DELANO vs. MORGAN.

MAY 25, 1868.—Laid on the table and ordered to be printed.

Mr. SCOFIELD, from the Committee of Elections, made the following

REPORT.

The Committee of Elections, to whom was referred the case of Columbus Delano, contesting the seat of George W. Morgan, make the following report:

This contest comes from the thirteenth district of Ohio, composed of the counties of Coshocton, Knox, Licking, and Muskingum. The election was held on the 9th of October, 1866, and the vote as returned was as follows:

	Morgan.	*Delano.*
Coshocton	2,468	2,100
Knox	2,537	2,913
Licking	4,020	3,397
Muskingum	4,203	4,547
	13,228	12,957
	12,957	
Majority for Morgan	271	

As both parties claim that a large number of persons, not qualified electors, voted at this election, it is necessary to determine what evidence shall be taken to show for which candidate such votes were cast. For whom a vote is given, by the laws of Ohio, is a secret properly known only to the voter himself, and he is never required to disclose it. This fact must therefore be often determined upon circumstantial evidence alone. To what political party a voter belonged, whose partisan he had been, whose friends claimed for him the right to vote at the time, what he said of his intention before and his act after voting, are circumstances which each claimant has endeavored to prove, and which the committee have considered in making up their verdict. In this action they are governed by precedent as well as principle. The same ruling obtained in the celebrated case from New Jersey, decided in 1840, and known as the "broad seal" case; and also in Vallandigham *vs.* Campbell, decided in 1858. (See Bartlett's Contested Elections, pages 28 and 233.) If it is not to be inferred, from this kind of evidence, for whom an illegal vote was cast, it cannot, except in a few instances, be ascertained at all. Any number of illegal votes, once placed in the ballot-box, either by the deception or connivance of the board, can never after be excluded unless the whole poll is rejected or the fraudulent voters voluntarily confess their crime. When, therefore, an illegal vote is shown to have been cast, the committee have endeavored to ascertain from circumstantial evidence, where positive proof could not be given, for whom it was cast and deduct it from his count.

The contestant claims that 201 deserters from the army and navy of the United States voted for the sitting member, and that this number of votes should be deducted from his count. Citizenship of the United States is one of the qualifications

for an elector by the constitution of Ohio. By the act of Congress passed March 3, 1865, it is provided that "all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report to a provost marshal, within 60 days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens." Under this law and the constitution of Ohio a deserter is not a legal voter in that State. In the argument before the committee by the counsel for the sitting member this inference of the law was not disputed, nor the constitutionality of the law denied, but it was claimed that neither the election boards nor this House could pass upon the charge of desertion. This fact, it was claimed, must be first settled by trial and conviction in a court; in other words, that the disqualification did not consist in *desertion*, but in *conviction* of desertion. But the law does not so provide. Conviction is not required nor mentioned. It is the duty of an election board to pass upon the facts that constitute a disqualification, such as nonage, non-residence, idiocy, insanity, color, race, bribery, &c. Why should they not pass upon the fact of desertion? Because, it is said, that is a crime. So is bribery, and yet the sitting member asks that a considerable number of votes alleged to have been cast under corrupt influences should be thrown out, although there was no conviction or even trial, and the committee have complied with his demand. It makes no difference that the same facts which constitute a disqualification would, if heard before a court, constitute a crime. There are many instances where the law makes *conviction* in a court the ground of exclusion from the franchise, and then, of course, exclusion can only follow conviction. But when it makes the existence of a fact, as in this case, the ground of exclusion, that fact must be passed upon by the officers of the election in the first instance, and by this House upon a contest. In the further argument of the case by the sitting member himself, it was claimed that the law was unconstitutional and void. The committee do not feel called upon to discuss this question. The law was enacted by the concurrence of both houses and the approval of the President. At that time the country was preparing for the last great struggle with the rebellion, and every available man was needed in the field. This act was put forth to call back deserters. Those who returned were to be pardoned, and those who abjured the duties were to forfeit the privileges of citizenship. The emergency is passed now, and the law, perhaps, should be repealed, but the power that enacted it can alone repeal it. The Supreme Court alone can declare it void. It is in the power of the House, to be sure, to override this law, because there is no appeal, but the committee do not recommend it. The committee were of opinion, therefore, that deserters from the military and naval service of the United States were not entitled to vote under the constitution of Ohio, and therefore deduct from the count of the sitting member the following numbers of voters who are proved to be deserters and to have voted for him:

In Coshocton county 53, being all those named on contestant's brief except No. 4, 8, 9, 14, 15, 23, 26, 29, 30, 31, 32, 47, 49, 55, 57, and 68.

In Knox county 41, being all named in contestant's brief except Nos. 16, 20, 25, 26, 35, 36, 37, 43, 46, 47, 48, and 51.

In Licking county 19, being all on contestant's brief except Nos. 2, 6, 8, 10, 12, 16, 23, 25, 26, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, and 41.

In Muskingum county 24, being all named on contestant's brief except Nos. 13, 14, 15, 16, 18, 19, 20, 23, 24, 25, 27, 32, 33, 35 and 38.

Following the rule of evidence above stated, the committee find that 40 persons disqualified as electors because of non-residence, two because of alienage, and eight because of minority, voted for the sitting member and should be deducted from his number of votes. The non-resident voters are numbered on contestant's brief as follows: In Coshocton county Nos. 1, 2, 4, 6, 8, 10, and 11. In Knox county Nos. 1, 2, 3, 4, 6, 8, 11, and 12. In Licking county Nos. 1,

2, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, and 20. In Muskingum county Nos. 1, 2, 3, 4, 8, 9, 10, 13, 14, and 16. The aliens were John Dermody and Michael Scully, and they voted at Mount Vernon, Knox county. The minors are numbered on contestant's brief as Nos. 1, 2, 3, 4, 5, 6, 7, and 8. The votes of eight persons who are proved to have been qualified electors and who offered to vote for contestant were rejected. Their names will be found on the eleventh page of contestant's brief, and numbered 1, 3, 5, 6, 7, 8, 9, and 10. The vote of W. H. Foote, No. 4 of this list, was exchanged by the judge of election for the vote handed in by David McDaniels. Foote handed in a vote for contestant and McDaniels for the sitting member; Foote was held to be a voter and McDaniels not, but by mistake McDaniels's vote was put in the box, and Foote's thrown away. This requires a change of two, and makes from this list ten votes to be counted for contestant.

In Jefferson township, Coshocton county, three votes cast for contestant were fraudulently exchanged and counted for the sitting member, making a change of six votes, which the committee correct.

The contestant asks that the returns from Pike township, Knox county, should be rejected because Salathiel Parrish, one of the judges of the election, being a deserter from the draft of 1864, was incompetent to act in that capacity. The constitution of Ohio provides, "that no person shall be elected or appointed to any office in this State, unless he possesses the qualifications of an elector;" and the statutes of that State further provide that "three persons to be elected township trustees, to have the qualifications of electors, shall act as judges of the elections." Under the act of Congress approved March 3, 1865, and the constitution and laws of Ohio, a deserter has not the qualifications of an elector, and is therefore incompetent to act as a judge of election. In the case of Howard *vs.* Cooper, (Contested Elections, vol. 2, p. 282,) the returns of Van Buren township were rejected because there were only two judges, when the law required three. If a return is untrustworthy when one of the judges is absent, it is certainly more so if the vacancy is filled by a person disqualified to act. Two competent judges are certainly more reliable when acting by themselves, than when advised, directed, and in part overruled by a third, pronounced by the law unfit for the trust. This principle is decided in Jackson *vs.* Wayne, (Contested Elections, vol. 1, p. 47.) Whether the selection of this judge was intentional or unintentional can make no difference in the enforcement of the rule, but the committee are not authorized to conclude, from any of the surroundings of this case, that it was purely accidental. This law of the United States was very much criticised by those who were opposed either to the war or the mode of conducting it. Many persons insisted that it was unconstitutional and void, and might be safely disregarded by the judges of elections. Indeed, it was disregarded in many parts of this district. In this very precinct, as appears from the evidence, 11 deserters were allowed by the board, thus illegally constituted, to cast their votes. Whatever may be thought of the propriety or constitutionality of this law by individuals, it was certainly binding upon the electors of Pike township until repealed by Congress or pronounced unconstitutional by the Supreme Court.

It is worthy of note in this connection that the required form of certificate to the poll-book was essentially changed in this case. The special fact required by law to be given is altogether omitted. It certifies only to the *number of votes cast*, while the law requires that it should certify that they were cast by *electors*. The number is not so important, because that is also in the certificate to the tally papers, but that it should appear affirmatively that the persons casting these votes were qualified voters, is pointedly required by the statute of Ohio. There is great propriety in the law, and it ought in all proper cases to be enforced. The committee, mainly for the reason first stated, have rejected these returns.

The contestant also claims that Linton and Monroe townships, in Coshocton

county, should be rejected. In each of these townships the ballot-box was tampered with, and the number of votes returned for the sitting member was larger than the number of votes cast for him, while the contestant's vote was proportionally diminished. In Linton the judges refused to allow certain friends of the contestant to be present while the votes were being received, as required by law; and in Monroe the township clerk refused to allow the friends of contestant to examine the retained poll-book and ballots as the law requires, and the poll-book returned to the clerk of the court was afterwards stolen. It is further objected to the returns from these townships that there is no certified poll-book. Either the frauds proved to have been practiced upon the ballot-box, or the absence of all certificate to the poll-book, might be considered a good reason for rejecting these returns altogether; but in proving the frauds the parties have also proved the number of votes and for whom they were cast. According to this evidence 46 should be deducted from the majority returned for the sitting member from Linton township, and 20 from Monroe. If the returns are rejected altogether, the majority to be deducted from the count of the sitting member in both townships would be 133. The committee have accepted the corrected tally.

The sitting member offers evidence tending to show that 12 idiotic or insane persons and ten minors voted for the contestant. Upon a careful examination of the testimony the committee come to the conclusion that seven of the first class and eight of the latter should be rejected. The two not rejected as minors are Nos. 4 and 10 on the brief of the sitting member. The committee also find that 22 votes were cast for the contestant by persons who were disqualified by reason of non-residence. These are numbered on the brief of the sitting member as 4, 19, 20, 21, 22, 28, 29, 33, 34, 38, 39, 41, 42, 44, 46, 50, 62, 65, 69, 71, 72, and 83.

The sitting member claims that a large number of non-residents voted in Blue Rock township, and that the whole return should therefore be rejected. It appears from the evidence that there was considerable excitement in this locality over the discovery of rock oil. During the entire year preceding the election adventurers and laborers to the number of 400 or 500 were attracted here from other counties of the State, and some from other States. The votes cast in this township in 1866 were 87 more than in 1865, and one witness estimates that at least 50 of this increase were cast by the new-comers. By the laws of Ohio a voter must have resided in the State one year, in the county 30 days, and in the township 20 days. There is no evidence that any person voted here who had not this requisite of residence. It would be very strange if of the 400 or 500 men who emigrated to this township one-fourth or one-fifth had not come with the intention of remaining. They came to engage in the business of producing oil, and a part of them left only after they found that business a failure. The committee think the whole township should not be disfranchised on mere suspicion that some non-residents voted.

The sitting member also claims that the returns from Clinton township, Knox county; Licking, Muskingum, Blue Rock, Madison, Union, Monroe, and Harrison townships, Muskingum county; Harrison and St. Albans townships, Licking county; Washington and Keene townships, Coshocton county, should be rejected, because the voting was suspended for a short time while the officers were dining. The committee cannot sanction this practice of temporary adjournment; but inasmuch as it has obtained very extensively in the State of Ohio, and inasmuch as it does not appear in these cases that any person was deprived of his vote in consequence of the adjournment, they do not feel warranted in depriving so large a number of electors of their votes on account of this unintentional and, in these cases, harmless errors of their officers.

The sitting member also claims that the returns from the first ward of the city of Zanesville should be rejected on account of the temporary absence of one of the judges and one of the clerks. The polls opened in this ward a few

minutes after 6 o'clock in the morning, and closed at 6 o'clock in the evening. The counting out immediately followed, making a continual session of 13 or 14 hours. Instead of closing the polls, as was done in the townships before referred to, the officers took turns in going out to their meals. They were absent for this purpose about thirty minutes each. However reprehensible this temporary absence may be, it does not appear to be brought within the case of Howard *vs.* Cooper, cited by the sitting member. In that case one of the judges was absent all the time, and his place was not supplied, as it might and ought to have been, by the voters present, and the returns are signed by less than the number of judges required by law. In this case the proper number of officers officiate at the election, count the votes, and sign the returns. A few votes may have been taken in the absence of one of the officers, but a list of them was kept, and subject to his inspection and criticism on his return. There being no proof or suspicion of unfairness or illegal voting in the ward, the committee are of the opinion that the votes should be counted.

The sitting member further claims that the returns from Clinton township, Knox county, should be rejected for the reason that the city of Mount Vernon and said township voted at one and the same precinct. The city of Mount Vernon was incorporated by a special act of the legislature in 1845. It lies in the centre of Clinton township, from whose territory it was taken. Under this special charter the township and city were authorized to hold all county, State and national elections together, and from that time to this all such elections have been so held. In 1852 a general act was passed by the legislature "to provide for the organization of cities and incorporated villages," which makes each ward of a city an election district, and provides that the election shall be held at such places as the councilmen for such ward shall direct. Under this act no places for holding general elections in the city of Mount Vernon have ever been fixed. The law was not supposed to apply to this city so as to overrule its special charter. The city and township continued to hold their general elections together as before. Up to and including the election of 1866, fifteen State and four national elections had thus been held since the act of 1852. It is claimed now for the first time that the general election in the city of Mount Vernon, under the law of 1852, should be held separate from the township, in its own wards, and that the 1,100 votes of this precinct must be disfranchised as the penalty for so long misconstruing the law. The committee are inclined to think that the sitting member is right in his construction of the law, considered as an original proposition, but as 18 different elections preceding that of 1866 have been held since the act of 1852 without question, they do not feel justified in setting aside an election held in pursuance of a construction so long sanctioned by the authorities of the State.

The following table exhibits the conclusions to which the committee have arrived:

Whole number of votes returned for the sitting member		13, 228
Add votes improperly rejected		3
		13, 231
Deduct deserters, 137, less the 11 in Pike township	126	
Aliens	2	
Minors	8	
Non-residents	40	
Three votes changed in Jefferson township	6	
Pike township	216	
Linton township	46	
Monroe township	20	
		464
Corrected votes of the sitting member		12, 767

Whole number of votes returned for contestant		12,957
Add votes improperly rejected		10
		12,967
Deduct insane or idiotic votes	7	
Minors	8	
Non-residents	22	
Corrupt voting	6	
Pike township	76	
		119
Corrected vote of contestant		12,848
Corrected vote of sitting member		12,767
Majority for contestant		81

The committee report the following resolutions, and recommend their adoption:

Resolved, That George W. Morgan is not entitled to a seat in the fortieth Congress from the thirteenth congressional district of Ohio.

Resolved, That Columbus Delano is entitled to a seat in the fortieth Congress from the thirteenth congressional district of Ohio.

VIEWS OF THE MINORITY.

Mr. Kerr presented the views of the minority as follows:

Mr. SPEAKER: The undersigned minority of the Committee of Elections, being wholly unable to concur with the majority in their conclusions, either upon the law or the facts in said case, respectfully submit the following statement of their views:

The election in the 13th Congressional district of Ohio, October 9, 1866, was officially returned to the governor, and certificate issued to the sitting member upon the same, as follows:

Counties.	George W. Morgan.	Columbus Delano.
Coshocton	2,468	2,100
Knox	2,537	2,913
Licking	4,020	3,397
Muskingum	4,203	4,547
Total Morgan's vote	13,228	12,950
Total Delano's vote	12,957	
Morgan's majority	271	

The following table illustrates the strength of political parties in said district during the years therein mentioned, and is given here because it possesses a general significance in connection with the whole case:

1860. Democratic majority, 549; aggregate vote, 25,122.
1862. Democratic majority, 3,064; aggregate vote, 22,462.
1864. Lincoln's majority, 10; aggregate vote, ———.
1864. Delano's majority, 239; aggregate vote, 23,560.
1865. Morgan's majority for governor, 787; aggregate vote, 24,251.
1866. Morgan's majority over Delano, 271; aggregate vote, 26,185.
1867. Democratic majority, 2,178; aggregate vote, 27,906.

To be a legal voter in Ohio, six qualifications are necessary, to wit:

1. To be a male citizen of the United States.
2. To be a white male citizen of the United States.
3. To be 21 years of age.
4. To be a resident of the State one year immediately preceding the election. (Art. V. constitution of Ohio.)
5. To be a resident of the county 30 days next preceding the election.
6. To be a resident of the township or ward 20 days next preceding the election. (Swan and Critch., Stat., vol. 1, p. 543.)

There are also six disqualifications, and any citizen who has any one disqualification is an illegal voter:

1. Idiocy, } (Art. V constitution of Ohio.)
2. Lunacy, }
3. Conviction and sentence to the penitentiary under the act defining crimes and misdemeanors of the first class. (1 Swan & Critch., 417.)
4. For conviction and sentence of bribery at an election. (1 Swan & Critch., 545 and 547.)
5. For conviction and sentence under the act to preserve the purity of elections, passed March 20, 1841. (1 Swan & Critch., 543.)
6. Desertion as defined by act of Congress of March 3, 1865. (U. S. Stat. at Large vol. 13, p. 487.)

Several questions arise upon the pleadings and notices in this case which, being essentially preliminary to the consideration of the case upon the evidence, demand attention. The requirement of the statute on this subject is entirely clear and seems to be imperative, that—

> Whenever any person shall intend to contest an election of any member of the House of Representatives of the United States, he shall, within 30 days after the result of such election shall have been determined by the officers or board of canvassers authorized by law to determine the same, give notice in writing to the member whose seat he designs to contest of his intention to contest the same, and in such notice *shall specify particularly the grounds upon which he relies in the contest.* (1 Brightley's Digest, 254.)

The contestant's notice to the sitting member contains twenty-two specifications, of which but three allege that illegal votes were cast for the sitting member. The 17th specification avers that a large number of unknown non-residents were brought into the district on the night before the election and voted illegally for the sitting member; but there was no testimony offered by the contestant to prove that any one of the persons so described voted for the sitting member, and this specification, therefore, needs no further attention. The other two specifications referred to read as follows:

> 2. Six hundred and twenty-five persons, not legally entitled to vote, were improperly and illegally allowed to vote at said election, and did cast their votes for you.
>
> 18. Illegal votes were cast for you at said election as follows: In Clinton township, Knox county, 25 votes, and in each of the townships of Jefferson, Union, Butler, Jackson, Brown, Howard, Harrison, Clay, Pike, Munroe, Pleasant, Morgan, Berlin, Morris, Miller, Middlebury, Wayne, Liberty, Milford, and Hilliar, in said Knox county, 10 votes. In the township of Newark, in the county of Licking, 25 votes, and in each of the townships of Fallsbury, Perry, Hanover, Hopewell, Eden, Mary Ann, Madison, Franklin, Washington, Newton, Licking, Burlington, McKean, Granville, Union, Bennington, Liberty, St. Albans, Harrison, Hartford, Monroe, Jersey, Bowling Green, and Lima, in said Licking county, 10 votes. In the township of Washington, in Muskingum county, 25 votes, and in each of the townships of Monroe, Highland, Union, Rich Mill, Meigs, Adams, Salem, Perry, Salt Creek, Blue Rock, Harrison, Wayne, Jefferson, Muskingum Falls, Springfield, Newton, Jackson, Licking, and Hopewell, ten votes. In the township of Tuscarawas, in the county of Coshocton, 25 votes, and in each of the townships of Adams, Oxford, Linton, Lafayette, White Eyes, Crawford, Mill Creek, Keene, Franklin, Virginia, Jackson, Bethlehem, Clarke, Monroe, Jefferson, Bedford, Washington, Pike, Perry, New Castle, and Tiverton, in said Coshocton county, 10 votes.

The sitting member, in connection with his answer to the notice and specifications of the contestant, excepted, in writing, to the sufficiency in law of every one of the specifications. The sufficiency of those specifications was submitted for determination to the committee by the sitting member, both in his printed brief and his oral argument before the committee. It is, therefore, the obvious duty of the committee to consider and decide that question. It is exceedingly material to the proper and just determination of the whole case and to the legal and substantial rights of the parties. We inquire, then, do the second and eighteenth specifications comply in terms or spirit, with the express requirement of the law? Do they "*specify particularly the grounds upon which he relies in the contest?*"

Substantially, the allegation in each specification is that illegal votes were cast for the sitting member. It cannot be said, without doing most manifest violence to the intention of the law, that such general and vague allegations can put the sitting member in possession of the *grounds* of contest. They do not aver in what the illegality of the votes consists. They do not state *facts* from which the illegality results as a conclusion of law. They only state the *conclusion of law* itself, and entirely omit any recital of the reasons or facts that are indispensable to sustain the conclusion. This is a violation of most obvious principles of correct pleading, and ought not to be approved. There is nothing in the nature or circumstances of this case to prevent or even render inconvenient a fair and full compliance with this law in the statement by the contestant of his *grounds* of contest. The object of all pleading, whether in ordinary

actions at law or in contested election, or in any cases required to be subjected to judicial or even *quasi* judicial determination, is to limit, to restrict, to narrow, as much as practicable, the range and scope of the investigation, to exclude unnecessary latitude of inquiry, to disclose at the outset the difficulties to be overcome by testimony, or the specific conclusions intended to be established by proof, to the end that such litigation may be simplified and cheapened, not made interminable and unnecessarily expensive, and especially that no advantage shall be taken or injustice done, against which it is impossible to guard by reason of the uncertainty and vagueness in the statements of the *grounds* of controversy. The importance of these principles has been well illustrated in this case. The contestant wholly fails to specify the *grounds* of contest in his notice, and then proceeds in his own order to make his proofs; but in reference to a large number of voters, (alleged to have been deserters,) takes his testimony at so late a day in the time allowed as to absolutely preclude the taking of counter-testimony by the sitting member. It was the intention of the law of Congress to prevent such results by requiring reasonable definiteness and certainty in the statement of the grounds of contest.

These principles have been repeatedly declared and sustained both in the English Parliament and in Congress. They were asserted in the case of Michael Leib, (1 Con. El., p. 165.) In that case the reported decision is as follows:

A petition impeaching the return of any person as a member of the House ought to state the grounds on which the election is contested, with such certainty as to give reasonable notice thereof to the sitting member, *and enable the House to judge whether the facts, if true, be sufficient to vacate the seat.*

Evidence ought not to be permitted of any *fact* not substantially averred in the petition.

The case of *Easton* vs. *Scott* (Con. El., 272) is directly in point. It was there held, that "if voters are objected to on account of the want of legal qualifications, the party excepting to them should, before taking testimony, give notice to his adversary of the *particular* qualifications in which they are deficient; *a general averment in the notice that the votes are illegal is not sufficient;* and the names of the persons excepted to must also be stated." See, also, the reasoning of the committee on p. 285.

The same principles are declared in the case of *Wright* vs. *Fuller*, (Bartlett's Con. El., p. 152,) and in the case of *White* vs. *Harris*, (Id., p. 257.)

In *Kline* vs. *Verree*, (Bartlett's Con. El., 381,) the point was again considered, and it was there held that "where the contestant failed to specify with *particularity* the grounds of the contest, the requirements of the statute were not complied with." In that case the sitting member took exception to the notice of the contest as vague and insufficient, and Mr. Dawes, then and now chairman of the Committee of Elections, in his very able report said:

The committee were compelled, therefore, to pass upon the sufficiency of this notice before considering the merits of the case. They heard counsel of sitting member and contestant upon this preliminary question, and gave to its consideration much time and attention. As a question of practice it is of importance.

After quoting from the statute of 1851, Mr. Dawes proceeded:

Did his notice specify *particularly* the grounds of this contest? It is proper to state that the contestant waived before the committee all grounds of contest except such as may be found in the last clause of the tenth specification. The attention of the House is, therefore, called to this specification, and to the *particularity* of the grounds of contest which that clause in it contains. It is in the following words:

"10. The examination of the tally papers relating to said congressional election, and deposited in the office of the prothonotary of the court of common pleas, and deposited in the several ballot-boxes of said congressional district, *together with a recount of all the ballot-boxes in said district at said election, will show that you were not elected and that I was elected.*"

Without subjecting this specification to the criticism that the last clause is inseparably connected with the first, so that the whole must be taken together and constitute but one allegation, quite different in its meaning from any just interpretation of the last clause, if standing alone, suppose it were a simple allegation, standing alone, that "a recount of all the ballot-boxes in said district will show that you were not elected and that I was elected," in what just sense could it be said that such an allegation is a compliance with that provision

of law which requires of the contestant to "specify *particularly* the grounds upon which he relies in the contest?" What is it more or less than the assertion, "You were not elected and I was?" or "I received more votes than you." The common law pleading, "you did" and "I didn't," would have every element of "particularity" in it which is contained in such a specification. The only precedent under existing laws approaching this in vagueness and generality which has come under the notice of the committee, is that of *Vallandigham* vs. *Campbell*, in the 35th Congress. But there is this to distinguish that case from the present one. In that case the sitting member took no exception to the notice of contest for want of particularity when served upon him, or in his reply thereto, or during the taking of testimony; but, on the other hand, filed his own answer in the same general terms, and the contest proceeded without objection on either side till the hearing before the committee, where the objection was first raised, when it was too late for either party to retrace his steps or correct the mistake. Whatever might have been the opinion of that Congress as to the sufficiency of those specifications, it might well have been held in that case—indeed, it could not well have been held otherwise—that any such defect in specification or answer had been waived by the parties. But in the present case there could be no such waiver. The exception to the sufficiency of this motion was taken at the earliest practicable moment, and in time for the service of a new notice. It was also renewed at the taking of the testimony, and at every stage of the hearing. There was no excuse offered for a non-compliance with the law in this particular, and the committee could discover none.

The question was thereupon presented to the committee, *shall parties contesting seats in the House of Representatives be held to conduct that contest according to the requirements of the statutes of the United States, or be permitted, without excuse, to depart from and disregard the plainest provisions of those statutes in this regard, founded in the plainest principles of practice and fair dealing?* Long before the statute was enacted, parties to contested elections, both in England and this country, were held to a compliance with the same rule. (*Leib's case*, Clark & Hall, 165; *Luttrell* vs. *Hume*, 4 Doug. Elect. Cases, 25; *Skerret's case*, 2 Pars., 509; *Carpenter's case*, 2 Pars., 537; *Kneass's case*, 2 Pars., 553.) Several of the cases here cited are from the State of Pennsylvania, and, so far as the local law of the State where this contest has arisen forms a rule for the guidance of the parties, are clear and decisive against the sufficiency of this notice of contest. And the committee, after a careful consideration of this question, have come unanimously to the conclusion that this notice is in no just sense a conformity with the requirements of the statute or the well-settled rules which should govern in all contests of this kind.

The committee have not felt at liberty to pass over this entire disregard of well-settled rules and statute enactments without notice, lest proceedings like these should grow into precedents, and parties to contest should hereafter meet committees, not for the purpose of trying prepared and defined issues, but for the purpose of making vague and uncertain complaints and indulging in endless and unsatisfactory discussions.

This reasoning seems to us conclusive and unanswerable. We conclude, therefore, that the specifications referred to are too vague and uncertain to satisfy the imperative requirements of the law, and that they did by reason thereof work undue prejudice to the sitting member in his defence, and that the testimony taken under them ought not to be considered by the committee or House.

But the majority of the committee, for reasons no doubt satisfactory to themselves, wholly ignore this great question, and proceed at once in their report to consider and decide the case upon other grounds. It becomes our duty, therefore, not to limit our inquiry by reason of the above conclusion, which, in our judgment, is alone fatal to the claims of the contestant, but further to examine the case upon all the facts and principles of law involved in the very voluminous record. In doing this we will first examine the allegations and proof of the contestant.

In Ohio the legal mode of voting is by the secret ballot. The highest and best official evidence of the number of votes, and for whom they were cast, is the returns of the election officers, made in accordance with the law. This compliance with the law is not required to be absolutely exact and technical; but the statute of Ohio (1 Swan & Cr., 539, § 33) provides "that no election shall be set aside for want of form in the poll-books, provided they contain the substance." It is an established rule in the congressional adjudication of election cases that where the law of the State under which an election was held has received judicial construction in the courts of that State, that construction shall be accepted as binding upon Congress. In the case of the State of

Ohio, &c., *vs.* Ritt, (American Law Register for December, 1867, p. 88,) Judge Brinkerhoff, a member of the supreme court of that State, in rendering the decision of the district court, used the following language: "It was correctly stated by counsel, as a universal law governing all elections, that, throwing aside mere forms, the only question is, Who has received the most legal votes? The point as to the want of the signatures of the judges to the papers touched a mere matter of form. The object was only to authenticate the paper, and it was competent to be authenticated by other means as it was by the oath of the recorder."

With some diversity in the rulings of the courts and of Congress on the subject, the better opinion seems to us to be, that the highest and best evidence, outside the record, for whom any elector intended to vote, is the testimony of the elector himself; but, where the voting is by the secret ballot, the elector cannot be required to testify for whom he voted; and if he declines so to testify, it is then competent to show by other evidence for whom he voted. But, in the latter case, the evidence should be in character of the highest order attainable under the circumstances, and, in legal effect, so clear and strong as to preclude any reasonable doubt as to the fact.

Keeping in view these rules and principles, we proceed, first, to consider the case as to

LINTON TOWNSHIP.

It is claimed by the contestant that the entire vote in this township should be rejected, because the poll-books were not signed by the officers of the election, and because said officers were guilty of fraud. But in his notice to the contestee of the grounds of his contest he does not aver that the poll books were not signed. He is, therefore, precluded by his own neglect from taking advantage of the fact, if true. But is it true? The law of Ohio requires that the names of the voters shall be entered upon the poll-books, and that after the poll-books are closed the poll-books shall be signed by the judges and attested by the clerks, and the names therein contained shall be counted and the number set down at the foot of the poll-book. At the election in question this was done, except the signing. The statute further requires that after the examination of the ballots shall be completed, the number of votes for each person shall be enumerated, under the inspection of the judges, and be set down opposite to their names, and that the judges of the election shall certify to the same, which certificate shall be attested by the clerks, *all of which was done.* (1 Swan & Cr., pp. 533-4-5.) The object of the election law is to require the officers to certify the result of the election. That they have explicitly done in this case, and we submit have thus *substantially,* although not technically, complied with the law.

The final certificate shows that the contestant received 101 votes and the contestee 200 votes; but the poll-book shows there were only 300 electors recorded as voting. This discrepancy may be the result of a clerical or typographical error, and is deemed too immaterial to cause a rejection of the poll or to demand further notice.

Fraud is alleged to have been committed by the election officers. In answer to this charge the contestee took the depositions of all the officers of said election, all of whom testify that the election was fairly conducted and free from any taint of fraud. The contestee further obtained the depositions of T. J. Platt, H. W. Duling, Joseph Love, Richard Fowler, William Love, E. L. Duling, W. H. Vickers, Richard Carroll, James McClain and John V. Heslip, alleged in the committee, and not denied, to be leading and prominent citizens and republicans of the township, who voted for the contestant, all of whom testified in substance that, before said election, the character of the election

officers for integrity and veracity was above reproach. Major Platt testified as follows:

THOMAS J. PLATT, of lawful age, being first duly sworn, deposes and says:

Question. Please state how long you have known Zachariah Baker, S. M. Bassett, and Abram Craver, judges, and Robert Catherwood and Robert Latham, the clerks of the October election for State and county officers held in Linton township, Coshocton county, Ohio, in the year 1866.

Answer. Well, sir, I have known them ever since they have been in this township; as near as I can come at it, I believe I have known them from 10 to 27 years.

Q. Please state what is their general reputation in the community in which they live, as men of integrity and veracity; is it good or bad?

Objected to.

A. Their general reputation is good.

Q. Please state to what political party you belong, and for whom you voted for member of Congress at the October election, 1866.

A. I belong to what is known as the Union party, and I voted for Columbus Delano.

Q. Please state how long you served in the Union army during the war against the rebellion, and what rank you held.

A. I served about four years and eight months, first as a private, non-commissioned officer, second and first lieutenancy, captain and major.

Q. Please state whether you have been informed of the object for which you had been subpœnaed until called to the stand as a witness?

A. My father told me I was subpœnaed.

Cross-examined:

Q. Assuming it as proved that more than 120 ballots for Columbus Delano as congressman were delivered to this board to be deposited in the ballot-box; that the ballot-box remained all the time under the personal care and inspection of this board; and that when the ballots were counted out there were only one hundred for said Delano, what have you then to say as to the integrity of this board?

A. I, sir, entertain the opinion that they were honest and did their duty as officers of that board.

Q. Upon the assumptions contained in the preceding question, how is it possible for them or all of them to be honest?

Question objected to as argumentative.

A. Well, sir, I am of the belief, knowing these men ever since my childhood, or a portion of them, that they have been considered honest men all this time; still, I cannot believe that there has been any fraud in this election on their part done wilfully.

Q. You do not answer my question. It may be very hard for you to believe that these men have acted corruptly; but notwithstanding such may be the case, I ask you how you can explain the facts stated in the question in any manner consistent with the honesty and integrity of the board, or a portion of them?

Objected to as speculative and argumentative.

A. It is not hard for me to believe it from the fact that I have before stated that I have known them ever since my childhood, or a portion of them, and to the best of my knowledge they have always passed as honest, upright men since I have known them. I have a better opinion of them than to think they would stoop so low as to commit an error of this kind wilfully.

Q. You still don't answer my question. How can it be possible for them, or all of them, to be honest if the facts are as stated in my former question? That is what I want you to answer.

Objected to as speculative and argumentative.

Q. You have hesitated quite a considerable time; please answer the question.

A. Well, I believe, then, such a thing might be, or could be a mistake in tallying, and still I must believe, and do believe firmly, that so far as they were concerned at the ballot-box on the day of said election, they did their duty as officers.

Q. I still think you have not answered my question; but as you have suggested that there might be a mistake in tallying, would it not be very easy to correct such a mistake by examining the ballots themselves, which the law requires shall be preserved?

A. Certainly; a mistake of that kind could be corrected.

Re-examined:

Q. When it is considered that all of the officers of that election have testified that it was conducted with fairness and honesty, and when it is further considered that shortly after the election a paper was carried round to obtain the signatures of persons who claimed to have voted (and many of whom did vote) for Mr. Delano, is there not as much reason to believe that some of the signers of that paper, not wishing to confront their own signatures, have testified falsely, as that the officers of the election have done so; that is, is it not as

reasonable to suppose that certain voters have testified falsely as that the officers of the election have done so?

Objected to.

A. It is.

Re-cross-examined:

Q. Did you sign such a paper?

A. I did, sir.

Q. Do you think that the fact of your having signed such a paper had any tendency to lead you to swear falsely with reference to your vote?

A. No, sir.

Q. Do you think it would have any such tendency with the other persons who, like you, had signed it?

A. Well, I think it would with some men.

T. J. PLATT.

It is deemed unnecessary to incorporate more of the testimony on this point; but it may all be found in H. Mis. Doc. No. 38, part 2, pp. 472 *et seq.*

It is further alleged by the contestant, not in his notice, but in his brief, and attempted to be proved, that said officers violated the law of Ohio by excluding from the election room his friends; but the evidence wholly fails to sustain the allegation. The great preponderance of the testimony establishes the fact that all who desired to enter the room were permitted to do so, but that two persons, Thomas F. Smith and John S. Williams, the first a republican and the last a democrat, were excluded from the room in consequence of their noisy and disorderly conduct. We refer to H. Mis. Doc. No. 38, part 2, pp. 463 *et seq.* We are, therefore, fully satisfied that these officers did, in every respect, in good faith and impartially, discharge their duties in the conduct of that election, and that to reject the poll of this township on any allegation of fraud against them would do great violence to the law applicable to the case and to the clear preponderance of the evidence.

The parties to this contest took the testimony of all the electors who voted at that election in Linton township and were in the township when the depositions were taken, and also examined witnesses to show the political relations of electors then absent from the township, whose depositions could not be obtained. The weight of all this testimony, giving to it the most liberal construction in favor of the contestant, shows that 123 electors *intended* to vote for him, and that 177 voted for the contestee. It is impossible from the evidence satisfactorily to explain the discrepancy between this testimony and the official returns. One hundred and eight persons testified they had voted for the contestant. The weight of evidence, construed as above mentioned, shows that sixteen other electors were republicans. After an examination of the whole testimony in detail, we can only attribute its singular character to the infinitely diversified and the unknown influences, motives, considerations, and circumstances that controlled the respective witnesses, and the imperfections, mistakes, and blunders which so often characterize the conduct of electors. Such modes of attacking official returns of elections have always been subjected to more or less criticism, and in the case of Van Rensselaer *vs.* Van Allen, 1 Con. Elec. Cas., p. 76, the committee very justly and forcibly remark that:

> The petition stated that numbers of persons had sworn that they had voted for the petitioner, whose votes, by the returns, had not been counted. On this it was observed that the committee did not consider this allegation of a nature proper to engage their attention. It was presumed that the House of Representatives would never institute an inquiry into such a species of evidence. It was extremely difficult for a man to swear that he had positively voted by ballot for a particular candidate, since it is well known that persons had, on such occasions, frequently put in a ballot for the person he had not intended to vote for. In the hurry and confusion which often takes place the ballots get shifted, and one is put in instead of another.

In this case, for example, it appears in evidence that Ephraim Dally, intending to vote for Mr. Delano in Hilliar township, voted a tax receipt; that Thomas D. Coe voted for Mr. Morgan in Millford township, when he intended to vote for

Mr. Delano; that Anthony P. Burkey, intending to vote for Mr. Morgan, is not certain whether he voted for Mr. Delano or Mr. Morgan; and that William H. Foot, in Berlin township, intending to vote for Mr. Delano, is uncertain whether he voted for the one or the other.

We are therefore unable to conclude that any rule of law, or any precedent, or justice to the parties to this case, demands the rejection of this poll. The result has not been shown to be "so tainted with fraud that the truth cannot be deduced therefrom." The very contrary is the case. The proof shows that 123, as above stated, were intended to be cast for the contestant, and the residue of the poll, 177, for the contestee, and the precedents both in Congress and in the civil courts require that the electors should be counted for the respective candidates accordingly. There is no evidence of fraud upon the part of the officers of the election.

MONROE TOWNSHIP.

The official returns of this township gave the contestee 97 votes, and the contestant 64 votes. The respective parties examined as witnesses every elector in this township and proved for whom he voted for member of Congress, except certain persons, numbering 17, who were either dead or absent, and as to them the parties admitted that 8 voted for the contestee and 9 voted for the contestant, giving, in all, 74 votes to the contestant and 87 to the contestee. In other words, by the testimony taken and the admissions of the parties the vote is corrected and rendered certain beyond a doubt. (H. Mis. Doc. No. 38, part 1, p. 447, and H. Miss. Doc. No. 38, part 2, p. 507.) If, therefore, there was any fraud practiced or attempted at this poll, it has deprived neither party of votes to which he was entitled. The result has not been shown to be "so tainted with fraud that the truth cannot be deduced therefrom." The certificate may well be rejected, for it is only *prima facie* evidence of what it contains, and is not absolutely obligatory upon the House. This is fully authorized by the case of Chrisman *vs.* Anderson, in 1860. Bartlett's Contested Election Cases, page 328, in which the House held that "it is the duty of the House in contested cases to go behind all certificates for the purpose of correcting mistakes brought to its notice." But the contestant alleges fraud in the officers of this election. The officers, of whom two were republicans and three were democrats, were all examined, and all testified that there was no fraud committed by them or with their knowledge. There was other testimony tending to excite suspicion as to the conduct of one of the officers, but it is, in our judgment, entirely insufficient to justify the rejection of the vote of the township, as established by the evidence and the admissions of the parties. It is impossible for us to perceive on what ground of law, or political or moral ethics, votes should be refused to any candidate for whom, by legal evidence, they are shown to have been cast. To reject such votes upon legal technicalities violates every precedent in Congress, and makes Congress assume the odious responsibility of *electing* members of Congress. We therefore find the contestant entitled to 74 votes and the contestee to 87 votes.

JEFFERSON TOWNSHIP.

In this township there is no evidence in detail of the persons for whom each elector voted. The official return imports *prima facie* verity, and the burden of proof to destroy this legal presumption is upon the contestant. He alleges fraud in the conduct of the election by one of the officers. He takes the testimony of Wm. P. Wheeler to prove that 96 electors voted for him. But Wheeler only states, in reference to the vote of the township:

I know that it has been canvassed. I am not sure my count is right. It foots up 96 votes with me this morning.

This is the substance of Mr. Wheeler's testimony, and it is too frivolous for comment, and does not attain the dignity of *hearsay* testimony. He gives the names of 96 electors, but there is no evidence that any one of them even declared that he voted for the contestant. Francis Walker is sworn to prove that Henry Metham, one of the judges, changed three republican for democratic tickets. He states that he was in the room during the counting, sitting eight or ten feet from the ballot-box, and that the room was lighted by two lamps, but the testimony of Lyman, and of all the election officers except one, who was dead, shows that there were four lamps ; he further states that he was able to recognize the republican tickets referred to because they had the American eagle at their head, and the democratic tickets because they had a shield or coat of arms at their head ; but T. W. Collier, editor of the Age, the organ of the republican party in Coshocton county, says that a large portion of the republican tickets had no engraving or device at their head, and those which had any such engraving or device had a flag. The election officers (except one who was dead) all testify that there was no fraud at this election of the kind alleged, or of any other kind, and their general reputation for integrity and veracity is sustained by the testimony of three leading republicans of the township, and is unimpeached by the contestant. Walker is contradicted in every material statement made by him by the testimony of several witnesses, and the evidence on every material point not only fails to sustain him but overwhelmingly contradicts him.

In 1865, at the gubernatorial election in this township, the contestee, then a candidate for governor, received 122 votes, while his opponent only received 79, making Morgan's majority 43. In 1866 the official return shows Morgan received for Congress only 119 votes and the contestant received 93, reducing Morgan's majority to 26. (H. Mis. Doc. 38, pt. 1, p. 361, *et seq.*, and H. Mis. Doc. 38, pt. 2, pp. 300, 378.)

In view of the foregoing considerations and of all the evidence in reference to this township, we feel compelled to find that the poll in this township is entirely free from fraud or unfairness of any kind that could do prejudice to either party.

PIKE TOWNSHIP, KNOX COUNTY.

In this township it is alleged by the contestant that Salathiel Parrish, one of the judges, was a deserter from the draft of 1864, and therefore incompetent, from disability as a citizen and elector, to act in that capacity. We consider the alleged ground of incompetency utterly untenable and unsound. But we will not take time in this connection to discuss it. We observe, first, then, that no such ground is specified in the contestant's notice, and it is, therefore, waived and not available now. Nor is it proved in this case that Salathiel Parrish, the alleged deserter, and Salathiel Parrish, the election officer, are the same person. But it is proved by the testimony of David Porch, (H. Mis. Doc. 38, part 2, pp. 276, *et seq*,) that Salathiel Parrish, who was the election officer, had furnished, according to law, a substitute, and was released from the draft in 1864. The case of Howard *vs.* Cooper (Con. El., vol. 2, p. 282) has therefore no application here. In that case but two persons pretended to act as judges. There was, therefore, *no* compliance with the law ; but in the case under consideration there was an actual compliance with the law, and even if Parrish were incompetent for the reasons alleged, yet, no fraud being alleged or proved, he was a judge *de facto*, and the election was clearly valid. (Milliken *vs.* Fuller, Bartlett's Con. El. Case, p. 176 ; Ohio, &c., *vs.* Ritt, Am. Law Reg. for Dec., 1867, p. 90 ; Barrett *vs.* Reed, 2 Ohio, 410 ; Johnson *vs.* Stedman, 3 Ohio, 96 ; Elden *vs.* Sexton, 5 Ohio, 216.)

The laws of Ohio (S. and C., sec. 20, p. 533) provide that if either of the judges of the election should be a candidate for a State or county office, it shall

be the duty of the electors present to elect a suitable person to act as judge in the place of said candidate.

In the contested election case of Grosvenor, republican, *vs.* Golden, democrat, before the senate of Ohio in 1865–6, one of the grounds of contest was that Erwin Moore, one of the judges of election, was a candidate for county commissioner, and was thereby precluded by the express terms of the statute from acting as judge of the election. The senate which tried and decided this contest was three-fifths republican. In speaking of a judge of the election being a candidate, the majority of the committee, in their report, say:

The committee find this contrary to a provision of the statute. But they further find that he (Moore) did not act *corruptly, but in ignorance of the law.* The committee regard said action as irregular, yet they are of opinion, and so find, that all the really essential requisites to constitute a valid election were observed in this case. The election was held at the proper time and place and by competent authority, (to wit, the township trustees.) That there was no evidence of fraud in conducting the same, and no doubt about the result. In view of these facts, we are unable to assign any satisfactory reason for rejecting this return. * * * The evidence is clear that the election was conducted with entire fairness. We are therefore of opinion that we can neither allege want of authority in the election board, fraud in conducting the election, nor any uncertainty about the result. The supreme court of this State have decided in the cases of Ohio *vs.* Choate, 11 O. R., p. 511; Ohio *vs.* Alby, 12 O. R., p. 16; Ohio *vs.* Jacobs, 17 O. R., pp. 151, 152, that where an officer acts under the *color* of authority, his acts will be binding, although in point of law and right he was no such officer. And if the acts of a person who acts by color of authority alone will be sustained, there is certainly much greater reason for sustaining the acts of a real officer, although the mode of his action has been irregular.

And the majority of the committee reported the following resolution:

Resolved, That W. Reed Golden is entitled to a seat in this house as a senator from the ninth senatorial district of Ohio.

And the resolution was adopted by the senate by a vote of 23 against 11. (Senate Journal, 1866, pp. 182, 183.)

HARRISON TOWNSHIP.

The claim of the contestant for the rejection of the poll in this township, being based upon no allegation or proof of actual fraud, and having been abandoned before the committee, will not be further considered by us.

COUNTING BEFORE 6 P. M.

The contestant claims that certain polls should be rejected because the officers commenced counting out before 6 o'clock p. m. on the day of election, contrary to law. We do not think this objection sufficient to reject the poll. It is mainly technical. It does not appear that any substantial prejudice was done to any one by the premature counting. And, on this point we are content to follow the rule established by the senate of Ohio, in February, 1866, in the case of Grosvenor vs. Golden, reported in Ohio Senate Journal, for 1866, pp. 181 *et seq.* We cite the following paragraphs from the report of the committee in that case, which was adopted by the Senate by a vote of 23 to 11, the Senate being republican by a large majority, and the rejected claimant for the seat being himself a republican:

3. That the judges in Good Hope township, Hocking county, opened the ballot-box and commenced counting out the votes before the election was closed.

4. That the judges in Washington township, in said county, only read the heads of the *unscratched* tickets. The committee find that both these charges are true in point of fact; and we find that in both cases the mode of counting out the votes was irregular and improper; but we are of opinion that it was only a mistake on the part of the trustees as to the mode of performing their office; that they did perform all the acts which were really essential to ascertain the verdict of the electors, and to preserve the evidence of that fact. They received the ballots, placed them in the box, kept a list of the voters, strung and preserved the tickets. They made a mistake in the time and manner of counting, but this did not impair the certainty of the evidence on the main point, and the committee regard it as

their duty to correct all mistakes made in counting the votes, whether the mistake related to the manner or result; the evidence showing no fraud in either of these elections, but the proof being that the tickets in the ballot-boxes are the same put in by the electors whose names are on the poll-books, and that the tickets are unchanged. The committee are of opinion that they could not be justified in setting aside the vote of a township simply because an election board, through ignorance or otherwise, mistook, in an unessential particular, the correct mode of performing their office, provided the same was done in such a manner as to afford satisfactory evidence of the true result of the voting, which we find was the case in these two townships.

ALIENS.

Michael Scully is alleged to have been an unnaturalized foreigner. The proof shows, however, that he had become a resident and made his declaration of intention to become a citizen of the United States on September 5, 1855, at Albion, New York, (H. Mis. Doc. 38, part 2, p. 220,) and made his final declaration and was naturalized on September 29, 1866, at Newark, Ohio, and was a citizen of Ohio, (H. Mis. Doc. 38, part 1, pp. 551, 81, *et seq.*) There is other testimony in reference to this voter which shows conduct on the part of other persons of a questionable character, but it does not disprove or materially effect the facts above stated. John Dermody is also alleged to have been an illegal voter. The proof shows that he came to the United States in June, 1863, and entered the military service thereof in May, 1864, and was honorably discharged over three months thereafter, in September, 1864, at the expiration of his term of service, (H. Mis. Doc. 38, part 2, p. 233,) and was therefore entitled to naturalization under the law of Congress of July, 17, 1862, (2 Brightley's Digest, p. 5,) without any previous declaration of intention, and without the previous residence of five years, and was in fact naturalized before the election at which he voted. But his naturalization was not obtained on the ground of his military service. Does this fact vitiate his naturalization? We think, upon well established rules of law, that such an act, if legal and proper upon any grounds at the time it is done, is not affected or invalidated by the fact that at the time it was done an untrue or insufficient ground was assigned before the court. We therefore hold that both these men were legal voters, and should be counted for the contestee. We further observe, as conclusive against their rejection, that they resided and voted in Mount Vernon, and in the contestant's notice to the contestee there is no allegation that any illegal votes were cast in Mount Vernon, which is divided into wards that constitute separate election precincts under the law of Ohio.

REBEL SOLDIERS.

It is alleged that Thomas Thatcher, Frank Towell, William Springle, Thomas Darr, David Kendall, James Goodin, Gilmore Kendall, George W. Stitely, and John Maddox voted for the contestee, and had been in the military service of the Confederate States in the late rebellion, and were therefore illegal voters, and should be rejected. We observe, first, that the testimony entirely fails to establish that James Goodin, William Springle, or Thomas Darr were in that service at all. The testimony shows that the others were in that service, but were citizens of Ohio. No law of Ohio, or constitutional provision, or act of Congress, disfranchises, or attempts to disfranchise such citizens in Ohio. We hold, therefore, that they were legal electors, and cannot be rejected by Congress in this case. The State of Ohio alone has the right and power to regulate the suffrage of her citizens.

MINORS.

The contestant avers that George B. Lewis, George W. Wheeler, John Bucksbarger, J. Willis Chapman, James K. T. Redman, John Kelso, Peter

Gibbeaut, jr., Rufus H. Lane, and Richard Cody, were minors and illegal voters under the laws of Ohio, and voted for the contestee. The father of George B. Lewis testifies that his son was of age when he voted. (H. Mis. Doc. 38, pt. 1, pp. 93–95.) The son himself testifies in like manner. No other proof overcomes this testimony. The father of Richard Cody, witness for contestant, swears his son did not vote at all, but remained at home all that day. The proof shows that George W. Wheeler and John Bucksbarger resided and voted in their respective wards in the city of Newark, and that John Kelso and Rufus H. Lane resided and voted in their respective wards in the city of Zanesville, and there is no allegation in contestant's notice of the grounds of contest that any illegal votes were cast in said wards. We hold the proof, therefore, inadmissible, and that the objection to these voters is waived by the contestant. We find that the votes of Chapman, Redman, and Gibbeaut were illegal by reason of minority, and reject them from the contestee's count.

LEGAL VOTES REJECTED FOR CONTESTANT.

The contestant claims that Thomas Boyle, Pleasant township, Knox county, W. F. Herrick, Clinton township, Knox county, John Brown, Liberty township, Knox county, William H. Foote, Berlin township, Knox county, B. F. Spencer, Bowling Green township, Licking county, William P. Hay, Coshocton township, Coshocton county, Tobias Kepner, Coshocton township, Coshocton county, Isaac Hook, Bethlehem township, Coshocton county, Lewis Quigly, fourth ward, Zanesville, Elza A. Dye, Meigs township, Muskingum county, were legal electors in their respective precincts, and desired to vote for him, but were illegally refused. We find from the evidence that the votes of John Brown, William H. Foote, B. F. Spencer, Isaac Hook, and Elza A. Dye were legal and ought to have been received for the contestant. The proof shows that Thomas Boyle, in August, 1866, determined to remove to and become a citizen of Iowa, and sent some of his stock there by his son at that time, and on October 2d, 1866, he had a public sale of his property, and on the day following his wife started for his new home by railroad and he started two horses and a buggy westward the same day. The election was on October 9, 1866, and on the 16th of that month he left for Iowa. (H. Mis. Doc. 38, pt. 2, p. 272–3, and pt. 1, p. 46.) The proof shows that W. F. Herrick left Ohio and moved to Illinois in September, 1865, with the intention to purchase land and cultivate some fruit, and to remain there an indefinite length of time, and while there he kept house, but returned to Ohio August 1, 1866, and attempted to vote for the contestant, and his vote was refused by an exclusively republican election board. The proof shows that William P. Hay moved from Ohio to Pennsylvania in November, 1865, "for the purpose of engaging in business as a commercial broker," and that "the time was indefinite" during which he intended to remain there, and that he did engage in business there, but returned in September, 1866, to Ohio and offered to vote for the contestant. The testimony shows that Tobias Kepner was a citizen of Ohio in 1865, and then removed to Iowa to engage in business with the intention to remain an indefinite period of time, and took his family with him, and did engage in business there, but returned in the summer or fall of 1866 to Ohio and attempted to vote, but it is not clear for whom he desired to vote. His vote was rejected. (H. Mis. Doc. 38, pt. 2, pp. 361–4, and pt. 1, pp. 334–340.) The testimony shows that Lewis Quigley was a citizen of Ohio in 1865 and then removed with his family to the west, in his own language, with the intention "in case I could do better there than here to remain, if not to return," and that he did settle in Illinois and remained there three months, and then returned to Ohio and offered to vote for the contestant in the city of Zanesville, and was refused. There is no allegation in contestant's notice to

contestee that any legal votes were rejected for him in that city, and objection to the exclusion of Quigley's vote is therefore waived.

The statute of Ohio provides that "if a person remove to another State, *with an intention of remaining there for an indefinite time, and as a place of present residence*, he shall be considered and held to have lost his residence in this State, notwithstanding he may entertain an intention to return at some future period." (1 Swan & Cr., p. 543–4.)

We hold, therefore, in view of all the testimony, the law of Ohio, and the general principles of law applicable to the case, that it is entirely clear that Thomas Boyle, W. F. Herrick, William P. Hay, Tobias Kepner, and Lewis Quigley had severally lost their residence and right to vote in Ohio, and had not regained it before the election, and were not legal electors at that time, and were properly rejected.

Non-residents who voted for the sitting member.

We find upon examination of the evidence that the following persons who were non-residents, and therefore not legal electors, voted for the sitting member:

COSHOCTON COUNTY.

Joseph Fiddy, H. Mis. Doc. 38, pt. 1, pp. 316, 330; Charles Wells, H. Mis. Doc. 38, pt. 1, pp. 317, 330; William Shaw, H. Mis. Doc. 38, pt. 1, pp. 317, 330; James Litchfield, H. Mis. Doc. 38, pt. 1, pp. 371–3, 385; Joseph Bartholow, H. Mis. Doc. 38, pt. 1, pp. 376, 385; Rodney Reed, H. Mis. Doc, 38, pt. 1, pp. 376, 385; Michael Everhart, H. Mis. Doc. 38, pt. 1, pp. 316, 329, 385; John McLain, H. Mis. Doc. 38, pt. 1, pp. 322, 325.

KNOX COUNTY.

James Johnson, H. Mis. Doc. 38, pt. 1, pp. 64–5, 70; John Johnson, H. Mis. 38, pt. 1, pp. 64–5, 70; Josiah Bowen, H. Mis. Doc. 38, pt. 1, pp. 101–2, 115; Eli Young, H. Mis. Doc. 38, pt. 1, pp. 110, 114; John Bell, H. Mis. Doc. 38, pt. 1, p. 119; Moses Painter, H. Mis. Doc. 38, pt. 1, p. 119; John Nixon, H. M. Doc. 38, pt. 1, p. 113; Allen Long, H. Mis. Doc. 38, pt. 1, pp. 130, 144.

LICKING COUNTY.

One boatman, (name unknown,) H. Mis. Doc. 38, pt. 2, p. 21, pt. 1, p. 153; Cyrus McKinney, H. Mis. Doc. 38, pt. 1, pp. 162, 171; Thomas Starret, H. Mis. Doc. 38, pt. 1, pp. 172–5; William Irwin, H. Mis. Doc. 28, pt. 1, p. 207; William Linton, H. Mis. Doc. 38, pt. 1, p. 209; James Streeter, H. Mis. Doc. 38, pt. 1, p. 209; John J. Creamer, H. Mis. Doc. 38, pt. 1, p. 209; Henry Holler, jr., H. Mis. Doc. 38, pt. 2, p. 59; John Weiss, H. Mis. Doc. 38, pt. 1, pp. 162, 171, 215; Otto Risher, H. Mis. Doc., pt. 1, pp. 191, 215.

MUSKINGUM COUNTY.

Robert Maginnis, H. M. Doc. 38, pt. 1, pp. 468, 521; Thaddeus Denman, H. Mis. Doc. 38, pt. 1, pp. 471, 521; Ferguson Moorhead, H. Mis. Doc, 38, pt. 1, pp. 513, 533; Daniel Dugan, H. Mis. Doc. 38, pt. 1, pp. 479, 496, 538; N. C. Robinson, H. Mis. Doc. 38, pt. 1, pp. 468, 521, 540; David Woodward, H. Mis. Doc. 38, pt. 1, pp. 470, 477, 521.

All the other alleged illegal voters under this classification, upon the most careful examination of the evidence touching each, we find to have been legal

voters and that their votes were properly received. Several of them voted in the cities of Newark and Zanesville, and are counted for the sitting member for the further reason that the contestant gave him no notice, as required by law, of illegal votes cast in said precincts.

DESERTERS.

The contestant claims that 201 persons, guilty of the crime of desertion, voted for the sitting member. Before presenting our views of the law applicable to this class of voters, either generally or in detail, we will present such a classification of the voters themselves, as a very careful examination of the evidence concerning each seems to justify and require. We will place them under certain general heads, and annex such additional remarks to each as the facts render necessary.

Persons under the draft of 1862, *against whom there is no proof of actual desertion or leaving the district, or the United States.*

COSHOCTON COUNTY.

Evan Rogers, no proof where he voted, if at all; Frederick Spang, no proof where he voted, if at all; Christopher C. Fisher, did not vote; Peter Hillier, proof unsatisfactory that there was such a man; Jacob Cutshall, three of same name; the drafted man ran off and never voted; Francis Lumbricht, George Loar, not liable to draft; over 45 years of age; Jno. P. Loar, a Republican, and not drafted. John Loar was, and was killed in 1864; Yost Snyder; Perry Wheeler, not drafted; no proof for whom he voted, mere hearsay; John Dougherty, no proof that John Dougherty, of White Eyes township, was even drafted, but John Dougherty of Pike township, a different man, was; Thomas Sheets did not vote, but another Thomas Sheets did vote in Mill Creek township, but no evidence for whom; John McDowell, no proof for whom he voted; Ransom L. Almack, Casper Rine, William Rine, a Republican.

KNOX COUNTY.

Milton Pipes, not drafted, but another Milton Pipes was, and did not vote; Samuel Jones, no proof for whom he voted; Lewis Biggs, James Biggs, Benjamin Burtnett, Jacob Elliott, Charles Elliott, Alvin Lybarger, Perez Lybarger, Hugh Lybarger, Robert P. Smith, Henry Wolford, Samuel Hoge, Thomas Wallis, Jesse Underwood, jr., not drafted; Jesse Underwood was, but politics not proved; Daniel Smith, no evidence he left the county.

LICKING COUNTY.

James Haskinson, Wesley Baring, James Shohoney, extremely uncertain whether he voted at all; Charles Carroll, Samuel J. Edwards, poll-book shows he did not vote—testimony vague; C. W. Collins, not drafted; Charles C. Collins was; Samuel Greenwood, no proof for whom he voted—not drafted, but Samuel Greenwood of Hartford township was, and did not vote; Jesse Vail, no proof for whom he voted; William H. Belt, a republican.

In the following cases under the draft of 1864 *there is no proof of identity of the persons drafted and the persons voting, except either identity or similarity of name on lists.*

COSHOCTON COUNTY.

George H. Strouse, not a deserter, did not vote; George H. Strouse, jr., did vote; George B. Smith did not vote; George Smith did; John Konyon, James

Murphy, William Pool, Henry Haynes, Horace Norris, Robert Grimes, Samuel Croskey, James Bucklew, George Billman, Henry Cutshall, Noah Infield, Joseph Sneider, Martin Randalls, Samuel Bickle, George Caser, Edward Merrill, Joseph Knight, Jackson Mills, Noah A. Fry.

KNOX COUNTY.

Benjamin Echenrode, John Philips.

LICKING COUNTY.

Calvin Neiberger, A. C. Denman, David Rector, John Moore, T. W. Larrabee, T. B. Nichols, Benjamin Foulk.

MUSKINGUM COUNTY.

Frank Huff, John Lewis, John Jones, W. H. Crawford, Solomon Ross, W. H. Smith, Benjamin Shane.

We hold in reference to this class of voters that the poll-lists are not sufficient evidence that a person voted. Parol evidence of identity is necessary. Parol proof is admissible to corroborate and sustain the record, but not to set it aside or contradict it where by law the record is required to be kept and is made evidence, as in Ohio. (2 Contested Election Cases, p. 223.)

In the following cases the identity of the drafted man and the voter is established, but generally by very vague and unsatisfactory testimony.

COSHOCTON COUNTY.

William Hyatt, John Holt, under draft of 1862; Chester T. Gomer, Nelson Maple, Stephen Loome, Anderson Maple, Francis Amore, John W. Curtiss, John Casner, Alexander Curtiss, Peter Fortune.

KNOX COUNTY.

Samuel Wilson, Emmanuel Wilson, Ephraim Wineland, George Scarborough, William M. Rinehart, Orange Johnson, Isaac Daniels, Calvin B. Trout, Daniel Lepley, John W. Allerding, Peter Bluebaugh, Jacob Snyder, William Meyers, Minor McQueen, Bourbon Coe, George W. Mack, Lerzy Kreeks, Simon Lepley. The latter alone left county to avoid draft.

MUSKINGUM COUNTY.

J. W. Doughty, Matt. Dollings, James Knight, Lafayette Garley, Demetrius L. Krigbaum, George W. Powell, John W. White, Isaiah Stotts, John Snyder, Hugh Johnson, John M. Rath, John McNally, Jacob Henry, S. C. Cassiday.

In the following cases, under the draft of 1864, *the conclusive fact as to each is indicated after the name.*

COSHOCTON COUNTY.

Peter Wingerson, no proof how he voted; Pat. Creely, no proof how he voted; J. Bradley Burt, put in substitute, part 2, pp. 335, 336; David Ford, put in substitute; Josiah Pepper, put in substitute; William Murray, neither drafted nor deserter; David E. Snyder, no proof for whom he voted; John Smith, poll-book shows he did not vote; John Wolf, no proof of desertion; Samuel Smith, no proof of desertion; Andrew Mavis, did not vote, part 1, page 385; James Addy, of Coshocton county, did not desert; George Smith, of Coshocton county, did not desert; Andrew Bickle, no proof of desertion; William Morton, did not

vote; John Pritchard, not a deserter; Andrew J. Camp, not a deserter; Jacob Wolf, not a deserter; Ezekiel Severns, not a deserter; Mahlon Baker, no proof for whom he voted.

KNOX COUNTY.

Franklin Vian, of Pike township, not deserter, of Monroe is so charged; Benjamin F. Kunkle, put in substitute, part 2, p. 276; John Kessenger, or Kensinger, who was drafted, did not vote; David Hodge, put in substitute, part 2, p. 279; Salathiel Parrish, put in substitute, part 2, p. 279; James F. Scoles, put in substitute, part 2, p. 279; Philip Arnold, put in substitute, part 2, p. 279; Anson Lewis, not deserter; Cyrus Mitchell, not deserter, part 1, p. 115; part 2, pp. 310, 311; Thomas Fadely, not deserter, put in substitute; Samuel Cronkleton, put in substitute, part 2, pp. 276, 279; Tolbert Rockwell, not deserter, nor on list, part 2, pp. 311, 312; Aaron Donohey, did not vote for Morgan, part 2, p. 250; Hiram McManus, not deserter; John McKahan, not deserter, part 1, p. 110; Otho Countryman, not deserter, part 1, pp. 111, 250, 253; George Ely, not deserter; Samuel Flack, not deserter; Samuel Jones, not deserter, part 1, p. 111; William Presley, or Priestly, not deserter, voted by no other name; Wilson Hartipee, no proof for whom he voted; John Miller, did not vote; John P. Miller, over 62 years of age, cripple 23 years, did vote, part 2, p. 99; Sylvester Hillary, no proof for whom he voted, or of his politics; Miller Davidson, voted for Delano, part 2, p. 102; Daniel Freese, no evidence about him; Charles Jewell, not charged with desertion on rolls of army; Linn Jewell, not charged with desertion on rolls of army; James H. Elliott, not charged with desertion by provost marshal; Richard S. Sigler, not charged with desertion by provost marshal; L. Cooley, not returned a deserter, but absent on furlough, and crippled in his hand; Riley Baker, not returned a deserter, part 1, pp. 205, 307, 308; John Cashdowler, not returned a deserter, part 1, pp. 206, 308; Harvey Wise, not a deserter, nor in army; Andrew Wise, not a deserter, nor in army; William T. Davidson, not a deserter, nor in army; George Brown, no proof for whom he voted; Samuel Cooper, no proof for whom he voted; James Richardson, no proof for whom he voted; Augustus Dutton, no proof for whom he voted; Jacob Meyers, no proof for whom he voted; John Loafman, no proof for whom he voted; Ambrose Benjamin, no proof for whom he voted.

MUSKINGUM COUNTY.

Anthony P. Burkey, he don't know for whom he voted, part 1, p. 600; Samuel J. Mattingley, poll-book shows he did not vote, part 2, p. 757; Isaac Linton, not a deserter, part 2, pp. 310, 311; Levi Bunting, not a deserter, part 2, pp. 251, 256; Hiram Walters, not a deserter, part 1, pp. 251, 256, 313, 314; Alfred Willis, did not vote, part 2, pp. 737, 738, 739; James Linton, did not vote, part 2, pp. 737, 738, 739; James Smith, not a deserter, part 1, p. 312—other proof worthless; Owen Gadd, did not vote, part 2, p. 754; Philip Beck, not returned as deserter, part 1, pp. 251, 256; Johnson Shaw, not returned as deserter, part 1, pp. 251, 256; Duncan West, not returned as deserter, did not vote, part 1, pp. 251, 256; William Manley, no proof for whom he voted, part 1, p. 506; Richard M. George, no proof for whom he voted; W. P. Anderson, not a deserter; Wash. Suttles, not a deserter, part 1, pp. 251, 256, 312, 313; Thomas Cunningham, no proof for whom he voted.

Thus it appears that 41 of these alleged deserters were drafted under the call for volunteers in 1862, and that 37, under the draft of 1864, are not identified with the alleged deserters, and that 43 of them are so identified, and that 79 of them are in no just or legal sense guilty of desertion or disqualified electors. It further appears that of the whole number, 102 are legal voters, and ought not to be rejected, for reasons which are briefly indicated after their respective

names in the foregoing lists. Generally, a very laborious and minute examination of the evidence, such as it is, discloses the fact and makes inevitable the conclusion that to reject any considerable number of them upon such evidence would result in gross injustice. The degree of uncertainty which characterizes all the evidence of desertion, even in the strongest cases, leaves so much doubt as to the fact as to justify the holding of it all to be utterly insufficient to convict.

We hold in reference to all of the alleged deserters that they are *legal* electors, and that there is a signal failure, by legal evidence, to establish disqualification against any of them, because—

There is no proof of the trial and conviction of any of them for desertion by any court or tribunal of competent jurisdiction, civil or military, under the acts of Congress, March 3, 1863, or March 3, 1865, or any other laws. Without such conviction, even admitting the validity of those laws, their right to vote remains entirely unimpaired. It involves a violation of the most obvious rules of law, and principles of justice, and guarantees of liberty, and rights of the States, to deprive a citizen of so precious and sacred a franchise upon a vague charge, without due process of law, or a fair and impartial trial, with opportunity to the voter to make his defence. There is nothing in the acts of Congress that gives any countenance to the assumption that it is the intention of those acts to work any such results. The authors of them were not ignorant of the prohibitions and guarantees contained in the fifth and sixth articles of amendments to the federal Constitution and other pertinent provisions of that supreme law. It is not competent for Congress to inflict punishment by the deprivation of rights upon the citizens of a State by mere legislative declarations. Neither can Congress, without usurpation, regulate suffrage in the States, by direct legislation to that end, or under the pretext of punishing men for alleged desertion. The regulation of suffrage belongs exclusively to the States, and this doctrine has been repeatedly affirmed by Congress in election cases and otherwise. It is also clearly established that Congress has no rightful authority to confer federal judicial power in such matters upon the judicial tribunals of a State, and still less upon the *quasi* judicial tribunals organized under the mere municipal regulations of a State, such as election boards, none of whose duties can scarcely be said to be judicial at all.

The language of the supreme court of Pennsylvania in the late case of Huber *vs.* Riley, a case which arose under the act of Congress of March 3, 1865, is so clear, just, and forcible that we quote from it the following paragraphs:

The spirit of these constitutional provisions is briefly that no person can be made to suffer for a criminal offence unless the penalty be inflicted by due process of law. What that is has been often defined, but never better than it was both historically and critically by Judge Curtis, of the Supreme Court of the United States, in Dean *vs.* Murray. (18 Howard, 272.) It ordinarily implies and includes a complainant, a defendant, and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. But I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offence and the imposition of legal penalties can be in any other mode than by trial according to the law of the land, or due process of law—that is the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. *And I cannot persuade myself that a judge of elections, or a board of election officers, constituted under the State laws, is such a tribunal. I cannot think they have power to try criminal offenders, still less to adjudge the guilt or innocence of an alleged violator of the laws of the United States. A trial before such officers is not due process of law for the punishment of offences according to the meaning of the phrase in the Constitution.* There are, it is true, many things which they may determine, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization. These things pertain to the ascertainment of a political right; *but whether he has been guilty of a criminal offence, and has as a consequence forfeited his right, is an inquiry of a different character.* Neither our Constitution nor our law has conferred upon the judges of elections any such judicial functions. They are not sworn to try issues in criminal cases. They have no power to compel the attendance of witnesses, and their judgment, if rendered, would be binding upon no other tribunal. Even if they were to assume jurisdiction of the offence described

in the act of Congress, and proceed to try whether the applicant for a vote had been duly enrolled and drafted, whether he had received notice of the draft, whether he had deserted and failed to return to service, or failed to report to a provost marshal, and whether he had justifying reasons for such failure, and if after such trial they were to decide that he had not forfeited his citizenship, all this would not amount to an acquittal. It would not protect him against a subsequent similar accusation and trial, would not protect him against trial and punishment by a court-martial. Surely that is no trial by due process of law, the judgment in which is not final, decides nothing, but leaves the accused exposed to another trial in a different tribunal, and to the imposition by that other tribunal of the full punishment prescribed by law. *It is not in the power of Congress to confer upon such a tribunal, which is exclusively of State creation, jurisdiction to try offences against the United States.* The doctrine seems a plain one that Congress cannot vest any of the judicial power of the United States in the courts of any other government or sovereignty. (Martin *vs.* Hunter's lessee, 1 Wheat., 304, 330; Ely *vs.* Peck, 7 Conn., 242, and Scoville *vs.* Canfield, 14 Johns., 338.) And clearly, if this is so, Congress cannot make a board of State election officers competent to try whether a person has been guilty of an offence against the United States, and if they find him guilty, to enforce a part of the prescribed penalty.

The same court, after an examination of all the laws of Congress on the subject of desertion and its punishment, gives the following just construction to the act of 1865:

All these acts of Congress manifestly contemplate trial for desertion in *courts-martial*, and the infliction of no punishment or forfeiture except upon conviction and sentence in such courts. The act of 1806 provided for general courts-martial, and made minute and careful regulations for their organization, for the conduct of their proceedings, and for the approval or disapproval of their sentences. Subsequent acts made some changes, but they have not restrained the jurisdiction or diminished the powers of such courts. It is to such a code of laws, forming a system devised for the punishment of desertion, that the 21st section of the act of March 3, 1865, *was added. It refers plainly to pre-existing laws. It has the single object of increasing the penalties, but it does not undertake to change or dispense with the machinery provided for punishing the crime.* The common rules of construction demand that it be read as if it had been incorporated into the former acts. And if it had not been, if the act of 1806 and its supplements had prescribed that the penalty for desertion, or failure to report within a designated time after notice of draft, (which the act of 1863 declares desertion,) should be punished on conviction of the same with forfeiture of citizenship and death, or in lieu of the latter, such other punishment as, by the sentence of a court-martial, may be inflicted, would any one contend that any portion of this punishment could be inflicted without conviction and sentence? Assuredly not; and if not, so must the act of 1865 be construed now *It means that the forfeiture which it prescribes, like all other penalties for desertion, must be adjudged to the convicted person, after trial by court-martial, and sentence approved.* For the conviction and sentence of such a court there can be no substitute. They alone establish the guilt of the accused and fasten upon him the legal consequences. Such, we think, is the true meaning of the act—a construction that cannot be denied to it without losing sight of all the previous legislation respecting the same subject-matter, no part of which does this act profess to alter.

It may be added that this construction is not only required by the universally admitted rules of statutory interpretation, but it is in harmony with the personal rights secured by the Constitution, and which Congress must be presumed to have kept in view. It gives to the accused a trial before sworn judges, a right to challenge, an opportunity of defence, the privilege of hearing the witnesses against him, and of calling witnesses in his behalf. It preserves to him the common law presumption of innocence until he has been adjudged guilty according to the forms of law. It gives finality to a single trial. If tried by a court-martial and acquitted his innocence can never again be called in question, and he can be made to suffer no part of the penalties presented for guilt. On the other hand, if a record of conviction by a lawful court be not a prerequisite to suffering the penalty of the law, the act of Congress may work intolerable hardships.

The reasoning and conclusions of the distinguished judge (Justice Strong) who delivered the foregoing opinion are so vigorous, clear and unanswerable, that we adopt them fully in this case. These views have been concurred in by other high courts in the country. The very language of the act seems to forbid any other construction. The *penalty* under the twenty-first section is declared to be "*in addition to* the other lawful penalties of the crime of desertion." What other or pre-existing penalties are meant? Certainly those only which, under the rules and articles of war and previous laws, might be adjudged against offenders by competent and proper courts.

But it is claimed that, because under the constitution of Ohio no man can be a legal elector who, in addition to the other qualifications, is not also a citizen

of the United States, therefore, Congress having control over citizenship of the United States, may decitizenize or withdraw citizenship of the United States from whom it pleases by mere legislative declarations, without due process of law, and that all persons thus deprived of citizenship of the United States at once cease to be citizens, or legal electors of the State of Ohio. This doctrine is deemed most dangerous, if not monstrous, and violative of most valuable and fundamental principles in our government. That provision in the constitution of Ohio was undoubtedly designed to prevent aliens from becoming electors in Ohio until they had first become by naturalization citizens of the United States. This was required on grounds of local State policy. But it is a perversion of terms to say that any person acquires the right of suffrage in Ohio by virtue of the laws of Congress. Naturalization does not confer the right of suffrage. That right is only conferred by the Constitution and laws of Ohio. Persons are allowed to vote there because they possess all the qualifications thus prescribed. The right of suffrage at a State election is a State right, a franchise conferable only by the State, which Congress can neither give nor take away. If, therefore, the act now under consideration is in truth an attempt to regulate the right of suffrage in the State, or to prescribe the conditions on which that right may be exercised, it would be held unwarranted by the federal Constitution. In the exercise of its admitted powers, Congress may doubtless deprive an individual of the opportunity to enjoy a right that belongs to him as a citizen of a State, even the right of suffrage. But this is a different thing from taking away or impairing the right itself. Congress may also impose upon the criminal forfeiture of his citizenship of the United States—that is, of what Justice Story denominates his *general* citizenship; but that does not legally or necessarily deprive him of his citizenship of the State, which is secured to him by the State constitution and laws, and is to be held on the terms prescribed by them alone. It is an integral part of the State government.

But we claim that the act of March, 1865, is unconstitutional in so far as it may be designed, by its terms, to work the disfranchisement of any of the persons alleged to be deserters in this case, because, to that extent at least, it is an *ex post facto* law, and a bill of pains and penalties. In support of these objections, waiving further argument here, we refer to the luminous and conclusive judgments of the Supreme Court of the United States in the cases of Cummings *vs.* The State of Missouri, and *ex parte* Garland, 4 Wallace Reports, pp. 277, 333, which ought to be familiar to every member of the House.

But it is attempted to evade the effect of these decisions by assuming that the failure to report, in some of these cases, after the President's proclamation, converted the previous desertion into a sort of *continuing* crime, for which *continuance* the elector may be disfranchised. It is not, and will not be, denied that the offence of desertion had been committed *before* the proclamation, if committed at all. It was therefore complete, and punishable in the manner prescribed under the previous laws. But the effect of the act of March 3, 1865, is to enlarge, extend the offence, to *increase it* by declaring it a *continuing* crime, which it was not before, which is the very definition of an *ex post facto* law.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; *or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.*.

The great justice of our conclusions concerning the true interpretation of these laws of Congress cannot be better illustrated than by a reference to the remarkable character of the evidence upon which it is attempted to disfranchise these electors. There is not legal proof of *actual* desertion in a dozen cases in the entire list. There is no record of a previous trial and conviction in a single case. There is hearsay and rumor of the most unsatisfactory, shadowy, and inadmissible character in considerable abundance, but most of it would be rejected

in any case on trial before any intelligent court in the country. Adjutant General Cowan states that General Fry's report gives 27,000 as the number of deserters among Ohio soldiers during the war; but he estimates that the number of deserters in his report could be reduced, by "returns to duty," two-thirds, by reason of existing orders having compelled officers to report every man absent at roll-call on muster day as a deserter. The same report shows that the number returned as deserters for the 13th district was 543. The proof relied upon, in nearly every case, to establish desertion is a copy of the muster-roll containing the name of the soldier or drafted man marked deserter, or a certificate of the adjutant general of Ohio that the records in his office show such facts. But we cannot find that any law of Congress makes such rolls or certificates legal evidence for the purposes for which they are here used. All this evidence as to the voter is *ex parte*, having been taken in this case *after* the election, and where the election boards, after examination of the voter and hearing the case according to the laws of Ohio, had adjudged him a legal elector and received his ballot. He is thus, in legal effect, to be deprived of a precious franchise, branded as a criminal, and punished, in violation of the most obvious principles of justice, and without a hearing.

ABUSE OF FEDERAL PATRONAGE.

We do not consider it necessary to give any attention in this report to the alleged improper and illegal use of federal patronage, because, after a careful examination of the evidence, we fail to discover any facts that can justly invalidate a single vote, or exert any material effect upon the just determination of this case.

CONTESTEE'S CASE.

Before we proceed to state our conclusions touching the case claimed to have been made by the contestee, and the better to indicate the grounds of law upon which we arrive at them, we incorporate the following provisions of the election laws of Ohio, copied from 1 Swan & Critchfield, p. 543:

AN ACT to preserve the purity of elections.

First. No person shall be permitted to vote at any election unless he shall have been an actual resident of the State for one year next preceding the election, and an actual resident of the county for 30 days next preceding the election, and an actual resident of the township or ward 20 days next preceding the election; and the judges of the election, in determining the residence of a person offering to vote, shall be governed by the following rules, as far as the same may be applicable: That place shall be considered and held to be the residence of a person in which his habitation is fixed, *without any present intention of removing therefrom*, and to which, whenever he is absent, he has the intention of returning.

Second. A person shall not be considered or held to have lost his residence who shall leave his home, or go into another State, or county of this State, *for temporary* purposes merely, without an intention of returning.

Third. A person shall not be considered or held to have gained a residence in any county in this State into which he shall come for *temporary purposes*, without the intention of making such county his home, *but with the intention of leaving the same when he shall have gotten through with the business that brought him into it.*

Fourth. If a person remove to another State with an intention to make it his permanent residence, he shall be considered and held to have lost his residence in this State.

Fifth. If a person remove to another State, *with an intention of remaining there for an indefinite time, and as a place of present residence*, he shall be considered and held to have lost his residence in this State, notwithstanding he may entertain the intention of returning at some future period.

Sixth. The place where a married man's family resides shall, *generally*, be considered and held to be his residence; but if it is a place for the temporary establishment of his family, or for transient objects, it shall be otherwise.

Seventh. If a married man has his family in one place, and he does his business in another, the former shall be considered and held to be his place of residence.

Eighth. The mere intention to acquire a new residence *without the fact of removal*, shall avail nothing; neither shall the fact of removal without the intention.

Ninth. If a person shall go into another State, and while there exercise the right of a citizen by voting, he shall be considered and held to have lost his residence in this State.

SEC. 34. That no election shall be set aside for want of form in the poll-book, provided they contain the substance. (Swan and Critchfield, p. 539.)

SEC. 24. If any judge of the election shall knowingly receive or sanction the reception of a vote for any person not having all the qualifications of an elector prescribed by this act, or shall receive or sanction the reception of a ballot from any person who shall refuse to answer any question which shall be put to him in accordance with the provisions of the 13th section of this act; or who shall refuse to take the oath prescribed by the 15th section of this act; *or shall refuse, or sanction the refusal by any other judge of the board to which he shall belong, to administer either of the oaths or affirmations prescribed by the 13th and 15th sections of this act, * * * on conviction thereof shall be imprisoned in the penitentiary, and kept at hard labor, not more than five years nor less than one year.* (Swan and Critchfield, p. 547.)

MINORS.

Of the alleged minors who voted for contestant we find the proof sustains the allegations as to the following persons, and that they should be deducted from the number of votes cast for him:

L. A. Proctor, admitted by contestant, see his brief, p. 12; Job N. Evans, admitted by contestant, see his brief, p. 12; Adolph McGrady, admitted by contestant, see his brief, p. 12; E. Kingston, admitted by contestant, see his brief, p. 12; Rufus Rowley, admitted by contestant, see his brief, p. 12; M. Cummins, admitted by contestant, see his brief, p. 12; Morrison M. Burns, admitted by contestant, see his brief, p. 12; Samuel March, admitted by contestant, see his brief, p. 12; Charles Hulien, part 2, pp. 136, 193, 877. The proof as to Elias Parshall and Samuel Wise is insufficient.

IDIOTS AND INSANE.

Of these classes we find the proof strong and conclusive against the capacity of the following persons who voted for the contestant, and that their votes ought to be deducted from him:

Silas Dibble, admitted by contestant, see his brief, p. 12; Benjamin Rutter, admitted by contestant, see his brief, p. 12; William Dickerson, part 2, pp. 42, 108; Nathaniel Martin, part 2, pp. 42, 113; Calvin Hill, part 2, pp. 183, 198, 265. John Andrews; his father swears he was a confirmed idiot, part 2, p. 208. Henry Eggleston has a guardian because insane, part 2, pp. 191, 266; Peter Stoneburner, part 2, p. 540. The proof as to Riley Garlinghouse, Jesse Whitehead, Henry Baker, and Hamilton Hopper is insufficient.

NON-RESIDENTS.

Of this class we find the proof very clearly establishes that the following persons were not legal electors, and voted for the contestant, and ought to be deducted from his votes:

Daniel W. Prouty, part 2, pp. 518, 520; Isaac Stockdale, part 2, p. 523; Martin Messick, admitted by contestant, see his brief, p. 12; Benjamin Briggs, admitted by contestant, see his brief, p. 12; John Davis, admitted by contestant, see his brief, p. 12; William Secord, admitted by contestant, see his brief, p. 12; Samuel Secord, admitted by contestant, see his brief, p. 12; R. Gleason, admitted by contestant, see his brief, p. 12; D. Pearson, admitted by contestant, see his brief, p. 12; Hugh Roy, part 2, pp. 533, 534, 535, 671; John A. Norman, part 2, pp. 622, 623; Henry S. Rhodes, part 2, p. 666; Charles Winson, part 2, p. 270; Henry Ackley, part 2, pp. 15, 38, 39; A. S. Foster, part 2, pp. 17, 18, 19; Esau Rice, part 2, p. 25; Spencer Clouse, part 2, pp. 28, 29, 30; S. L. Southard, part 2, p. 34; A. E. Hamilton, part 2, p. 43, 1 S. and

C's Stat., O., pp. 543, sec. 2; B. P. Humphrey, part 2, p. 60; Samuel G. Lusk, part 2, p. 62; John R. Wood, part 2, p. 66; George McMasters, part 2, p. 69; Emmanuel Sites, part 2, p. 73; Andrew Fry, part 2, pp. 12, 88; Wesley Bell, part 2, pp. 89, 97; Daniel Baker, part 2, p. 112; William Sarratt, part 2, p. 74; David Bliss, part 2, p. 131; Hiram French, part 2, p. 144; John Lewis, part 2, pp. 151, 161; Emer E. Entricken, part 2, p. 153; Rinaldo Craig, part 2, pp. 158, 160, 193, 214; J. Atkins, part 2, pp. 180, 200, 214; W. W. Malay, part 2, pp. 207, 208; John C. Jacobs, part 2, p. 210; William Tribbett, part 2, p. 247; Charles Purcell, part 2, pp. 256, 262, part 1, p. 98; John Means, part 2, p. 280; Stephen Carmichael, part 2, p. 280; Cassius Hollister, part 2, p. 280; Ebenezer Hays, part 2, pp, 320, 323, 409; Thomas Reese, part 2, pp. 360, 365, 367, part 1, p. 368; W. S. Cotting, part 2, pp. 414, 415, 416, 417; W. House, part 2, p. 446, part 1, p. 395.

NON-RESIDENT STUDENTS.

J. H. Grey, part 2, pp. 4, 8, 84; A. L. Lockert, part 2, pp. 5, 9, 83; M. N. Reed, part 2, pp. 5, 9, 84; E. J. Pearce, part 2, pp. 6, 9, 85; H. A. Rogers, part 2, pp. 9, 10, 11; James K. Mendenhall, part 2, p. 172; D. K. Wade, part 2, p. 176; Charles T. Stout, part 2, p. 188; George N. Meade, part 2, p. 189; Henry J. Camp, part 2, p. 190.

The proof as to Jefferson Carnes, Charles Dockarty, Eli Stainbrook, William Burns, John Arndt, John Wharton, William Beardsley, V. W. Graves, James N. McGiffin, Gustavus Bascom, W. C. Manson, Shannon Hadley, John Allman, O. P. Meeks, W. L. Langford, G. M. Peters, Arthur Lawrence, Robert C. Booth, A. B Nicholas, Elijah Leedy, Thomas Newell, George Van Horn, R. J. Adler, Jackson Williams, John Gregson, F. M. Oglevie, Samuel P. Sherman, E. A. Roothe, and John Davies is insufficient.

It has been our aim, in passing upon the foregoing cases, to be governed by the law of Ohio, (the material parts of which are quoted,) and the established principles of law applicable to such cases, and the facts developed in the cases respectively.

It is said that the right of the students to vote is *res adjudicata*. But we are not advised that their right to vote in this case has ever been adjudicated. The case of Farlee *vs.* Runk (vol. 2 Cont. Elec. Cases, p. 87) does not settle the question. In that case the Committee of Elections held that the students who voted in that case in New Jersey *under the constitution and laws of New Jersey*, and upon the facts proven, were legal electors. But it does not appear that the House sustained the advice of the committee. In the case under consideration, the legislature of Ohio enacted a law in 1857, which has been in force ever since, the validity of which has been recognized by all departments of the State government, and has never been judicially questioned or denied in that State, and that law provides for the guidance of election officers that—

> A person shall not be considered or held to have gained a residence in any county in this State into which he shall come *for temporary purposes*, without the intention of making such county his home, *but with the intention of leaving the same when he shall have gotten through with the business that brought him into it.*

The evidence in reference to these students brings them respectively within the clear operation of this law.

BLUE ROCK TOWNSHIP.

It is claimed by the sitting member that, by reason of alleged gross frauds, irregularities and menacing disturbances at the election in Blue Rock township, Muskingum county, the entire poll should be rejected. The material facts in reference to this precinct are as follows:

The officers of the election were all the political friends of the contestant.

120 persons voted there in 1866 who did not vote there in 1865. In 1865, at the governor's election, 129 votes were cast for Cox, the republican candidate, and 79 votes for Morgan, the democratic candidate, making the majority for Cox 50. At the congressional election in 1866, 206 votes are returned for the contestant, and 89 for the sitting member. The majority for Mr. Delano is 117, and his increase over the vote for Cox, in 1865, is 67, and the increase in the township since 1865 is 87, and the increase in the vote for Mr. Morgan is 10. In 1867, 711 more votes were cast than ever before in the 13th district, yet in that year the whole vote in this precinct was 258, being 37 less than in 1866, and Hays, the republican candidate for governor, received, in 1867, 155 votes, being 51 votes less than Mr. Delano had in 1866, and Thurman, the democratic candidate, received 103, being 14 more than Mr. Morgan had in 1866.

The polls were closed for one hour by the election officers at dinner time. The law of Ohio requires them to be opened "between the hours of six and ten o'clock in the morning," and continued open until six o'clock in the afternoon. The district court of Hamilton county, Ohio, by Justice Brinkerhoff, a distinguished member of the supreme court of Ohio, has decided, since the election in controversy, that—

Under the Ohio statute, passed March 3, 1852, "to regulate the election of State and county officers," (3 Curwen's Rev. Stat., sec. 1920,) after the polls of an election have been once opened between the hours of six and ten in the morning in pursuance thereto, they cannot be closed for any purpose, until six o'clock in the afternoon, *without rendering the election illegal and void.* (State vs. Ritt et al., Am. L. Reg. for December, 1867, p. 88.)

Yet in that case the court says:

There is no pretence that the ballot-box was tampered with, but that the judges rather acted in ignorance of what their duties were.

In the summer of 1865, there sprang up, in this township, a great deal of excitement about the alleged existence of petroleum there, and large numbers of transient persons, as laborers, speculators, and mechanics, and others, came into the township, without intending to become citizens of it, and many of them are alleged to have illegally voted.

There were great irregularities, frauds, and disturbances attending the conduct of the election, which can be best indicated by the repetition here of the material parts of the testimony on these points.

Thomas L. Elwell testifies (part 2, p. 579) that—

The companies were principally formed in the fall of 1865 and spring of 1866. They came from different portions of Ohio, Massachusetts, New York, Virginia, and Pennsylvania. They may have been from other States, but I recollect of hearing of men from these States. Men from these different places performed the labor. These were principally from Virginia. I knew one man from New Jersey by the name of Cox.

* * * * * * * *

Q. With what political party did the non-resident oil men act in Blue Rock township at the October election, 1866?

A. Principally with the republican party, with one or two exceptions.

* * * * * * * *

Q. State what you know relative to there having been an exodus of oil men from Blue Rock township immediately after the last October election.

A. The exodus was general; the oil men generally left immediately after the election.

James White testifies, (part 2, p. 608:)

* * * * * * * *

Question. How long have you resided in Blue Rock township, Muskingum county?

Answer. A little over fifty years.

Q. State with what political party the non-resident oil men in Blue Rock township acted at the last October election.

A. Well, sir, as far as I know, they voted the republican ticket; I understood there was one voted the democratic ticket; his name was Stitely.

* * * * * * * *

Q. Please state what was the conduct and bearing of the active republican friends of Mr. Delano towards members of the democratic party while at the polls.

Objected to.

A. I thought they were a little rougher than ever I had seen there.

Q. Describe what that conduct was.

A. Well, I have been a voter there all my life, and never saw as much abuse to old citizens; they called them rebels and everything they could lay their tongues to.

Q. State whether or not you and other democrats were intimidated from asserting your right as challengers by the conduct of the friends of Mr. Delano.

A. There were three old members went into the house and thought we would challenge some of their votes; they commenced abusing us till I backed out, and went out of the house and staid out.

Q. State whether or not democrats were generally induced to leave the polls in consequence of the abuse and threats of the friends of Mr. Delano.

A. They did run two democrats off; the democrats came, and would go right off again.

Cross-examined by W. R. Sapp, attorney for contestant:

Q. What political party do you belong to, and for whom did you vote for Congress at the last October election?

A. I belong to the democratic party, and voted for Mr. Morgan.

Q. Will you please name any democrats who left the place where the election was held by reason of abuse, &c.?

A. Yes, sir; I can tell you two; Mr. Farrel and Mr. Silvey.

Q. What was said to them, and by whom?

A. After they had got on their horses ready to go, there was a great band of them with Tom McClees, hooping and hallooing and urging them on; I couldn't tell you the words they said, for they were all cursing.

Q. Now you say this was when those gentlemen got on their horses to leave for home; that could not have been the cause of their leaving, could it?

A. The cause of their leaving was they were abusing them; Mr. Silvey said something and Slater slapped his hand over his mouth, and then they swarmed around him.

Joseph McDonald testifies (part 2, p. 624:)

Q. How long have you resided in Blue Rock township, Muskingum county, Ohio?

A. Since 1816.

Q. Were you at the election held for State and county officers and member of Congress in said township in October, 1866?

A. Yes, sir.

Q. Please state what you know relative to the judges of said election refusing to swear non-resident oil men when they were challenged? As nearly as you can, please state what was said.

A. They said they fetched them in as stragglers or Methodist preachers, who had a right to vote wherever they were; there were some few sworn; the balance were not sworn; the judges said it was not worth while.

Q. Please state who requested the judges of said election to have the non-resident oil men sworn.

A. I did myself, and also heard other persons do so, but do not recollect who. They said they had not time to swear all of them, and they passed the oil men into the class of stragglers and Methodist preachers.

Q. Please state to what political party the judges of said election belonged, and whether all the trustees of said township officiated as judges at said election.

A. They were republicans; there were only two of them officiated; John Patton was appointed in Mr. Sterrett's place; Mr. Sterrett was there and voted, but was sick and went home; Mr. Patton was also a republican.

Q. Please state what was the conduct and bearing of the active friends of Mr. Delano at that election to members of the democratic party?

A. They were more like a mob than anything else.

Q. State what you know relative to democrats having been driven from the polls by threats and intimidations.

A. One gentleman there, I have forgotten his name, he was a democrat, they brought him up and examined him; he answered all the questions that were put to him, and the mob called him a secessionist. They did not let him vote; put him off until the afternoon; he was willing to swear that he had been two years in the county, two years in the State, and six months in the township.

Q. To what political party did the non-resident oil men, who voted in Blue Rock township at the last October election, belong?

A. They belonged to the republican party generally; there were few democrats.

John Silvey testifies, (part 2, p. 633:)

Q. How long have you resided in Blue Rock township, Muskingum county, Ohio?

A. Ever since I was born, about forty-three years.

Q. Please state whether you were present at the election held in Blue Rock township for State and county officers and members of Congress in October, 1866.

A. I was.

Q. State what you know relative to the judges of said election refusing to swear non-resident oil men when challenged.

A. Mr. McDonald and I went into the polls and requested them to swear these oil men; the reply was that it was not necessary; that Mr. Peyton's reference was enough; that they are the same as a Methodist preacher on a circuit; wherever they were at the time was their residence; nothing further said in my presence.

Q. Please state whether or not democrats were intimidated from challenging by the conduct of the active friends of Mr. Delano at that election.

A. Well, I suppose they were.

Q. State what was the conduct towards democrats by the active friends of Mr. Delano at that election.

A. Why, if the democrats were to speak, fifteen or twenty would run up and shake their fists at you and menace you, and threatening to beat you or whip you.

Q. For how long was that election suspended by the judges at noon?

A. I could not tell you; I wasn't there just at noon.

Q. Please state whether the democrats or many of them remained at the polls during the election or went home; and if they did not remain, what was the reason?

A. Well, there didn't appear to be many of them remain at the polls. I think there was a reason of too much rabble and too much fuss.

Q. With what political party did the non-resident oil men in Blue Rock township act at the last October election?

A. As a general thing with the republican party.

Q. Now, can you give the facts which make them non-residents according to law; we want facts, and not your opinion?

A. The fact is this: they were there a few days before the election; they were there at the election, but they were not there a few days after the election, and they are not there now—that is, a majority of them.

Further reference is made to the depositions of Robert Mawhorter (part 2, p. 586,) Robert Silvey, (part 2, p. 613,) William B. Hunter, (part 2, p. 589,) Joseph Harper, and Alexander Buchanan, (part 2, p. 629, and part 2, p. 658.)

In conclusion, in our judgment, all the proof touching this precinct discloses such a condition of disorder and violence, and so many gross irregularities, frauds, and unlawful acts, on the part of the election officers and the friends of the contestant, that it is impossible to deduce the truth from the returns. It is impossible, upon an impartial examination of all the evidence, not to conclude that there were committed numerous, palpable, and corrupt violations of the law, in rejecting legal and receiving illegal votes, in refusing to regard challenges, in permitting confessedly transient, itinerant persons to vote because they were like methodist preachers, and in other acts detailed in the testimony. These conclusions are further greatly strengthened by the facts concerning the remarkable changes in the votes in this township between the years 1865, 1866, and 1867. We refer in this connection, as authority, to Blair *vs.* Barrett, 2 Cont., Elec. Cas., p. 308; Knox *vs.* Blair, Id., p. 521, and cases there cited; Howard *vs.* Cooper, Id., p. 275; Kneas's case, Parsons Select Cas., p. 553, and Washburn *vs* Voorhees, in the 39th Congress.

In view of the whole case, *upon all the facts and the law applicable thereto* we feel compelled to reject the entire poll of this township.

CLINTON TOWNSHIP, KNOX COUNTY.

It is claimed by the sitting member that the poll of this township should be rejected. The facts and the law in reference to the election in this township are as follows:

Within the corporate limits of this township is situated the incorporated city of Mount Vernon, divided into five wards. The constitution of Ohio requires electors to vote in the county, township, and ward in which they reside. The laws of that State require:

That each township in the several counties shall compose an election district, unless such township is now, or shall hereafter be, divided by law into more districts than one; the election to be held at such place in such township or district as the trustees in each township shall direct; and each ward of any city that is or may be divided into wards shall compose an election district; the elections therein to be held at such places as the members of the city

council for their respective wards shall direct; and in all elections holden under this act they shall serve as judges, and perform the duties required of township trustees in like cases. (Act of May 3, 1852; 50 Ohio Laws, 311; Swan and Cr. Stat., p. 532, sec. 15, 16.

That if either of the trustees, common councilmen, or clerk of any township shall fail to attend at the time and place of holding elections, or if either of them should be a candidate for a State or county office, then it shall be the duty of the electors present to choose, *viva voce*, suitable persons, (as the case may require,) having the qualifications of electors, to act as judges or clerk (as the case may be) of the election. (Act of April 2, 1859; 56 Ohio Laws, 119; 1 Swan and Cr., p, 533, sec. 20.)

No person shall be permitted to vote at any election unless he shall have been an actual resident of the State for one year next preceding the election, and an actual resident of the county for thirty days next preceding the election, and an actual resident of the township or ward twenty days next preceding the election. (Act of May 1, 1857; 54 Ohio Laws, 136; 1 Swan and Critchf. Stat., p. 543, sec. 71.)

Any person who shall wilfully vote in any township or ward in which he has not actually resided for twenty days next preceeding the election, shall, on conviction thereof, be imprisoned in the jail of the proper county not more than six months, nor less than one month. (Act of May 1, 1857; 1 Swan and Cr., p. 544, sec. 73.)

Nothing in this act contained, so far as the same relates to the length of time required of the voter to reside in the township or ward where he offers to vote, shall be held, taken, or construed to apply to any voter who is the head of a family, who shall *bona fide* remove with his family from one ward into another within the corporate limits of any city within this State, or who shall remove from one township to another within the same county. (Act of May 1, 1857; Swan and Cr., p. 544, sec. 85.)

That all elections hereafter to be holden for * * * representatives to Congress shall be held and conducted in the manner prescribed by this act.

In the city of Mount Vernon *no election was held according to law. No attempt was made to hold any election according to law in said city as such, or in the respective wards thereof.* An election was held within the territorial limits of the 4th ward, but it was held as a township not as a ward election, and was held by the trustees of Clinton township, neither of whom was a councilman or officer of the city. At this election the electors of the township, including the city, voted. The votes of the citizens of the city and those of the citizens of the township outside the city were all deposited in the same ballot-box. The polls were closed by the officers of this election from 30 to 60 minutes between 12 m. and 1 o'clock p. m., and the ballot-box and poll-books were carried away and kept by the officers, all of whom were the political friends of the contestant. (See the decision of Justice Brinkerhoff, referred to in connection with Blue Rock township.) The working men in the foundries and workshops of the city generally voted during their dinner hour, from 12 to 1 o'clock, and were liable to lose wages if absent to vote at another hour. (Pt. 2, pp. 286, 287, 211, and Pt. 1, pp. 132, 133.) The general elections for Clinton township appear to have been holden as this election was during the preceding 13 or 14 years, for some unexplained reason ignoring the existence of the city and disregarding the plain letter of the law. One of the officers of the election, John Y. Reeve, refused to administer the oath to many persons challenged by the friends of the contestee, and unlawfully and fraudulenty deposited their ballots in utter disregard of the demands of competent challengers, and thus committed felonies punishable by imprisonment in the penitentiary of the State. The law says that:

If any judge * * * shall refuse or sanction the refusal by any other judge of the board to which he shall belong to administer either of the oaths or affirmations prescribed by the 13th and 15th sections of this act, * * * (to be administered to any person whose right to vote is challenged,) he shall be imprisoned in the penitentiary and kept at hard labor not more than five years nor less than one year.

Can this election be sustained? Although we deem it wholly immaterial to effect the result of this contest whether the House exclude or admit the poll of this township, yet it becomes our imperative duty to present the facts, the law, and our views to the House. The law, in the conduct of this election, has not only been openly disregarded, but it has been also directly violated. No

elections were held in the wards of the city. Their ballots were confused with those of the citizens of the township outside. It is no answer to say that the proper officers neglected to organize election boards in the city, and that the people therefore might vote at the township poll, because, in such case, it was the right and duty of the citizens at the time to select other officers, and proceed to hold the election according to law. The citizens of the city had no right to vote at all out of their respective wards, and to do so was to commit crime under the laws of Ohio. If all these things can be done without vitiating elections, then election laws become useless and inoperative. Upon the evidence in this case it is impossible to purge this poll of votes unlawfully cast, or to determine what electors of *Clinton township* voted at all, or for whom they voted. In Miller *vs.* Thompson, 2 Contested Election Cases, p. 118, it is held that "if the constitution and laws of a State require that electors shall vote only in the counties in which they reside, and at designated places in those counties, *votes given at other than the designated places must be treated as nullities.*"

We do not feel at liberty for a moment to hesitate in the conclusion, *upon all the grounds of fact and law*, that it is our clear duty to reject this poll entirely. The vote returned for the contestant was 736, and for the contestee 355.

OTHER TOWNSHIPS.

In reference to the elections in Madison, Muskingum, Licking, Union, Monroe, and Harrison townships, in Muskingum county, and Harrison and St. Albans townships, in Licking county, and Washington and Keene townships, in Coshocton county, and the first ward of the city of Zanesville, in Muskingum county, although the evidence discloses in the conduct of them severally many irregularities and violations of the letter and spirit of the law, yet, inasmuch as the evidence fails to show any material injury to either party, or corrupt and fraudulent conduct on the part of the officers, we do not think that their rejection is demanded. The chief violations of the letter of the law consist in closing the polls for short periods during the dinner hour, and in the too frequent absence of one or another of the officers from his place at the polls while open. The fact of such unlawful closing of the polls, or of such occasional absence of an officer of the election, without proof of bad faith, fraud, corruption, or actual injury, we deem insufficient to call for the rejection of the polls in question.

DOUBLE VOTES.

The proof shows that in Jefferson township, Knox county, a double ticket was put into the ballot-box, with the name of the contestant on each, and both were illegally counted for him, although the law expressly required both to be rejected; and, in the counting out, one ballot for the contestee was unlawfully thrown out by the officers of the election. (Pt. 2, pp. 186, 239.) The evidence as to these facts is very clear. Two votes, therefore, ought to be deducted from the contestant in this precinct and one added to the number for the contestee.

VOTES ILLEGALLY REJECTED.

In Hartford township, Licking county, the vote of Samuel Sloan for the contestee was unlawfully rejected by the election officers, and ought now to be added to his vote. (Pt. 2, p. 34.) The right of Sloan to vote was perfectly clear. Isaac Boyd and James H. Miles are admitted by contestant to have been illegally refused the right to vote for contestee. (See contestant's brief, page 12.)

VOTER CONVICTED OF COUNTERFEITING.

In Millford township, Knox county, Edward Beach voted for the contestant, but had been previously convicted by the United States district court for the

northern district of Ohio of passing counterfeit coin and was unpardoned, which offence is a felony alike under the laws of Ohio and of the United States, and punishable in like manner under each, without disfranchisement under the federal law. But if the conviction had been under the laws of Ohio, a part of the penalty would have been disfranchisement. The sitting member claims, therefore, that as the voter was a citizen of that State, and the offence was committed therein, the disfranchisement under the State laws attaches and takes effect upon the conviction in the federal court. We think otherwise. The penalties denounced against any crime by the respective governments can only take effect as to the government under which they are adjudged Neither government is called upon to enforce the punishments prescribed on conviction of crime by the other. There is believed to be no authority for any other conclusion.

VOTE RECEIVED AT PLACE AWAY FROM THE POLLS.

In Hartford township, Licking county, Jesse McCassland was permitted by the officers of the election to cast his vote at his own house, remote from the legal place for holding the election, the officers going to his house with the ballot-box and poll-books to receive his vote, because he was sick. He voted for the contestant. His vote was illegally received. No law can tolerate such conduct. No court should receive votes so cast. They have been judicially held illegal. One vote should, therefore, be deducted from the contestant in this precinct.

BRIBERY.

There is a great deal of testimony in the record showing that bribery was resorted to for the purpose of securing votes for the contestant, and in many cases bribery is clearly established. But, in view of the laws of Ohio, we deem it unnecessary to refer in detail to the evidence on this subject. The statute of Ohio (1 Swan & Cr., 540, sec. 51,) says:

That if any *candidate* or *elector* shall, directly or indirectly, *give* or *promise* any meat, drink, or other reward, with the intention to procure his election, or the election of any candidate, he shall forfeit and pay for every such offence a sum not exceeding five hundred dollars, and if a candidate, be rendered incapable for two years to serve in the office for which he was a candidate.

And it further provides, at page 545, section 11, that:

Any person who shall, by bribery, attempt to influence any elector of this State in giving his vote or ballot, or who shall use any threat to procure any elector to vote contrary to the inclination of such elector, or to deter him from giving his vote or ballot, shall, on conviction thereof, be fined in any sum not exceeding $500, nor less than $100, and be imprisoned in the county jail of the proper county not more than six months nor less than one month.

We are not able to find any provisions in the laws of Ohio which disfranchise the elector who receives a bribe for his vote, or any provisions which destroy, invalidate, or reject the ballots cast in consideration of bribes, or render void or partially void the polls at which such ballots are received. The whole policy of the law seems intended to punish only the persons, whether candidates or electors, who offer the bribes. We cannot extend this policy beyond the settled judgment of the State, however much we may condemn and deplore the policy itself.

RECAPITULATION.

Official vote for contestant	12,957
Add votes illegally rejected	5
Add to his official vote in Linton township	23
Add to his official vote in Monroe township	10
Making	12,995

Deduct minors	9	
Deduct insane and idiots	8	
Deduct non-residents	45	
Deduct non-residents, (students)	10	
Deduct contestant's majority in Blue Rock township	117	
Deduct contestant's majority in Clinton township	381	
Deduct double vote in Jefferson township	2	
Deduct vote of McCassland	1	
Total		573
Total legal vote for contestant		12, 422

Official vote for contestee	13, 228
Add vote thrown out in Jefferson township	1
Add legal votes rejected	3
Making	13, 232

Deduct votes in Linton township	23	
Deduct votes in Monroe township	10	
Deduct minors	3	
Deduct non-residents	32	
Total		68
Total legal vote for contestee		13, 164
Total legal vote for contestant		12, 422
Legal majority for contestee		742

We therefore conclude that the sitting member, George W. Morgan, is duly and legally elected to represent the 13th district of Ohio in the House of Representatives, and that the contestant, Columbus Delano, is not so elected and not entitled to said seat.

M. C. KERR.
JOHN W. CHANLER.