the committee of the aldermen reversed the result, and found a majority of 5 votes for Field.

This recount by the aldermen was based on the following statute of Massachusetts:

SEC. 4. If within three days next following the day of any election ten or more qualified voters of any ward shall file with the city clerk a statement in writing that they have reasons to believe that the returns of the ward officers are erroneous, specifying wherein they deem them in error, said city

clerk shall forthwith transmit such statement to the board of aldermen or the committee thereof appointed to examine the returns of said election. The board of aldermen, or their committee, shall thereupon, and within five days, Sunday excepted, next following the day of election, open the envelope and examine the ballots thrown in said ward, and determine the questions raised; they shall then again seal the envelope, either with the seal of the city or a seal provided for the purpose, and shall endorse upon said envelope a certificate that the same has been opened and again sealed by them in conformity to law; and the envelope, sealed as aforesaid, shall be returned to the city clerk. Said city clerk, upon the certificate of the board of aldermen or their committee, shall alter and amend such ward returns as have been proved to be erroneous, and such amended returns shall stand as the true returns of the ward.

In accordance with this law a recount was had in response to a petition as follows:

To the city clerk of the city of Boston:

The undersigned, qualified voters of Ward 13, in the Third Congressional district, hereby state that they have reason to believe that the returns of the ward officers of said ward for Member of Congress in said Congressional district, at the election of November 7, 1876, are erroneous, in that all the ballots cast for Walbridge A. Field as Member of Congress were not counted and credited to him, and that more ballots were credited to Benjamin Dean as Member of Congress than were cast for him; and they ask for a recount of the vote of said ward for Member of Congress, in accordance with the provisions of section 4 of chapter 188 of the acts of the year 1876.

(Signed by 15 voters of the ward.)

The recount was made by a committee of three aldermen, two of whom were of the political party to which contestant belonged, and they found enough of what they considered errors to change the result of the ward counts.

This recount was objected to for two main reasons:

(1) Because it was not properly procured under the laws of Massachusetts, in that the petitioners did not specify wherein they deemed the returns in error.

The statement required by the 10 qualified voters must specify wherein the returns are in error. It is not sufficient to allege generally that the count made by the ward officers was not correct, or that they counted more votes for one candidate than he was entitled to, or less votes for another than he received.

This petition constitutes the jurisdictional fact in the case, and unless it complies with the statute no jurisdiction is conferred on the board of aldermen, or upon their committee, and all proceedings by them not founded on a petition which complies with the statute are utterly void and of no effect. The rule of law applicable in such cases is well established. McCrary, in his treatise on the American law of elections (sec. 280), says: "An application for a recount of ballots cast at an election will not be granted unless some specific mistake or fraud be pointed out in the particular box to be examined. Such recount will not be ordered upon a general allegation of errors in the count of all and giving particulars as to none of the boxes." (Kneass's case, 2 Parsons, 599; Thompson *v.* Ewing, 1 Brewster, 67, 97.)

In Skerret's case (2 Parsons, 509) the court of common pleas of Philadelphia held that the true rule "regulating such proceedings should be defined, so as to advance on the one hand substantial and meritorious and to arrest on the other futile and querulous complaints. It is not sufficient to state generally that A received a majority of votes, while the certificate was given to B, and therefore the complainants charge that there was an undue election. This is but a conclusion, and it is not for the pleader to state conclusions, but facts from which the court may draw conclusions. If fraud is alleged, the petition must state the manner in which the fraud was committed, the number of votes fraudulently received or fraudulently rejected. (See Carpenter's case, 2 Parsons, 537; Lelar's case, 2 Parsons, 548; Kneass's case, 2 Parsons, 553.)

It was held also by the supreme court of Pennsylvania, in the case of Gibbons *v.* Shepherd (2 Brewster, p. 2), that certainty to a common intent was required, that the petition should not be so loosely drawn as to permit the powers of sworn officers chosen by the people to be inquired into with-

out well-defined cause. McCrary, in section 283 of his work, says: "The same rule should be applied to a pleading of this character that is applied to all other similar pleadings. It should state in a legal and logical form the facts which constitute the ground of the complaint. Nothing more is required, nothing less will suffice." The supreme court of Illinois (1 Breese, 285) held "that an affidavit for a writ of attachment which does not comply with the statute confers no jurisdiction, and all subsequent proceedings are void." As the fourth section of the Massachusetts act is held to confer the jurisdiction upon the board of aldermen to count these votes upon the filing of a petition specifying the errors, if such petition does not comply with the statutes no jurisdiction is conferred.

The right of the board of aldermen or their committee to examine the ballots is not to be exercised except in certain cases and in the manner provided by the law above referred to. The statute gives no general right to substitute an aldermanic count for a ward count.

The majority further quoted a report of the city solicitor of Lynn, the Massachusetts legislative cases of Morse *v.* Lonnergan, etc.

The minority hold that the language of the petition was sufficient.

The complaint to be made is not as to the manner in which the election by the ward officers has been conducted, it does not go to any wrongful act of these officers, but is directed specifically to the ascertained result, the returns made by these officers. The object to be accomplished is to have an examination and count of the ballots by the board of aldermen. The complaint can only be as to the result of the count of the ballots by the ward officers.

This specification of error is to be by persons who were in no way connected with the count of the ballots; by persons who cast the ballots and who have reason to believe that there has been error in their count.

Statements by such persons could hardly be more specific than those filed in this case, "that all the ballots cast for Walbridge A. Field had not been counted and credited to him, and that more ballots had been credited to Benjamin Dean than were cast for him."

It is the opinion of your committee that these statements were sufficient in law to authorize the examination and count of the ballots cast in the several words by the board of aldermen.

(2) Because the Federal election law was supreme, and the result of the supervisor's count might not be reversed by the intervention of a recount authorized and conducted solely under State law.

The majority report went quite fully into this branch of the case, but there was dissent among the majority members on the committee, and also on the floor by members of the majority party in the House. A member of the minority party, Mr. Benjamin F. Butler, of Massachusetts, however, espoused on the floor the contention in favor of the constitutionality and binding effect of the Federal canvass.[1]

The majority report says:

Congress, in pursuance of its constitutional power to make regulations as to the times, places, and manner of holding elections for Representatives in Congress, or to alter State regulations on these subjects, enacted the foregoing provisions. They must be held valid and binding upon all the States. From the moment of the enacting of these provisions (February 28, 1871) they become a part of the election law of the State of Massachusetts, overriding all opposing State statutes made or to be made by the State, and the passage of the State law of April 20, 1876, authorizing an aldermanic count, so far as it provided for the taking of the final count of the votes for the Representative in Congress out of the supervision and scrutiny of the United States supervisors of election was an evasion if not a nullification of the Federal law. After Congress had provided for the appointment of two supervisors of election for each voting place, and had required such officers to count the votes for Representative in Congress, and to remain with the ballot boxes until the count was wholly completed, and the certificates made out, it is not competent for any State to provide another board of canvassers, who may take possession of the ballot boxes, exclude the Federal officers, and secretly count the votes and declare a different result.

[1] On this point, see speeches of Messrs. Candler, Mills, Walsh, and Butler, Record, pp. 1792, 2039, 2046, 2084.

As the counting of the votes is now admitted to be the most important function to be performed in reference to an election, laws relating to this part of the election machinery must be strictly construed and rigidly enforced. The count made by the aldermen was made in secret, three or four days after the election, partly in the nighttime, and the United States supervisors and all other persons except the three aldermen were excluded from the room and were not permitted to see what was being done. A count made under such circumstances is in derogation of the acts of Congress and is of no validity whatever.

The minority, after quoting the sections of the Revised Statutes (secs. 2011–2019) which were enacted as amendments to the act of May 31, 1870, "to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," [1] say:

These provisions of law were not enacted by Congress in pursuance of its constitutional power to "make or alter" regulations as to the manner of holding elections for Representatives in Congress.

They are not certainly to operate even to the supervision of an election for a single polling place in a city or county which may constitute only a part of an election district, but shall only operate when a certain number of citizens shall make known in writing to a United States judge their desire to have the election "guarded and scrutinized."

The manner of holding such an election is in no way regulated.

These officers are designated as "supervisors of elections." They are appointed by the judges of the Federal courts as instruments in the process of "enforcing the rights of citizens of the United States to vote in the several States;" not managers of an election, but guardians and scrutinizers of an election managed by others, officers of the States.

They are to attend at all times and places for holding elections for Representatives in Congress and for counting the votes at such elections in order that they may challenge votes and inspect and scrutinize the manner in which the voting is done, but they are not to receive or decide upon the legality of any vote or regulate the manner in which the voting is done. On the day of election and at the places of holding the election they are to take, occupy, and remain in such position as will best enable them to see each person voting, scrutinize the manner in which the voting is being conducted, and at the closing of the polls they are to put themselves in such a position in relation to the ballot boxes, for the purpose of engaging in the work of canvassing the ballots, as will enable them to fully perform their duties in respect to such canvass herein provided, but they are not to be in position enabling them to receive a vote, conduct an election, or control a ballot box.

Each of these supervisors is required "personally to scrutinize, count, and canvass each ballot in their election district cast;" not as a board of election managers, to ascertain the number of ballots cast and for whom cast, and as such board to make returns thereof to the State officer who shall certify that result, or the House of Representatives, who shall judge of that return; but each one personally is to scrutinize, count, and canvass each ballot cast in his voting precinct, and make "such certificate and return of all such ballots" as may be directed and required by the chief supervisor from whom he received his appointment. They make returns only of what they have seen in the management of the election to the chief supervisor appointed by the judge of the circuit "in order that the facts may become known." "Become known" through these supervisors, these witnesses for the courts having jurisdiction of the offenses created in these acts, enacted to "enforce the rights of citizens of the United States to vote in the several States of the Union, and for other purposes."

Further than the returns made, which do not in terms show a count made by these supervisors, except as to the returns from the Eighteenth Ward, the evidence does not show that the supervisors counted the votes in the wards comprising the election district. So that, in the determination of the value of those returns as evidence in this case, their only value is in their official character.

The undersigned, believing that they are not counts made and results ascertained in pursuance of any law made "to regulate the manner of holding elections for Representatives in Congress," hold that they are insufficient to set aside the result found in this case according to the law of the State of Massachusetts, the certified return of the board of aldermen.

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[1] The Federal election laws have since been repealed.

(3) The majority of the committee also endeavored to show that the committee of aldermen did not follow the law in making their recount; but the minority joined issue on this question of fact.

In accordance with their conclusions the majority reported resolutions declaring contestant entitled to the seat.

The report was debated at length in the House and with a considerable breaking of party lines on March 14, 15, 26, and 27, 1878,[1] and on the latter day the question was taken on substituting the minority resolutions, which affirmed the title of sitting Member, for the majority resolutions, which proposed to award the seat to the contestant. On this vote there appeared yeas 120, nays 119, whereupon the Speaker voted in the negative, and the vote stood yeas 120, nays 120. So the motion to substitute failed.

On March 28 the question recurred on the resolutions proposed by the majority, and there appeared yeas 123, nays 123, whereupon the Speaker voted in the affirmative, making yeas 124, nays 123, so the resolutions were agreed to.[2]

Thereupon Mr. Dean, the contestant, appeared and took the oath of office.

932. The Florida election case of, Finley v. Bisbee in the Forty-fifth Congress.

Officers of election being guilty of frauds and forgeries, the returns were rejected.

Returns being rejected for fraud by election officers, no act of the said officers may be admitted as proof aliunde of the vote.

Returns being rejected, the evidence of the voters as to how they voted is not always accepted in proving the vote aliunde.

A contestee was not allowed the votes he proved aliunde when contestant, because of uncertainty of proof, could not be credited with any of the votes he undoubtedly received.

Both the returns and the vote were rejected in a case wherein contestee's proof aliunde gave him a greater vote than was returned by a dishonest election board favorable to him.

The testimony of a voter as to what ballot he cast depends for its value on the intelligence of the witness.

On February 5, 1879,[3] Mr. Thomas R. Cobb, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Florida case of Finley *v.* Bisbee. In the first session of the Congress, at the organization of the House on October 15, 1877,[4] the Clerk had announced that while there had been certain legal proceedings in regard to the returns, Mr. Bisbee plainly had the prima facie certificate, and therefore had been enrolled.

The precinct returns were conceded by both parties to show the election of the contestant, Finley, by a majority of 5 votes, but the canvassing board had found from the returns a result favorable to Mr. Bisbee, and the certificate had been issued to him.

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[1] Record, pp. 1778, 1788, 2038, 2082–2095.

[2] Journal, pp. 743, 746–748.

[3] Third session Forty-fifth Congress, House Report No. 95; 1st Ellsworth, p. 74.

[4] First session, Record, p. 52.

Three main questions arose in the determination of this contest, the first of which was of especial importance. Indeed, in the reports and debates it was quite generally claimed that this point was decisive, although this was not admitted by all who discussed the question. The points were:

(1) As to the vote of Archer precinct, No. 2, in Alachua County, both parties to the contest admitted that the return was false and forged, and that the officers of election were guilty of the frauds and forgeries; and hence the committee were unanimous that these returns should be rejected.

The returns being rejected, a question arose as to how the true vote should be ascertained, provided it could be ascertained.

The contestant introduced testimony to show that the actual vote was 180 for Bisbee and 141 for Finley. The sheriff of the county was present when the tally sheet was made up, and therefrom made a memorandum which showed that result. Also announcement was publicly made by an election officer of the vote for governor, showing a similar party division. On the other hand, the clerk and one of the inspectors of the election testified that the vote for Bisbee was 398 and for Finley 137. The actual poll lists were extracted from the county offices between the time of the canvasses of the votes and the investigation of the case by Congress. The returns also disappeared. The majority say:

> At all events, they are not to be found; and in the opinion of your committee they were destroyed by some of the conspirators to cover up their crime. The poll list, tally sheet, and the return belonging to said poll are gone.
>
> Your committee is clearly of the opinion from the evidence that the election at this poll is tainted with frauds, the returns false and forged, whereby they showed that contestee got some 200 or 300 more votes than were actually cast for him, which were canvassed and counted for him by the returning boards.
>
> Your committee is therefore compelled to go behind these fraudulent returns and examine the evidence in the case, and ascertain the true vote, if it can be done, from the evidence.

In view of the conflicting testimony, neither the majority nor the minority believe that the state of the vote can be ascertained from the testimony of witnesses as to the footings of the tally sheets or the announcements of election officers. The minority thus voice the position on this point:

> We can not say that the officers of an election were false to their trust—guilty of gross frauds—and for that reason reject their returns, and at the same time say that the vote canvassed by them for Mr. Finley, as shown by a tally sheet kept by them, is sufficient proof, or any legal proof, that he received 141 votes at that poll. We think that this position of contestant can not be maintained on any principle of law or evidence. We cite the following authorities on this question:
>
> "When fraud or grow culpable negligence on the part of the officers of an election is shown, all their acts and doings are rendered unworthy of credit and must be disregarded." (See McCrary, sec. 303.)
>
> "We repeat, therefore, the opinion expressed in a former chapter, that a willful and deliberate fraud on the part of such an officer being clearly proven, should destroy all confidence in his official acts irrespective of the question whether the fraud discovered is of itself sufficient to change the result. The party taking anything by an election conducted by such an officer must prove his vote by evidence other than the return." (McCrary, sec. 431.)
>
> "Where the conduct of the election officers is such as to destroy the integrity of the return, and to avoid the prima facie character which they ought to bear as evidence, due and adequate proof must be demanded of each vote relied on." (Opinion of the court in Mann *v.* Cassada, 1st Brewster, p. 60. See also Thompson *v.* Ewing, a case from Pennsylvania courts, reported in 1st Brewster, 107; Weaver *v.* Given, 1st Brewster, 140; Givens *v.* Stewart, 2d Brewster, p. 2; Jenkins *v.* Hill, N. H. Reports, p. 144.)

These well-settled principles show that contestant in a case like this can not rely upon unofficial statements of the vote proven to be false, or a tally sheet also proven to be false, to establish his vote. Indeed, they go further and show that the returns being rejected for gross fraud on the part of the election officers, he can not rely upon any act of theirs, official or otherwise, to establish his vote.

A "tally sheet" is not mentioned in the laws of Florida. No such paper is required to be kept or returned. If such a paper was produced, it would be inadmissible as evidence, even if no question was made of its having been falsely kept.

But contestant seeks to establish his vote at this poll by the evidence of a witness who looked over such a paper and took down certain figures from it. When he insists, and the committee concurs, that the officer who kept it was so false to his trust and fraudulent in his conduct that his return of this poll can not be accepted as the truth, and when other and reliable evidence clearly shows that the figures on said tally sheet were false, certainly nothing in the rules of law and evidence will permit this.

A witness, Fleming, a member of contestant's political party, stood at the poll with pencil and paper noting those who voted. His evidence led the majority of the committee to believe that about 318 votes were cast. The list of Fleming was put in evidence by contestant. The minority views, signed by Messrs. Jacob Turney, of Pennsylvania, and J. N. Thornburgh, of Tennessee (one a member of contestant's party and the other belonging to the party of sitting Member), say:

Mr. Bisbee, having this list before him (the poll book at this precinct was lost or mislaid), called 283 voters on Fleming's list, who swear they, together with 8 others on this list, voted the full straight Republican ticket, including for Congress Mr. Bisbee. This would leave Mr. Finley 14 votes had he called the remainder of Fleming's list, and they had sworn they voted for him. The testimony does not show that there was but one Democrat among all the colored voters at this precinct, and he was appointed inspector at this poll. This clearly shows that the announcement made at the close of the poll, that Mr. Finley received 141 votes, Mr. Bisbee 180, is not true.

In fact Mr. Bisbee produced in all witnesses to show that 308 voters cast ballots for him. Mr. Finley, the contestant, proved no votes in this way.

Therefore sitting Member claimed 308 votes at this precinct. The minority views supported this claim strongly.

But the proof shows that an election was opened and held at a time and place established by law by officers legally appointed to hold an election at Archer poll, No. 2, and that many legal voters were there and voted. In such cases we find that we are remitted to such other evidence as may appear in the record to ascertain the vote for contestant and contestee. We cite the following authorities on this point:

"When a return is rejected, legal votes are not lost; they may be proven by secondary evidence, and when thus proven maybe counted." (McCrary's Law of Elections, sec. 302.) "In which case each candidate must prove, by calling the voters as witnesses or otherwise, the number of votes received by him." (Ibid., sec. 391.)

This rule was adopted, and the testimony of the voters held conclusive, in the following cases: Reed *v.* Julian (2d Bartlett, 823, 828, 832); Washburn *v.* Voorhees (idem, 54, 60, 62, and 64); Lloyd *v.* Newton, Clark's & Hall's R., 520; Vallandigham *v.* Campbell (1858) (1st Bartlett, 223, 228, 229, and 230). See also report of Mr. Lamar, which was adopted by the House; Reed *v.* Kneas (Brightly, 366, 371, 372).

In the case of The People ex rel. Judson *v.* Thatcher, reported in 7th Lansing N. Y. Reports, the court held that the testimony of the voters was higher evidence than the returns (pp. 280, 281, 282, and 286).

In the case of Washburn *v.* Voorhees, Hamilton Township was returned voting as follows: Washburn, 143; Voorhees, 498. Washburn called the voters themselves and showed that 27 more votes were cast for him than were returned; the returns were set aside, and the evidence of the voters taken establishing his vote. Mr. Voorhees, who received according to the returns 498 votes, made no effort to establish his vote. The evidence incidentally showed that four persons voted for him; these only were counted for him. The committee, in citing the authorities upon which they base their decision, say:

"But the rejection of a return does not necessarily leave the votes actually cast at a precinct

uncounted. It only declares that the return having been shown to be false shall not be taken as true, and the parties are thrown back upon such other evidence as is in their power to show how many voted and for whom. So that the entire vote, if sufficient care be taken and the means are at hand, may be shown and not a single one lost, notwithstanding the return is rejected. It is found, as has already been stated, that 170 votes were cast at this precinct for Mr. Washburn. There was also the testimony of four persons that they voted for Mr. Voorhees."

In Reul *v.* Kneass, 584 (Brightly's L. Cases, 366, 372), the court, in answering an objection urged to testimony of voter, said:

"Let the doctrine be once established as constitutional law that an elector can not be heard in such a case to prove how he voted in order to establish the falsity of an election return, and the suffrage of every man in the country is placed under the control of the election officers, who may make him appear to have voted exactly as they please. According to this doctrine, if 500 out of 600 voters in a given district should vote for one candidate and their votes should all be returned as given to another, no adequate means exist in any body, legislative or judicial, in the Commonwealth to relief against so crying a wrong; for refusing to hear the testimony of electors to prove how they voted, the establishment of fraud in such a case would be impossible." (Brightly's L. Cases, 371, 372.)

In Vallandigham *v.* Campbell (1858) there were three reports, and the report submitted by Lamar and signed by four Members was finally adopted by the House. (1st Bartlett R., 223, 228, 229, 230.)

In this report of Lamar's there is an elaborate review of all the authorities, English and American, upon the questions of the admissibility of the declarations and testimony of voters as to their qualifications and for which candidate they voted. (Id., 230.)

The majority of the committee combat this position.

But there is still another view of this question assumed by the contestee. He insists that he has proven by 308 persons that they voted for him at Archer, No. 2. He claims that he has proven this by the mouths of the voters, outside of the returns, and that therefore he is entitled to have them counted for him in case the returns are set aside for fraud. And as the contestant has failed to introduce any witnesses to testify that they voted for him at said poll, that therefore he, contestant, is not entitled to have any votes counted for him at said poll, thereby giving contestee 308 majority at said poll instead of 258 majority fraudulently returned for him by his political friends, thus enabling him and them to succeed by their own wrongs to a greater extent than their criminal acts standing alone would justify. But the statements of these 308 witnesses will hardly sustain this assumption by the contestee. A large number of them do not testify that they voted for contestee, but that they voted the Republican ticket; many of them could not read, as we have already said, and therefore they had to depend upon others for the kind of tickets they voted, and were liable to be deceived; but however this may be, your committee is of the opinion that this view of the case can not be sustained under the proof. The proof shows that contestant did get votes at said poll, and that he probably got somewhere from 136 to 141. Your committee admits that if there was no evidence other than the returns, they being fraudulent and void, proving that the contestant received votes at said poll, then it would be unquestionably right to count the vote clearly proven to have been cast for contestee. But when the proof shows that a large number of votes were, in point of fact, cast for one candidate, as for the contestant in this case, but the number not being sufficiently certain to enable them to be counted, it seems to your committee to be manifest injustice to count the votes of his opponent, thereby increasing his majority to the full number of votes so counted. There is no rule of law or equity that will justify such action, but it would be a clear case of uncertainty in the proof, and stands in the same position as to uncertainty as the other positions assumed, and the entire vote must be rejected.

Your committee has therefore come to the following conclusions as to this precinct:

First. That the result of the election as shown by the returns is false and fraudulent.

Second. That from the other evidence in the case it is impossible to ascertain the true vote of said poll.

The vote must therefore, in the opinion of your committee, be entirely rejected.

The majority insist that as the poll was in charge of election officers, a majority of whom belonged to sitting Member's party, it was not probable that the true vote for contestant was swelled in the returns.

The minority views maintain that the evidence of the voters is sufficient as to how they voted. Although illiterate, they recognized the Republican ticket by the way the flag was placed on it, the flag on the Democratic ticket being placed in a different way. Also the tickets were given to them by officers of their political clubs, and these officers distributed none but straight Republican tickets, bearing Bisbee's name.

933. The case of Finley v. Bisbee, continued.

A voter being qualified as to naturalization, his vote was not rejected because he did not produce his papers at the polls as required by the State constitution.

The acts of election officers being presumed to be correct, a vote should not be rejected unless it is positively proven that the voter was disqualified as to registration.

(2) A question arose as to the votes of certain foreign-born persons, which were received without the production of naturalization papers. The majority report thus states the case:

The qualifications of voters in Florida are prescribed and defined in section 1 of Article XIV of the constitution of that State, as follows:

"SECTION 1. Every male person of the age of twenty-one years and upwards, of whatever race, color, nationality, or previous condition, who shall at the time of offering to vote be a citizen of the United States, or who shall have declared his intention to become such in conformity to the laws of the United States, and who shall have resided and had his habitation, domicile, home, and place of permanent abode in Florida for one year, and in the county for six months next preceding the election at which he shall offer to vote, shall in such county be deemed a qualified voter at all elections under this constitution." (See acts of 1868, containing the State constitution, p. 211.)

The third section of the same article of the constitution, and the one on which the contestee relies, does not create any additional qualifications for voters, but only prescribes a regulation. It reads as follows:

"SEC. 3. At any election at which a citizen or subject of any foreign country shall offer to vote under the provisions of this constitution, he shall present to the persons lawfully authorized to conduct and supervise such election a duly sealed and certified copy of his declaration of his intention, otherwise he shall not be allowed to vote. And any naturalized citizen offering to vote shall produce before said persons lawfully authorized to conduct and supervise the election the certificate of naturalization, or a duly sealed and certified copy thereof, otherwise he shall not be permitted to vote." (Acts of 1868—constitution, sec. 3, pp. 211–212.)

In the opinion of your committee it is clear that section 1 of Article XIV prescribes and defines all the qualifications of voters, and equally clear that section 3 does not create any additional qualification.

The qualification prescribed by section 1, in regard to foreign-born persons, is, that at the time they offer to vote they shall either be citizens of the United States, or shall have declared their intention to become such; while section 3 does not create any additional qualification, but only undertakes to prescribe the mode of proof, in case the right of such persons to vote shall, at the time they offer to vote, be disputed.

Such is the reasonable interpretation of these two sections of the constitution of Florida, when taken and construed together.

Moreover, this is the construction given by the first legislature in the State of Florida, which convened under the constitution of 1868, and it is to be observed that very many of the members of said legislature were also members of the convention that formed the constitution, and your committee are advised that this construction has been acquiesced in by every legislature that has convened since that time.

The legislature of 1868 treated and construed the third section of Article XIV of the constitution as being merely directory, as will be seen from the sixteenth section of the act of August 6, 1868, which provides as follows:

"SEC. 16. If any person offering to vote shall be challenged as not qualified, by any inspector or by any other elector, one of the board shall declare to the person challenged the qualifications of an elector. If such person shall claim to be qualified, and the challenge be not withdrawn, one of the inspectors shall administer to him the following oath: 'You do solemnly swear that you are twenty-one years of age; that you are a citizen of the United States (or that you have declared your intention to become a citizen of the United States according to the acts of Congress on the subject of naturalization); that you have resided in the State one year, and in the county six months next preceding the election; that you have not voted at this election, and that you are not disqualified to vote by the judgment of any court;' and if the person challenged shall take such oath he shall be allowed to vote." (Pamphlet acts 1868, p. 5, sec. 16.)

It is shown by the testimony in this case that none of these alien-born voters, except one, were challenged; that their naturalization papers were not demanded; that they were allowed to vote without question, and that they were in fact (with the exception of 7), at the time they voted, either naturalized citizens of the United States, or had declared their intention to become such, as required by section 1 of Article XIV of the constitution of the State. And your committee are of the opinion that, as they are proven to have possessed the qualification of citizenship or of having declared their intention to become citizens as required by the constitution, their votes should not be rejected.

The majority say it is the settled law of elections that where persons vote without challenge they are presumed to be entitled to vote and that the election officers receiving the votes did their duty properly and honestly. The section requiring the presentation of a certificate prescribed only a regulation, and according to McCrary "the right to vote must not be impaired by the regulation." Furthermore, the evidence showed that the larger portion of these aliens had been naturalized, and therefore section 1 of the fourteenth amendment to the Federal Constitution guaranteed that no State law should "abridge the privileges or immunities" of these naturalized citizens.

The minority combat this proposition, saying in their views:

Now, contestant concedes that a vote cast by a person not registered is illegal. And it is too well settled to be disputed. Registration is a "necessary prerequisite" to be complied with by the voter before he can legally vote. The constitution of Florida makes another "necessary prerequisite" of a foreign-born person before he shall vote. It tells him he shall present to the officers of the election his duly certified and sealed "naturalization papers" or his "declaration of intention" (where he has not taken out his final papers), "otherwise he shall not be allowed to vote."

And it seems to us that the same principle must be applied in the case of foreign-born persons who did not present their papers, as the law required, to the officers at the election that we have applied to unregistered voters. The requirement of the constitution is mandatory. It requires a certain thing to be done by a foreign-born person, "otherwise he shall not vote."

It is urged by contestant that they were not challenged, and had they been required so to do, that in most cases they could have produced the papers the constitution required. We might say the unregistered voters were not challenged. They, too, could have registered if they knew the law required it and they desired to do so. Each has failed to do what the constitution of the State has commanded before they can legally vote.

This is not something the law requires of the officers of election. It is a requirement of the citizen to qualify him to vote. The constitution of the State challenged his vote unless he complied with the supreme law of the State.

"The right of suffrage is not a natural right nor is it an absolute unqualified personal right. It is the right derived in this country from constitutions and statutes. It is regulated by the States, and

their power to fix the qualifications of voters is limited only by the fifteenth amendment to the Constitution, which forbids any distinction on account of 'race, color, or previous condition of servitude.'" (McCrary, sec. 3, and cases therein cited.)

"But the election franchise, like other rights, is not that of unrestrained license. In a government of law, the law must regulate the manner in which it must be exercised. The time and occasion and mode of voting are to be prescribed by the legislature, except in so far as the constitution has a voice of its own on the subject, and therefore it is that laws have been created for election officers, regulating the hours of the day during which the election shall be held, and the proof necessary to establish the right to vote. * * * The elector's privilege is not, therefore, a mere constitutional abstraction, but it is to be exercised in subordination to law, and on proof of title of the person claiming its exercise. The right, however well founded in fact, may be lost for want of such evidence of titles as the law demands." (Opinion of court in case of Batturs *v.* Megary, Brewster Rep., vol. 1, p. 171; see also 2d Bartlett, 831.)

In Pennsylvania persons not assessed for taxes were required by the laws of the State to answer certain questions under oath, concerning tax, age, and residence, and also to prove their residence by the oath of a qualified voter.

In the following cases it was distinctly held that a vote cast without complying with the statute was illegal and could not be counted. (Mann *v.* Cassady, 1st Brewster, p. 12; Myers *v.* Moffett, 1st Brewster, p. 230; Weaver *v.* Given, 1st Brewster, p. 141; Sheppard *v.* Gibbons, 2d Brewster, pp. 117–129.)

In Brightly's Leading Cases, p. 492 (note), the author says:

"Votes received from electors whose names do not appear on the assessment list without the preliminary proof required by law were formerly held to be prima facie illegal and to be rejected from the count unless adequate proof were made on the trial of the legality of such vote. (Mann *v.* Cannada and Weaver *v.* Given.) But the modern and better opinion seems to be that such votes being illegal when received can not be made legal by the production of evidence of qualification on the trial which ought to have been but was not produced to the election officers."

He cites Sheppard *v.* Gibbons and Myers *v.* Moffett.

In the case of Sheppard *v.* Gibbons, the court says:

"A vote prima facie illegal must be disallowed if the voter did not at the time of offering it produce the preliminary proof required by law. (Brightly, p. 558 and 572. See Covode *v.* Foster, 2d Bartlett, 600 et seq., and Wright *v.* Fuller, ibid, 159 and 160.)

Again, the statutes of Wisconsin provide that no person, not registered, should be allowed to vote unless he produced his own affidavit and the affidavit of a householder of the district of his residence in the district. In a case reported in 21st Wisconsin, page 566, it is held that the affidavits must be produced or the vote is illegal and must be thrown out.

This is an important case, and all the principles arising under section 3, article 4, constitution of Florida, concerning foreign-born voters are decided.

The minority further cite the case of Bancroft *v.* Slumpf (23d Wis., 630), and urge that the 74 votes of foreign-born persons, who voted without complying with the conditions of the constitution, should be deducted from contestant's vote.

934. The case of Finley v. Bisbee, continued.

As to the sufficiency of certified copies of registration lists as evidence of the qualifications of voters.

Until the contrary is proven, election officers are presumed to have tested the voter's qualifications by a required oath.

Criticism of the rule of proportionate deduction of illegal votes the nature of which is unknown.

Evidence is not admitted on a point as to which there was a total failure to plead in the answer.

(3) As to the votes of certain persons who were not registered.

The law of Florida provided for a registration of the legally qualified voters in

each county, and that "no person not duly registered according to law shall be allowed to vote." Also further sections of law provide:

SEC. 8. No person shall be entitled to vote at any election unless he shall have duly registered six days previous to the day of election.

Section 9 provides:

That the county commissioners shall meet at the office of the clerk of the circuit court within thirty days preceding the day on which any election shall be held and examine the list of registered electors, and erase therefrom the names of such persons as are known or may be shown to their satisfaction to have been dead, or ceased to reside permanently in the county, or otherwise become disqualified to vote; *Provided,* That if any person whose name may be erased shall on offering to vote at any election declare on oath that his name has been improperly struck from the list of registered voters, and shall take the oath required to be taken by persons challenged, such person shall have the right to vote.

Section 10 provides for furnishing the election officers at each precinct with a revised list of the registered voters of the county.

On these provisions of law the sitting Member based an objection thus set forth in the minority views:

The sitting Member insists that a large number of persons at various polls in eleven of the counties of the district voted, never having been legally registered. He introduces, first, the poll list, showing who did vote at each of the polls where such illegal votes were cast; then produces either a certified copy of the original registration book, including the names of all persons who had been striken off, or he produces a copy of the revised list of registration, together with a list of the names striken off; thus presenting a certified copy of the names of all persons who have ever been registered since the adoption of the new constitution in 1868. By comparing the poll list with the list of registration so produced, we find that many persons have voted who have never been registered. If they were sworn at the polls as the statute demands, and took the oath that they had been registered and had been improperly stricken off, then they must have sworn falsely, for the record itself, the highest evidence, shows that they never were on the registration book and hence were never stricken off. The contestant in this case was the contestant in the Forty-fourth Congress, in the case of Finley *v.* Walls. He was given his seat upon a decision that the votes not found on the revised list were not sworn as the law directs. In this case they never were registered, and such oath, if taken, would have been false. Their votes could not be received even if sworn. In that case the officers of the election were called and proved how many persons voted at each poll who were not on the revised registration list supplied by the clerk. In this case the voters, as shown by record evidence, never did register. In the former case, where it was not ascertained for whom the legal votes were cast, they were deducted from the vote each candidate received, according to a rule which seems now well established. It is proper here to notice an objection made by contestant in regard to the evidence concerning the names that had been "stricken off." He insists that this is no longer a record, and cannot be introduced as evidence. This might be true if in "striking off" or "erasing" the name of a voter from the "registration book" it was so obliterated that the name could not be ascertained; but such is not the fact. The name "stricken off" is not so defaced that it can not be made out. In fact, we find in some cases the only striking out that is done is the writing at the end of the name the words "removed," or "dead," or "convicted of felony," etc. (See Record, pp. 708–728.) Again, the proof shows in regard to the county of Alachua that the clerk of the circuit court, in order to prepare the revised list for the officers at the various polls at this election, handed his "registration book" to the printer to prepare the revised lists necessary. But instead of printing a revised list, he printed the names of those who were stricken off as well as those who had not been stricken off. A pen had been drawn through the names of those stricken off, but they were still legible. (See evidence of Clerk Webster, Record, p. 137.)

The clerks of the circuit courts furnish in the record of this case lists of names of all persons who have ever been registered in their county since the adoption of the new constitution in 1868. They certify that they are true and correct; they include the names of those who had once been registered, but are dropped or "stricken off" when revised lists are prepared to send to the officers holding an

election. We think this evidence legitimate and proper. From these registration lists and the poll lists we can, by comparison, clearly ascertain the names of all persons who have voted but have never been registered. We also hold that persons who have never been registered could not legally vote. Upon this question we cite the following authorities:

Finley *v.* Walls, Forty-fourth Congress:

"If election officers receive a vote without preliminary proof, which the law makes an essential prerequisite to its reception, such vote is as much an illegal one as if the voter had none of the qualifications required by law."

Brightly's L. Cases, 453, 492, note.

State *v.* Hilmoutel, 21st Wis.. 566.

State *v.* Stumpf, 23d Wis., 630.

16 Mich., 342.

Registration is, under the constitutional laws of Florida, an essential prerequisite before voting. The law tells the elector, unless you are registered you shall not vote. It tells the officers of election they shall not receive it. Hence, such illegal votes cannot be counted either by the courts or by unbiased legislative bodies, even after they are put in the ballot box.

The majority in their report do not admit the legality of the contestant's argument, and say:

The contestee offers in evidence the certified copies of the registration lists of the counties; also the poll lists of the precincts of said counties; and he invites a comparison of the names on the poll list with the names found on the registration list, and insists that the votes of all persons whose names appear on the poll list as having voted, but whose names are not found on the registration list, be declared void, for the reason that such votes are illegal.

Your committee does not agree with this view of the question. If a person vote in a county in Florida, having all the qualifications of a voter of said county except that his name has never been registered in said county, his vote, in the opinion of your committee, would be illegal, or if the name of such person having once been on the registration list of said county, but having been erased therefrom by the board of commissioners, afterwards cast his vote without having first taken the oath that his name had been improperly stricken "off from" the list of registered voters, his vote would also be illegal. But suppose we examine the poll list and find the name of a voter thereon as having voted, and we then turn to the registration list and find his name is not on that, can it therefore be said that he voted illegally? Certainly not. If a person votes at an election, his vote is presumed, under the law, to be legal until the contrary be proven in a legal way, for the reasons—

First. That the acts of an officer or officers of an election within the scope of this authority are presumed to be correct and honest until the contrary is made to appear, and therefore that they as such officers would not receive an illegal vote.

Second. That the presumption is always against the commission of a fraudulent or illegal act, and therefore that a man would not cast an illegal vote. (McCrary, sec. 87–440; Little *v.* Robbins; Gooding, *v.* Wilson.)

The majority further say that while the certified copy of the poll list is evidence that the voter cast his vote, a certified copy of the revised registration list was not evidence that his name had never been on the registration list for it might have been erased. The law of Florida did not provide for making a record of names of persons erased from the registration lists.

The fact can not be proven by the record, and certainly can not be proven by the certificate of the clerk attached to what purports to be a copy of a record which has no legal existence, for the clerk can only certify to records in such case, and his certificate to a fact in this case, outside of the records legally in his custody and of which he is legally authorized to give certified copies under his hand and seal, amounts to no more than the certificate of a private individual to a given fact.

The sitting Member introduced the evidence of two witnesses who had examined the poll lists, registration lists, and other papers, and who gave the results of their examinations. The majority say:

These statements made by the witness are inadmissible. The papers themselves are the best and only evidence of what they contain, if they are admissible for any purpose. The committee must make the comparison and can not take the statements of the witness as to the result of his comparison.

Your committee is of the opinion that this proof is insufficient to prove that these persons voted illegally whose names are not found on the registration lists of their respective counties. If they took the oath that their names had been improperly erased from the registration list—and the proof thus far is insufficient to overcome the presumption that they did—their votes are legal. The contestee undertakes to overcome the presumption in favor of the legality of this class of votes in another way. On some of the poll lists of the precincts in these counties is found at the end of some of the names of the persons voting these words, "Not sworn." At the end of others the word "Sworn." Now, it is contended by contestee that whenever you find a name on the poll list of any precinct with the words "Not sworn" written after it, which name is not found on the registration list of the respective county, that the vote of such person is illegal. This position can not be maintained, for reasons which we have heretofore stated. But we will further say that the law does not authorize the election officers, or either of them, to write the words "Not sworn" or "Sworn" on the poll list after the names of the voters who have voted and whose names are not found on the registration list of the county in which they vote, whether such persons were sworn or not before they voted. The writing of these words are therefore unofficial acts, and not a part of the poll list under the law, and not evidence, and can not be made so by a certified copy of the poll list, as is here attempted to be done. It would be a very dangerous rule, indeed, which would permit everything which appears on the face of a record to become evidence, whether placed there by authority of law or by the unofficial acts of irresponsible persons. How these words came to be written on these poll lists or by whom they were so written the evidence does not show. But it is enough for your committee to know that they were not placed there pursuant to any law and can not be considered as evidence.

Your committee is, therefore, of the opinion that the evidence does not prove that the votes cast by persons whose names were not found on the registration lists of the counties in which they voted are illegal. The evidence does not prove that they did not take the oath required by law in such case.

The minority, holding that the votes in controversy should be deducted, laid down this rule:

Where the proof shows for whom such illegal vote was cast, we deduct it from the candidate who received it. Where it is not shown for whom such illegal votes were cast, we adopt the well-settled rule which was followed in the case of Finley *v.* Walls, Forty-fourth Congress. This rule is laid down by Mr. McCrary in his Law of Elections, section 298 (see authorities there cited), as follows:

"In purging the polls of illegal votes the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number."

Of course, in the application of this rule, such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each.

The majority report says:

In purging the polls of illegal votes the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. (McCrary on Elections, p. 223; Shepherd *v.* Gibbons, 2 Brewster, 128; McDaniel's Case, 3d Penn., L. F., 310; Cushing's Election Case, 583.)

Of course, in the application of this rule, such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each. (McCrary, p. 223.)

This is, perhaps, the best rule that can be adopted in such case. It is manifest, however, that it may sometimes work a great hardship; for the truth might be, if it could be shown, that all the illegal votes were cast for one of the candidates, while it is scarcely to be presumed that they would ever be

divided between the candidates in exact proportion to their whole vote. But the rule that would deduct them all from either one of the candidates, in the absence of proof as to how the illegal votes were cast, is much more unreasonable and dangerous. The above rule is perhaps the safest one to be adopted in a court of justice, where there is no power to order a new election, and where great injury would result from declaring the office vacant. But it is manifest, as we have already said, that it might work a great hardship. And in a legislative body, having the power to order a new election, it is safer, in the opinion of your committee, and more conducive to the ends of justice, to order such new election than to reach a result by the application of such a rule. (McCrary, pp. 224, 225.)

A question as to pleading is thus disposed of by the majority report:

Contestee undertakes to prove that certain devices were resorted to in this county by certain persons to compel persons to vote the Democratic ticket by numbering tickets which they gave to said voters, with threats that if they did not vote the Democratic ticket they would be discharged by their employers, etc. There is nothing in the answer which will justify such proof. There is no allegation in the answer that can under any rule of pleading known to your committee be construed so as to admit such evidence. We are disposed to extend the rule in this case as far as possible, in order to let in all the evidence, but when there is a total failure to plead, as is the case here, we can not consider the evidence in determining a fact which tends to change the vote of either candidate. Your committee will say, however, that the proof on this point wholly fails to sustain such an allegation were it averred.

In accordance with their conclusions, the majority of the committee recommended the following resolutions:

Resolved, That Horatio Bisbee, Jr., is not entitled to a seat in this House as a Representative in the Forty-fifth Congress from the Second Congressional district of Florida.

Resolved, That Jesse J. Finley is entitled to a seat in this House as a Representative in the Forty-fifth Congress from the Second Congressional district of Florida.

The minority reported in favor of sitting Member.

The report was fully debated on February 20, 1879,[1] and on that day the question was tried on the majority resolutions, which were agreed to, yeas 131, nays 122.

Thereupon Mr. Finley, the contestant, appeared and took the oath.

935. The Missouri election case of Frost v. Metcalfe in the Forty-fifth Congress.

On so difficult a question as that of residence strong testimony is required to destroy the presumption that election officers have permitted none but qualified electors to vote.

The Committee on Elections declined to count votes of persons prevented from voting by an erroneous dropping of their names from the registration.

The Committee on Elections declined to reject or purge a poll because of the bad conduct of United States marshals.

On February 25, 1879,[2] Mr. John T. Harris, of Virginia, from the Committee on Elections, submitted the unanimous report of the committee (the minority concurring in the conclusions) in the Missouri election case of Frost *v.* Metcalfe.

Sitting Member had been returned by an official plurality of 19 votes. Con-

[1] Journal, p. 477; Record, pp. 1670–1683.

[2] Third session Forty-fifth Congress, House Report No. 118; 1 Ellsworth, p. 289.

testant sought to overturn this result by a number of objections. Certain of these involved questions discussed, as follows:

(1) Contestant alleged that 6 illegal votes were cast by negroes not residents of Missouri. The report says:

They do not regard the proof as sufficient to show that the 6 votes in question were not legal voters. It wholly fails to show that the residence of these colored men was not at their place of voting. Neither does the evidence show that they voted for contestee. It would be a dangerous doctrine to the right of election to permit the solemn act of the sworn officers of the law to be set aside upon such testimony. It is to be presumed that they did their duty. A majority were of the same politics of the contestant, and the evidence shows they sought to be watchful and careful in the discharge of their duty. It may be, and often is, difficult to determine the home or domicile of a boatman, or one who is constantly engaged in steamboating or on railroads, but as the law contemplates every man has a domicile or residence, it is often only known to the party himself. It is a question of intent, known alone to the party. It is to be presumed the election officers sifted these voters and came to correct conclusions. The evidence is not sufficient to show they did not.

(2) While considering the question of defective registration lists the report says:

While on this branch of the subject your committee will dispose of the complaint made by contestant that by reason of the errors in copying the registration list he lost many more votes than contestee. To count votes which were never offered at any poll is carrying the doctrine further than we ever knew it. To authorize this committee to count a vote, four things are requisite—first, the person offering to vote must have been a legal voter at the place he offered to vote; second, he must have offered his vote; third, it must have been rejected; and, fourth, it must be shown for whom he offered to vote. These requisites do not exist in these cases; therefore your committee will not further consider them.

(3) Contestant alleged:

That the conduct of judges and United States supervisors and marshals at said precinct No. 77, in handling and tampering with the ballots and the tallies, tainted the return from that poll with fraud, and rendered the result so uncertain that said poll must be wholly rejected.

The committee say:

The contestant asks that the whole poll at No. 77 be set aside and discarded, because the return was tainted with fraud by handling and tampering with the ballots and tallies.

The only evidence on this subject is given by the deputy United States marshal, Wortman. The contestant does not call any of the judges or officers conducting the election, a majority of whom were Democrats, to sustain this charge. As before said, the law presumes public officers did their duty. The returns are in due form and were duly counted. According to the showing of this witness, the falling out of the ballots was purely accidental. Then why not have called some of the officers to prove these facts if they existed? The failure to call them raises the presumption that they would not sustain the charge. They do not occupy the position of parties charged with fraud testifying in their own behalf, but they are presumed to be impartial and disinterested, or, if partial, a majority of them are presumed to lean toward contestant, therefore would have been willing to tell the truth in his behalf.

To set aside a formal and regular return made by sworn officers of both political parties, upon such evidence, would set a dangerous precedent and render popular elections but a name and a mockery.

(4) Contestant alleged:

That said marshals were wholly unnecessary and were appointed solely for the purpose and in number sufficient to make reasonably certain the election of Metcalfe.

Eighth. That the money promised them by the Government was used simply as a bribe for votes for Metcalfe. That many of them were Democrats, who, to obtain the position, were compelled to promise and pledge that they would vote for Lyne S. Metcalfe.

The committee said:

Your committee deprecate the appointment of United States marshals under any pretext. If they are intended as conservators of the peace, the power of the State is ample for that purpose. If they are in any manner to interfere in the elections, it is clearly a violation of the laws of the States for them to do so. But the law of the United States warrants the appointment of deputy marshals, and the same must be respected until altered or repealed. It does not limit the number. The question in this case is, Was the conduct of the marshals such as to invalidate the whole election? It can not with any strong reason be urged that this committee shall make an estimate from conjecture how many voters they changed by their conduct. Nor would it be safe or warranted that the parties alleged to have been bribed, would, but for such bribe, have voted the other way. If the conduct of these deputy marshals was such as to pollute the whole vote of the district, then the committee could not sift the good from the bad voters and declare a result, but would be compelled to find there had been no fair expression of the popular will, and that no legal election had been held.

The testimony of the witnesses called by the contestant to prove bribery and fraud on the part of those marshals is very vague and unsatisfactory. Some 8 were introduced, who do prove that they were appointed with the promise expressed or implied that they would vote for Metcalfe, but 5 admit they voted for Frost; 2 say they voted for Metcalfe, but they preferred him and were in no way influenced by the office. One did not vote at all. So that the evidence, so far as it goes, tends to repel the presumption that the 728 deputy marshals were influenced in their votes by reason of their appointments. To say the least of it, the testimony is not very reliable, coming as it does from men who confess their own abasement and degradation.

There is nothing in this evidence that would justify your committee in transferring any votes from Metcalfe to Frost or deducting any from Metcalfe; much less would it justify them in setting aside the whole election.

In accordance with their conclusions, the committee reported resolutions confirming the title of sitting Member to the seat.

On February 25, 1875,[1] this report was presented in the House, but was not acted on then or thereafter.

[1] Journal, p. 525; Record, p. 1893.