35TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 408.

MINNESOTA ELECTION CASE.

MAY 20, 1858.—Ordered to be printed.

Mr. THOMAS L. HARRIS, from the Committee of Elections, submitted the following

REPORT.

The Committee of Elections, to whom were referred "the certificates and credentials of W. W. Phelps and James M. Cavanaugh, claiming seats as members of this House," with instructions "to inquire into and report upon the right of these gentlemen to be admitted and sworn as members of this House," ask leave to report:

The certificate of W. W. Phelps, which forms the credentials presented, certifies "that at a general election, held on the 13th day of October, 1857, under the constitution adopted by the people of Minnesota, preparatory to their admission into the Union as a State, W. W. Phelps received a majority of the votes cast at the said election as a member of the United States House of Representatives of the thirty-fifth Congress from the State of Minnesota, and, by an official canvass of said votes, was, on the 17th day of December, 1857, declared duly elected one of its members." The certificate of Mr. Cavanaugh is in the same language. Both are dated on the 18th day of December, 1857, signed by S. Medary, then governor, and bear the broad seal of Minnesota.

The constitution of Minnesota, under which the State was admitted into the Union, provides in the schedule—

"SEC. 21. The returns of said election for and against this constitution, and for all State officers and members of the House of Representatives of the United States, *shall be made and certificates issued in the manner now prescribed by law for returning votes given for delegate to Congress;* and the returns for all district officers, judicial, legislative, or otherwise, shall be made to the register of deeds of the senior county in each district in the manner prescribed by law, except as otherwise provided. The returns for all officers elected at large shall be canvassed by the governor of the Territory, assisted by Joseph R. Brown and Thomas J. Galbraith, at the time designated by law for canvassing the vote for delegate to Congress."

The 4th section of the "Act to establish the Territory of Minnesota," provides that a "delegate to the House of Representatives of the United States may be elected," &c., and "the person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly."

It will be seen, by these provisions, that the certificates of election referred to the committee are in due form certified according to law, and that there can be no question justly raised as to their regularity and force.

An objection is urged to the right of the claimants to their seats on the ground that their election was prior to the admission of the State into the Union. In the opinion of the committee, if it be admitted that there is no force in numerous precedents scattered through the journals of Congress, and extending back to the earliest times of the republic, sanctioning this course, it should be considered that Congress, by the enabling act authorizing the formation of a constitution and State government, thereby fully empowered the people of Minnesota to prepare themselves to assume, upon their admission, all the rights, powers and attributes of a sovereign State in the Union. One of these rights is that of being represented in Congress; and were elections held prior to admission for members of the House of Representatives held void, States must remain unrepresented after their admission, and until elections can be subsequently held, presenting the anomalous spectacle of States *in the Union*, without representation or voice in the national councils. The act of admission into the Union, upon being consummated, relates back to and legalizes every act of the territorial authorities, exercised in pursuance of the original authority conferred. As the election of members to this House looks directly to the end in view contemplated by the enabling act of Congress, the committee think it entirely within the scope of action conferred upon the people of the Territory, and should be respected by Congress.

Another objection urged against the admission of the members who claim seats in the House of Representatives from Minnesota is, because of their election by general ticket instead of districts. The schedule of the Minnesota constitution provides—

"SEC. 9. For the purposes of the first election, the State shall constitute one district, and shall elect three members to the House of Representatives of the United States.

The election was held throughout the State, as one district, in conformity with the foregoing provision.

This, it is contended, is in contravention of the 2d section of the act of June 25, 1842, and the election is therefore void. That section is as follows:

"That in every case when a State is entitled to more than one representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of representatives to which said State may be entitled, no one district electing more than one representative."

It will be observed that, by the terms of this law, it was to apply only to "this apportionment," to wit, that of 1842; but should it be held otherwise, it is conceived that its effect has been already settled. The obligation of this act was brought in question by the next Congress after it was passed, in a contest of the seats and the members returned from the States of New Hampshire, Georgia, Mississippi,

and Missouri; and the Committee of Elections, to whom the subject was referred, reported a resolution as follows:

"*Resolved*, That the section of 'An act for the apportionment of representatives among several States according to the sixth census, approved June 25, 1842,' is not a law made in pursuance of the constitution of the United States, and valid, operative, and binding upon the States."

Upon the question of the admission of the members of the States named which had so elected their representatives by general ticket, and not in accordance with the law, it was decided in the affirmative by *ayes* 127, *noes* 57. This disposition of the question has never been disturbed, although members elected under the general ticket system have been upon this floor (with the exception, it is believed, of three Congresses) ever since, and without objection. It seems now too late to reopen the question.

There seems to be but one question of any importance remaining, and this grows out of the fact that the constitution of Minnesota provides for the election of *three* members to the House of Representatives, while, by the act for the admission of the State, it is entitled to but *two*. The right of Minnesota to hold an election prior to the admission of the State has already been considered, and its legality, upon the admission of the State, has been shown. Does the act of Congress cutting down the number proposed in the constitution of Minnesota from *three* to *two* render the election previously held altogether void? If *void*, then the gentlemen presenting credentials are not entitled to be sworn, and admitted to seats in the House of Representatives; if *voidable* only, the House will not, of its own motion, so declare it until some citizen of the State of Minnesota shall call it in question. It will not volunteer to search for causes to reject those who claim to be elected its members, and who bring credentials which are regular upon their face, and entitle them to admission.

The provision of the constitution of Minnesota for the *election* of members to the House of Representatives was approved by the act of admission, but the *number* was restricted to two The committee have before them no evidence that more than two ever were elected, notwithstanding the provision of the constitution of the State. The committee have seen no other credentials than those referred to them, nor are they aware of any proclamation of the governor, or other canvassers, declaring any persons elected besides those now claiming seats. If, therefore, the question of *election* was presented to the committee, (which it is not,) there is nothing before them to justify the rejection of their claims. The committee are only instructed to "inquire into and report upon *the right of these gentlemen to be admitted and sworn* as members of this House." The committee construe this as a *direction* to inquire into the *prima facie* rights of Messrs. Phelps and Cavanaugh to be *admitted* and *sworn*. The credentials they present, in the opinion of the committee, clearly entitle them to their rights.

It was so settled in 1795, in the case of Benjamin Edwards, and has been uniformly sustained by the House, and, since the celebrated New Jersey case, it would seem, cannot be properly questioned. These

credentials, being regular upon their face, the number of those claiming seats is the number fixed by law to which the State is entitled.

No others are known to be claiming seats; no others are known to the committee to have been elected, or as claiming to have been elected. The committee are, therefore, of opinion that the gentlemen presenting their credentials are entitled *prima facie* to be sworn and admitted to seats; but they do not propose that such admission shall preclude any contest as to the rights of these gentlemen which may at any time hereafter be properly instituted. They submit the following resolution:

Resolved, That W. W. Phelps and James M. Cavanaugh, claiming seats as members of this House from the State of Minnesota, be admitted and sworn as such: *Provided*, That such admission and qualification shall not be considered as precluding any contest of their right to seats which may be hereafter instituted by any person having the right so to do.

Mr. GILMER, from the Committee of Elections, submitted the following

VIEWS OF A MINORITY OF SAID COMMITTEE.

The undersigned members of the Committee of Elections, to whom the question of the right of W. W. Phelps, as a representative of the State of Minnesota on this floor, was referred, respectfully submit—

That the said W. W. Phelps is not duly elected a member of this House.

This is apparent on the slightest consideration of the plainest and most notorious facts and the simplest principles of law. His claim to his seat rests on the following certificate:

"I, Samuel Medary, governor of Minnesota, hereby certify, that at a general election held on the 13th day of October, 1857, *under the constitution* adopted by the people of Minnesota, preparatory to their admission into the Union as a State, W. W. Phelps received a majority of the votes cast at said election as one of the members of the United States House of Representatives of the 35th Congress from the State of Minnesota; and, by the official canvass of said votes, was, on the 17th day of December, 1857, declared duly elected one of said members.

"In testimony whereof, I have hereunto set my hand and caused to [L. S.] be affixed the great seal of Minnesota, at the city of St. Paul, this 18th day of December, 1857.

"S. MEDARY."

The claimant is forbidden to take his seat under that certificate—

1st. By a great constitutional principle; and

2d. By a plain rule of election law.

1st. The Territory of Minnesota was organized in 1849, and in 1857 the people were authorized to form a constitution *preparatory* to admission into the Union, and it was declared they should be entitled to one representative and as many more as their population might show them entitled to according to the present ratio.

The certificate shows the election to have been held on the 13th of October, 1857.

No census had then been taken and returned; but one had been partially taken and returned, showing a population of about 134,000.

On the 13th of October, (the same day the people of Minnesota voted on and adopted their constitution,) on that day there was no law of the United States assigning to Minnesota any number of representatives; on that day there was no State of Minnesota in existence known to the laws; the people of the Territory were then engaged in voting, *under* a law of Congress for the government of the Territory, on a constitution which that law declared to be, in terms, preparatory to admission into the Union. The United States marshal still kept the peace of the Territory, and still executed the process of the Terri-

tory. The courts of the Territory still administered the laws of the United States in the Territory; the governor appointed by the President still held the only executive power recognized in the Territory; the legislature of Minnesota still was the only legal legislature. These things so continued until the 11th day of May, 1858, when, by law of that date, Minnesota became a State.

The Supreme Court have aided our reasoning by their rulings, and they have resolved that under the Constitution the territorial laws and authorities continue exclusively in force in the Territory until the passage of the act of admission, and then cease.—(McMilly *vs.* Baily, 10 Howard, 77.)

It is therefore clear that the certificate is decisive against the claim of W. W. Phelps; for it shows the claim to rest on an election in a Territory of the United States, which was an act of usurpation, in its nature punishable and absolutely void. It was, and could be, by no law of the State, for it was before the State existed at all. It could not be valid by a territorial law, for a Territory cannot elect members of Congress. It is nonsense to talk of ratification by the subsequent admission of the State, for, till admission, the State was *nothing*. It was created at the moment of admission; and it is a universal principle that, if an election be without legal authority when made, it is absolutely void, and cannot be made valid by any subsequent law; for *that* is equivalent to naming the people's representatives by law, without an election at all.

In the absence of law the claimant has no right, and the electors have parted with some of their rights.

If one or two supposed precedents be cited, it is sufficient to say that precedents for such a flagrant usurpation as the naming the representatives of a State by a vote of the House of Representatives, is fit only to be reversed and expunged. It could only exist in high party times, when the necessity of votes invaded the rights of the people, and a dominant majority defied not less the rules of law and the Constitution than the plainest and most substantial rights of the people.

But it is respectfully submitted that there is no case at all analogous to this.

There is *no case* where the people of a Territory have presumed to elect, by the same ballots which determined whether they should adopt the constitution preparatory to admission, representatives to Congress; still less when on that day they elected more representatives than the act, under which they were proceeding, said they should have when admitted as a State.

The people of Minnesota did not even wait till they had expressed their opinion on the constitution; they did not wait till they had even resolved to ask Congress to admit them with it as their constitution; but while it was a mere proposal before them whether they should propose it to Congress, they go through the form of electing representatives under a constitution which they had not yet adopted themselves—which had no legal existence, even, as a petition of the people—to represent the people of a State which not only did not exist, but which had not even resolved to ask to be allowed to exist; not only so, but the law of Congress saying they should be entitled only to

one representative, and so many as the census might show her entitled to, in addition, they elected *three* representatives for a population shown by the census, so far as it appears, to be entitled only to *one;* for the ratio of 93,420 gives only *one* representative for 136,414. To be entitled to *two* representatives under the act of Congress, there must be 186,840; and for three, there must have been 281,460.

This claim is, therefore, at war with the plainest principles of the constitution, and beyond the shelter of the bad precedents set in high party times by parties pressed for votes.

2d. But suppose the State of Minnesota to have been capable of electing representatives before she existed, to represent her nonentity, the election and certificate is void by the law of elections.

For we must assume, in this view of the case, that the constitution was operative on the 13th of October, 1857, as if Minnesota were a State and admitted into the Union, having all the laws of the United States then existing in force, but not anticipating laws not then existing.

This is supposed to be the most favorable possible view of the case. In that event, under the enabling act, Minnesota was entitled to elect *one* member only. But concede the question of population to entitle her to two, she could be entitled to elect only *two*; and no one pretends population enough for three.

Now, the 9th section of the schedule says: "For the purpose of the *first* election, the State shall constitute one district, and *shall* elect *three* members to the House of Representatives."

This is the only law of the supposed State for holding any election. The United States have a right to pass laws regulating elections, but they have not done so. No laws exist but State laws. No law is pretended to exist in Minnesota for the election of representatives to Congress but this clause. Every election which does not conform to this clause is therefore without law, and therefore void.

If, therefore, the State law requires three representatives to be elected, and the State is entitled to only two, it *is impossible* to make *under that law* a valid election. The law makes it the *duty* of every citizen to vote for *three* persons. The returning officers are bound to *return* three persons. If the people *voted* for three, and if three be returned, there is no possible way of ascertaining, for which *two* of the *three* the people voted; and the ballots are void, the return is void for repugnancy and there is no one elected.

If, on the other hand, the people, by some singular accident, voted for only two on each ballot, there must be *three* returned by *law;* the law of the State, which is the only election law we can look at, declares the three highest persons *elected*, and the returns to this House must conform to that fact, and certify the election of *three* persons; and the same would be the case if each voter named only one person on each ticket; still the three highest would be declared elected, and equally elected; in fact, equally entitled to claim a return, and equally entitled to a seat in this House.

There is no mode or law by which this House can elect, out of the *three* certified to us, two, who should *be* the representatives. To suppose *that*, is to suppose a law of election different from the only one

actually existing. Congress, in judging of elections, is not a legislative but a judicial functionary—deciding not what ought to be law, but whether either of the claimants before her is entitled to a seat under the State laws. What those laws say must be read alone in them. If they conflict with paramount laws, they *are void;* but the fact that the only law of the State is *void* because in conflict with a paramount law, does not create another law in conformity with the paramount law. The law remains simply *void*, and is as if it had never existed. So that if the only law of a State for an election be absolutely in conflict with the Constitution of the United States, or a law of Congress constitutionally binding on the State, it is as if there were no law of the State *at all* on the subject; and if it be the only election law of the State, then there is *no* election law, and no election is possible till one shall be passed. The mere declaring by Congress that the State shall be entitled to *two* representatives, is not an election law, but defining the number which the State *may elect.* It confers on *Congress* no power to elect for the State, between several persons equally elected by the State laws, any more than it gives the power to Congress to say which of two persons having an equal number of votes shall be the representative.

Nor can the difficulty be avoided by assuming a particular case, when there may happen to be two candidates having a majority and the highest number of votes, and the third having *the next highest,* and solving the difficulty by taking the two highest and leaving out he *third.*

For if all three have a clear majority of the whole vote, it is clear that a majority of the whole people have *sent all three;* and the minority who gave a greater vote to two over the *one*, have no right awarded to *them* to elect their favorite to the exclusion of the third person having also a majority of the whole vote cast. And if only two have a majority of the *whole vote*, and the third stand next highest, the case is not altered, for the law equally declares *all elected.* A majority elects only *because* the law says so. The law may require two-thirds, or it may declare the highest vote, though a minority, sufficient; but in either event it is not the mere fact that a majority or a mere plurality of votes are cast for the three persons which elects them, but the fact that the *law declares* that the three having such number of votes shall be declared elected, which elects them. The one is as much elected as the other. The highest is no more elected than the lowest of the three. And the fact that two of the three have higher numbers than the third, can be no *ground* for Congress to select between the three persons *elected* by the State law, to make a Congressman out of two and repudiate the third. That is for Congress to elect instead of the people. If the State law might say, whoever gets 10,000 votes shall be declared elected, it is plain any surplus over 10,000 would give no one any advantage over one having only 10,000.

In a word, any supposed right of Congress to select two out of three, by reason of two out of three declared elected by the State law happening to have more votes than the third, assumes that it is not the *law*, but the number absolutely, irrespective of the law, which elects;

and this is plainly not so, when the law expressly declares that *three* shall be declared elected, and draws no distinction between the validity of the election of the third by reason of any difference in the number of their respective vote *between themselves.*

Votes may not follow the ratio of number merely, and we must always look to the law to see the value assigned to the number. When the House of Representatives elect a President, the votes cast are not counted, except as members constituting a State vote ; a majority of *all must concur* to elect, and they cannot elect unless two-thirds of the States be present. This sufficiently shows how fallacious and arbitrary a test mere numbers are. *It is the law alone* which prescribes the value to the number ; and if it say a smaller number shall elect equally with a larger number, provided the smaller number bear any assigned relation to the whole number, then the person getting such smaller number is equally elected with the other under the only law declaring who shall be returned as elected.

In a word, the law of Minnesota is *void*, because in direct conflict with a paramount law ; and she can have no representation till she has changed her law and made it conform to the law of Congress.

Here is not the case of an election law providing for the election of *two* when *three* are returned, but the fact is apparent that two have a greater number than the *third ;* for the law itself declares the two elected, and the third is rejected as mere surplusage.

But it is the case of a law self-contradictory and repugnant, the law of Congress declaring that two only shall be elected, and there stopping ; the law of the State requiring that three shall be elected, and declaring the three having a certain proportion of votes to be elected. It seems plain the law is wholly incapable of being executed, and is void. It is equally clear that the declaration by Congress, after the actual election under the constitution, that the State shall be entitled to only two, cannot better the case. If the number allowed and elected had happened to agree, the after law *might*, with some plausibility, be treated as a ratification ; but when the whole election was done, and some three were elected under the *State law*, the subsequent declaration that only two could be admitted could by no possibility *avoid* what was valid according to the State law before, nor elect and discriminate between equal titles under the same law by an arbitrary rule not prescribed by the law, drawn from the irrelevant question of which two got most votes, when *all had enough* under the law electing them.

3d. But in the particular case, we are not driven to such legal discussions.

In point of fact, it is uncontroverted—it is notorious—that the election was for *three* members, on the same day, at the same polls, by the same ballots which were cast for or against the constitution, and that three persons by the canvassers were declared elected. The constitution required the people so to do; the certificate of W. W. Phelps states that the election was held under the constitution, and that W. W. Phelps received a *majority* of the votes cast at said election, as *one* of the members of the House from the State of Minnesota. If these things be so, then it is the plain case of three persons voted for

and elected at the same election, on the same day, and at the same time and places, when only two could be validly chosen; and that case has been ruled a void election, as to all, by the highest authority.—(See 7 Cong. Globe, 135; Cushing's Pol. Law, 104; Glanville Cases, II and XXI.)

It is impossible for the House to say which of the *three* the people preferred. They have not expressed their will between them, but only between them and others. If we accept two and reject one, or elect him and assign a meaning to the ballots for him which the people casting them did not assign to them, this House is bound to notice the election laws of the States and the proceedings of officers under them. We may have to inquire, by evidence, into the details of numbers of votes and the qualification of voters, where a contest arises on the question of a majority; but we are entitled to take legal notice, without proof, of the proceedings of the canvassers, and what they do, and who they are, just as W. W. Phelps supposes us to recognize Mr. Medary as the officer of the Territory mentioned in the constitution; just as judges notice the seal of the United States, or of a State, without proof. So that we are bound, in point of law, to notice the fact that three persons were declared elected by the canvassers, and that their certificate before us is only certifying one of them equally elected at the same time and places, under the same law, and that all are equally void.

It is erroneously supposed that the question referred to the committee concerns merely the right of Mr. Phelps to take his seat provisionally as holding the certificate.

We regard the question presented as going to his right to the seat at all, whether provisionally or finally; and if the evidence and law show that he can in no event be entitled to the seat, we are *bound* now to say so, and to exclude him from a position to which he can have no claim at any time.

In the present case, it is impossible to separate the two questions of a right to take the seat till a better title is shown, and an absolute right to the seat, for no one can claim the seat provisionally who is not *prima facie* entitled to hold it absolutely. It is not any certificate which entitles the holder to claim the seat. The certificate itself must be a legal certificate; it must purport to be from or by an officer authorized to give a certificate; it must purport to represent the result of a *possible* election according to the law, and it must show that under such an election the holder is elected *prima facie*.

But this certificate is a mere nullity, and so appears on the simplest inspection of it. The certificate does not purport to be from any officer of the State of Minnesota, nor by any officer authorized by any law of that State to make the certificate. It does not purport to be in pursuance of any law of the State, but is dated before the existence of the State, and certifies an election before the people had even voted on the constitution. It certifies Mr. Phelps to have been elected before Congress had assigned any representatives to the State of Minnesota; before the office of representative for that State had any legal existence, and it purports to give the result of an election held under a law by

which no valid election of the number of representatives since authorized could possibly have been elected.

The certificate is, therefore, on its face, not a *prima facie* title, but a *prima facie* refutation of title, and effectually precludes all right, provisional or final, to a seat.

The facts in the case of James M. Cavanaugh being the same, we are of the same opinion as to his right to qualify as a member of this House.

We therefore offer the following resolution:

Resolved, That W. W. Phelps and James M. Cavanaugh, have no right to qualify and take their seats.

EZRA CLARK, JR.
JAMES WILSON.
JOHN A. GILMER.

MAY 19, 1858.

Mr. ISRAEL WASHBURN, Jr., from the Committee of Elections, submitted the following

VIEWS OF A MINORITY OF SAID COMMITTEE.

The undersigned, a member of the Committee of Elections, to whom was referred the credentials of Messrs. Phelps and Cavanaugh with instructions to report on their right to be admitted and sworn as representatives in this House for the 35th Congress from the State of Minnesota, dissenting from the conclusions of the majority, asks leave to submit the following minority report:

On the 26th day of February, 1857, Congress passed an act entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and State government, preparatory to their admission into the Union on an equal footing with the original States." The fourth section of this act provides for the taking of a census of the people of Minnesota with the view of ascertaining the number of representatives to which she would be entitled in the Congress of the United States; and it is declared that "*said State shall be entitled to one representative, and such additional representatives as the population of the State shall, according to the census, show it would be entitled to according to the present ratio of representation.*"

Under the authority of this act, a constitution was prepared, and submitted to the people of Minnesota, and by them approved on the 13th day of October, 1857. The ninth section of article sixteenth of this constitution is as follows:

"*For the purposes of the first election, the State shall constitute one district, and shall elect three members to the House of Representatives of the United States*"

Section sixteen of the same article provides that, "upon the second Tuesday, the 13th day of October, 1857, an election shall be held for members of the House of Representatives of the United States, governor, lieutenant governor, supreme and district judges, members of the legislature, and all other officers designated in this constitution, and also for the submission of this constitution to the people for their adoption or rejection."

In pursuance of these provisions of the constitution, and on the very day upon which the people of Minnesota were to decide whether it should be adopted or rejected, an election was held for three representatives in the Congress of the United States.

The returns of the votes for these officers were afterwards, on the 17th day of December, 1857, canvassed by the proper officers, and the following gentlemen, viz: W. W. Phelps, J. M. Cavanaugh, and G. L. Becker, declared to be duly elected.

On the 18th day of December, 1857, certificates of election were made out and delivered (signed by "S. Medary, governor" of the Territory of Minnesota) to said Phelps and Cavanagh, and, as the undersigned is informed and believes, and as he understands to be the

admitted fact, to said Becker, of each of which the following, with the exception of the name of the person elected, is a true copy:

"I, Samuel Medary, governor of Minnesota, hereby certify, that at a general election held on the 13th day of October, 1857, *under the constitution adopted by the people of Minnesota, preparatory to their admission into the Union as a State*, W. W. Phelps received a majority of the votes cast at said election as one of the members of the United States House of Representatives of the 35th Congress from the State of Minnesota, and, by an official canvass of said votes, was, on the 17th day of December, 1857, declared duly elected one of said members.

"In testimony whereof, I have hereunto set my hand and caused to [L. S.] be affixed the seal of Minnesota, at the city of St. Paul, this 18th day of December, 1857.

"S. MEDARY."

An act for the admission of the State of Minnesota into the Union was passed the 11th day of May, 1858. By this act the number of representatives to which the new State is entitled in the Congress of the United States is fixed at two. The language is as follows: "That said State shall be entitled to two representatives in Congress until the next apportionment of representatives amongst the several States."

On the 13th day of May instant, Messrs. Phelps and Cavanaugh caused their credentials to be presented, and asked to be sworn as members of this House; whereupon the House passed the following resolution:

"*Resolved*, That the certificates and credentials of W. W. Phelps and James M. Cavanaugh, claiming seats as members of this House from the State of Minnesota, be referred to the Committee of Elections, with instructions to inquire into and report upon the right of these gentlemen to be admitted and sworn as members of this House."

In the preliminary inquiry which the committee were directed to make, the undersigned did not deem it material to investigate several questions suggested by the facts, admitted or alleged to exist in the case, bearing upon the general question of the election of the claimants, rather than upon their *prima facie* right to be sworn; and which questions are not understood to have been acted upon by the committee, but have been left to the future action of the House. He acknowledges the great inconvenience that would result if, in the ordinary cases of election contests, the question of the right to seats was to be raised, discussed, and decided, upon the presentation of the credentials of persons whose rights are disputed. But he cannot doubt the strict propriety of raising the question of right, in the first instance, whenever the papers in possession of the House, and the laws, which it is presumed to know, show that there cannot have been a legal election. The question now presented, is not so much whether there has been a legal election of representatives in Congress from the State of Minnesota, as whether the papers presented to the House, the laws of Congress, and the constitution of Minnesota, contain anything fatally inconsistent with that hypothesis.

In the judgment of the undersigned, they do. He believes that, under

the law of Congress and the constitution of Minnesota, there has been, there could have been, no legal election. The facts necessary to be known for the final action of the House are such as it is bound to take cognizance of. The credentials of the claimants are in its possession; the law admitting Minnesota as a State was passed at the present session, and therefore its members must be supposed to be actually as well as constructively acquainted with its provisions; the constitution of Minnesota was not only referred to in this act, but it was upon that instrument that the act is founded; and besides, it is so recited in the certificates of the territorial governor as to make it a part thereof.

When these gentlemen presented themselves to be sworn in as representatives from Minnesota, the House was presumed to know, and it did know, that that State was entitled to two, and only two, representatives; and further, that the election at which they allege they were chosen was an election for three and not for two representatives. Of these facts the House had perfect and complete knowledge, knowledge actual and constructive, at the time of the reference to the Committee of Elections. They can never be disputed or varied, and they prove conclusively that there has been no election that this House can recognize for a moment. The objection is vital and insurmountable. That it is so, is apparent upon the first view of the case. There cannot have been an election of which this House can take notice, unless it was held under the provisions of a law of Minnesota. There can have been no law of Minnesota inconsistent with a constitutional law of Congress upon the same subject. The law of Congress, of whose validity no doubt can be raised, declares that Minnesota shall have only two representatives in this House. The law of Minnesota, (her constitution,) under which the election took place, declares that she shall have and "elect" three representatives. Under this law, for she had no other, her people voted for and elected three representatives. If the law is valid and effective, the three are elected, one as much as another; if not valid, none are elected; for there can be no election which was not held under the provisions of law; any other election is but the choice or designation of unauthorized assemblies of the people. If the law of Minnesota has sufficient force and vigor to entitle these gentlemen to be "sworn and admitted," it has enough to retain them in their seats. If their case is *prima facie* a good one, it is a perfect one, so far as this question is concerned; for all that can be shown hereafter, bearing upon it, is shown and understood now. From what already appears, the House is informed by an irresistible logic that these gentlemen have not been elected under any law of Minnesota.

It is said that Messrs. Phelps and Cavanaugh have received a larger number of votes than any other candidates for the office of representative. Conceding this to be true—concerning which, however, there is no evidence, except what may be implied from the fact that certificates were made out and delivered to them—and that no inference of the kind is deducible from this circumstance, is obvious from the fact that a similar certificate was issued to another gentleman, (Mr. Becker,) who has not seen fit to present it here—and their case is not improved, for it still remains that they were not elected under any regulation of the State of Minnesota having the vigor of

law. Three representatives were elected, if any were; there was no law for any other number. Had there been a law for two, in conformity with the act of Congress, *non constat*, Messrs. Phelps and Cavanaugh, or either of them, would have received a larger number of votes than Mr. Becker, or some other candidate; the people voted for three representatives; if the election had been for two, we have no right to assume that voters who preferred Mr. Phelps or Mr. Cavanaugh to the opposition candidates, would have preferred either of them to Mr. Becker. To permit the candidates to decide among themselves who shall be admitted to seats and who shall retire, would be to transfer the election from the people of the State to the candidates. But it is confidently submitted that the House has no right to admit members who do not appear to have been elected by the people of a State under the laws thereof. In the opinion of the undersigned, it would not be within the authority, or comport with the dignity, of this House, to receive members who were not elected under a law of the State which they claim to represent, or of Congress; or, where a larger number are returned than the State is entitled to elect, to authorize them to decide among themselves who shall be its representatives

The State of Delaware is entitled to one representative. Suppose she should provide by law for the election of two, will it be contended that such a law would be of any force or validity? And will it be said that if, under such law, she should elect two representatives and send them here, it would not be competent for the House to reject them both upon their presenting themselves to be sworn in as members? And if both might be properly rejected, either might be; otherwise it would be an election by the House, and not by the people of Delaware. By what legal and safe rule can the House proceed to determine which of the two persons, designated and returned under the provisions of such a law, should be admitted as the properly elected representative of the State? It is believed there is none.

If in this case Mr. Becker had presented his credentials, and asked to be sworn as a representative from Minnesota, by what rule or upon what principle could the House have decided that the application of Messrs. Phelps and Cavanaugh should be preferred to his? The fact that he does not appear can add no strength to their position. It is the right of the people of Minnesota with which the House has to do, and no arrangements between these parties, no negligence or dereliction on the part of either of them, can be permitted to affect this right.

In the case of Reed *vs.* Cosden, Contested Elections, page 353, it was decided "where two candidates had an equal number of votes, the governor and council, assuming to act under a State law, 'proceeded to decide between them which should be representative,' and gave their certificate of election to Jeremiah Cosden, who became the sitting member. This proceeding being illegal and unwarranted by the constitution, was not admitted as evidence of his right to a seat in the House."

The committee, in their report, say:

"The Constitution of the United States, article 1, section 2, provides that: 'The House of Representatives shall be composed of members chosen every second year by the *people* of the several States; and

the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the legislature.' Section 5 of the same article provides that 'each House shall be the judge of the elections, returns, and qualifications of own its members.'

"On the first Monday of October, 1820, in conformity with the law of Maryland, an election was held by the qualified electors of the sixth congressional district. On that day they either did or did not elect a member of Congress. None could be elected unless he received a greater number of votes than were given for any other candidate.

"*The term election must mean the act of choosing, performed by the qualified electors, in conformity with the requisitions of the Constitution and laws regulating the manner in which the choice shall be made. If, therefore, the legal electors on the day appointed should fail to make a choice, it is confidently believed that no other authority of the State can at any other time make good this defect.* Let it be supposed that the electors should fail to attend an election; that, subsequently, no election is held, would it then be contended that the executive authority could, by lot or otherwise, appoint a representative for such district in the Congress of the United States?

"This is a power which it is presumed none will contend does exist. Yet it is believed to be nothing more than that which has been exercised by the governor and council of Maryland in the case under consideration.

"In this case, the electors assemble, they proceed to elect, they make no choice; they come to no constitutional result. It is asked, what is the difference between the two cases? The one would be an appointment, because no election had been held; the other because no choice had been made. The committee, being of opinion that the power thus virtually exercised by the governor and council of Maryland, in appointing a representative to the Congress of the United States, being contrary to the express provisions of the Constitution, and one which this House cannot sanction, have no hesitation in rejecting the official statement of the proceedings in the case as evidence of the right of the sitting member to a seat in this House."

In the case cited, appears to have been decided that it is not competent for the House to admit as a representative one who has not been elected by the "*people*" of the district or State which he claims to represent, and that there can be no valid election unless it was held under the provisions of a law of the State, consistent with the Constitution of the United States. This authority would seem to be decisive of the question referred to the committee.

The highest considerations of policy, and a proper regard for the authority of Congress, should caution us against the establishment of a precedent so unsound and pernicious in principle as this would be, and which, if respected hereafter, must lead to manifold inconveniences and abuses.

The undersigned recommends the adoption of the following resolution:

Resolved, That Messrs. W. W. Phelps and J. M. Cavanaugh are not entitled to be admitted and sworn as members of this House.

I. WASHBURN, JR.