

Chapter XXXVII.

GENERAL ELECTION CASES 1892 TO 1894.

1. Cases in the Fifty-second Congress. Sections 1041-1045.¹
 2. Cases in the Fifty-third Congress. Sections 1046-1058.
 3. Senate Cases from Kansas, Florida, and Idaho. Sections 1059-1061.
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1041. The Pennsylvania election case of Craig v. Stewart in the Fifty-second Congress.

Where nonregistered voters were required to file affidavits on voting and these affidavits did not appear on file, the House rejected the votes.

As to the mandatory or directory nature of a law requiring nonregistered voters to file affidavits when they vote.

As to the duty of the House in an election case to follow the judgment of a State court rather than their own precedents.

Affidavits of nonregistered voters not being found in the depository specified by law, it was held that the burden of proof shifted to the party benefited by the votes.

On February 16, 1892,² Mr. Jason B. Brown, of Indiana, from the Committee on Elections, submitted the report of the majority of that committee³ on the contested election case of Craig v. Stewart, from Pennsylvania. The sitting Member was returned by a plurality of 162 votes, which the contestant attacked. The report says:

The contestant has stated many reasons why he should be declared elected to the Fifty-second Congress, but the principal one and the only one the committee deems it necessary to report on is: That there were a large number of ballots cast at the election of November 4, 1890, for the contestee by persons whose names were not on the registry list, and who did not furnish the affidavits required by the laws of Pennsylvania to entitle them to vote. That a sufficient number of such ballots were cast to change the result of the election.

The response of the minority defines the single issue involved in the case:

The minority concede that the contestant has shown a sufficient number of votes to have been cast by nonregistered persons for the contestee and counted for him by the election officers to overcome his plurality, but they strenuously deny that the contestant has proved that these persons failed to make and procure affidavits required of nonresident voters and they doubt whether he is entitled to be seated even if he has.

¹ See also cases of *Belknap v. Richardson* (prima facie), Volume I, section 56; *Noyes v. Rockwell*, Volume I, section 574; *Reynolds v. Shonk*, Volume I, section 682.

² First session Fifty-second Congress, House Report No. 367; *Rowell's Digest*, p. 472; *Stofer's Digest*, p. 7; *Record*, pp. 1449, 1488-1498.

³ The minority views were presented by Mr. Henry U. Johnson, of Indiana.

The constitution of the State defines the qualifications of voters; and the laws of the State prescribe a registration of voters as a prerequisite to the exercise of the franchise, with the additional provision that a person otherwise qualified to vote shall not be debarred by a failure to register if he conform to certain requirements thus set forth:

On the day of the election any person whose name shall not appear on the registry of voters, and who claims the right to vote at said election, shall produce at least one qualified voter of the district as a witness to the residence of the claimant in the district in which he claims to be a voter, for the period of at least two months immediately preceding said election, which witness shall be sworn or affirmed, and subscribe a written or partly written and partly printed affidavit to the facts stated by him, which affidavit shall define clearly where the residence is of the person so claiming to be a voter.

The person presenting himself to vote must also make out an affidavit setting forth his qualifications.

The law of Pennsylvania also provided, as related to the above requirements:

And no man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote as hereinafter required.

The majority of the committee say as to the above requirement:

The courts of Pennsylvania have ruled that a compliance with the law in this regard is absolutely indispensable. (58 Pa. St., 338; 59 Pa. St., 109; 1 Brewst., 103; 2 Stew., 239; 71 Pa. St., 302; 11 Phila., 631; 10 Phila., 213; 5 W. N. C., 9; 2 S. and R., 267; 1 Brewst., 102, 103; 135 Pa. St., 459.)

Under the act of January 30, 1874 (P. L., 31), it is the duty of the elector, whose name is not on the registry list, to produce the required affidavits at the time he offers his vote. Election officers can not waive such production. A vote received without such affidavit is illegal, and can not be made legal at a subsequent investigation in the courts. (McDonough's election, 105 P. S., 488; Lower Oxford contest, 2 C. C., 323; In re contested election, 42 L. 1., 304; Marks v. Park, 2 Leg. Rec., 62; Fowler v. Felthoff, Ibid, 403; Commonwealth v. Cornelius, 8 W. N. C., 215; In re contested election, 4 Kulp, 196.)

The contestant claims that a large number of votes were received at certain polling places from men whose names were not on the registry lists, and who failed to make affidavits and produce witnesses as required by law.

The law of Pennsylvania also had this requirement:

The said affidavits of all persons making such claims and the affidavits of the witnesses to their residence shall be preserved by the election board, and at the close of the election they shall be inclosed with the list of voters, tally list, and other papers required by law to be filed by the return judge with the prothonotary, and shall remain on file therewith in the prothonotary's office subject to examination as other election papers are.

The majority then continue:

On this point the committee is unanimous in the opinion that more than a sufficient number of votes from unregistered voters whose affidavits are not on file as required by law were cast for the contestee to change the result and give the seat in contest to the contestant. But a minority of the committee contend that there is no sufficient evidence in the record that the affidavits required of all the unregistered voters were not duly executed.

The evidence shows that when the papers filed by the return judge with the prothonotary were delivered up by him for use in this contest, the affidavits in question were not with them. The contestant offered no other or further evidence to show that they were not taken than this failure to find them on file in the office of the prothonotary. He contends that the absence from the prothonotary's office of a large number of such affidavits which were required to be there, especially when a large number were found there, is sufficient proof to raise the prima facie conclusion that they never were taken.

The majority of the committee agree in this view. We insist that the presumption is that if these affidavits had been executed they would have been found where the law provides they should be filed, and that on failure of the officer to produce them the burden of proof was cast on the contestee to show that they were in fact executed. He offered no evidence on this point, and by this failure of the contestee the prima facie case of the contestant becomes conclusive.

The minority consider two general propositions in opposition to the views of the majority.

(1) The first proposition is thus stated:

It has not been expressly decided in any case that has fallen under the observation of the minority that the failure of a nonregistered person to make an affidavit required by law as a prerequisite to voting renders his vote illegal after it had been cast and counted. The supreme courts of Pennsylvania and Wisconsin, however, have held that such was the effect where the nonregistered voters made and furnished affidavits which were defective in material particulars, and in so deciding they stated that laws requiring affidavits of nonregistered voters were mandatory rather than directory. It is a plain inference, however, that if in these cases there had been no affidavits whatever made by the nonregistered voters the holding would have been the same way. (See *In re contested election of Martin McDonough*, 105 Pa., p. 488; *contested election of Owen Cusick*, 136 Pa., p. 459; *State on complaint of Doerflinger v. Helmantel*, 21 Wis., p. 574; *State ex rel. Bancroft v. Stumpf*, 23 Wis., p. 630.)

The supreme court of Illinois, on the other hand, has twice held that a law of the kind referred to was simply directory, and that the vote of a nonregistered person, cast upon affidavits materially defective at an election where affidavits were by law required to be made by a nonregistered person before voting, was valid. (78 Ill., p. 170; 88 Ill., p. 498.)

In the case of *Campbell v. Weaver*, a contested election of the Forty-ninth Congress from one of the Congressional districts of the State of Iowa, reported at page 455, volume 7, of the *House Contested-Election Cases*, the contest turned on the construction of the election law of that State which required of all nonregistered persons the making of certain affidavits before they could vote. The persons whose right to vote was in controversy had made affidavits defective in very material particulars. The majority of the Elections Committee reported that the law should be held to be directory and not mandatory, and that the votes of such persons were legal and should be counted. The House adopted this report and retained Mr. Weaver in his seat.

In the contested election case of *Curtin against Yocum*, from a Congressional district of Pennsylvania in the Forty-ninth Congress, reported at page 416, volume 5, of the *House Contested-Election Cases*, the construction of the very election law of that State under which the election in the case now under consideration was held is discussed in the report of the minority of the Committee on Elections, and it was therein declared that the provision of the law requiring affidavits of nonregistered voters was purely directory. This report was adopted by the House.

In so much, however, as the report was clearly right upon other grounds it can not fairly be said that by adopting it and retaining Mr. Yocum in his seat the House necessarily held with the minority in their view that the provision of the law referred to was directory.

In the course of the debate, speakers sustaining the minority views combated¹ the theory that the House must follow the holdings of the State courts, and declared in favor of the authority of the House's own precedents, made in the performance of a constitutional duty. But in conclusion of this branch of the question, the minority say:

In view of the conflict in the authorities on this question, as hereinbefore pointed out, and in so much as there are weighty reasons in support of each view, which reasons will be found fully set forth in the decision of the courts and in the reports adopted by the House of Representatives, your minority feel that if the rule that the statutes requiring nonregistered voters to make affidavits before voting is to be held mandatory by this House, and the voter thereby cut off from the privilege of proving,

¹Speeches of Messrs. Henry U. Johnson, of Indiana, and Charles W. Stone, of Pennsylvania, Record, pp. 1458, 1488.

after the election, that he possessed the constitutional qualifications of an elector at the time he cast his ballot, the House should require of all contestants proof of a clear and satisfactory character that the nonregistered electors really did not make and produce the necessary affidavits.

(2) The minority, proceeding to the next proposition, contend that the burden of establishing his contention rests upon the contestant at all stages of the case, and insist that he has not sufficiently proven that no affidavits were made and produced by the nonregistered voters. The minority say:

“When a person offering to vote is challenged at the polls no presumptions are indulged in favor of his right to vote. He is then and there called upon to furnish evidence of his qualifications as an elector. But when he has once voted unchallenged and his ballot has been deposited in the ballot box and counted and canvassed and a certificate of election issued upon it, quite a different rule prevails. Every reasonable intendment should then be indulged in his favor and his vote should not be rejected upon technical presumptions and because some degree of doubt may be thrown upon it. Particularly is this the case where a contestant upon whom rests the burden of proof and who asks that the vote shall be rejected refuses to make positive proof of the voter’s disqualification, which it appears it is easily within his power to do if the voter, in point of fact, had not the right of suffrage.

The minority go on to cite authorities in support of this proposition, and then comment on the failure of the contestant to produce the testimony of the officers of election as to whether or not they allowed nonregistered persons to vote without making the affidavits. Party challengers at the polls, as well as citizens, would also be knowing to these facts.

The sufficiency of the evidence furnished by the prothonotary two months after election as to affidavits on file in his office is thus discussed by the minority:

Now, the minority submit whether the certificate of the prothonotary that certain affidavits appeared on record in his office, a public one to which all persons had access, on January 27, 1891, and the oral testimony of his deputy that these were all the affidavits on file in the office at that time, satisfactorily establishes the fact that they were all the affidavits originally filed by the return judge. But, assuming that it does, the minority earnestly insist that this fact simply rebuts the presumption of the regularity of the action of the return judge in the filing of all the affidavits of the nonregistered voters, and does not reach back, as claimed by the contestant, and prove either that the nonregistered voters did not actually make or that the officers of the election did not actually take the affidavits. The making of the affidavits by the voters was one thing, the action of the election officers in taking another, the delivering of the affidavits by the election officers to the return judge another, and the action of the return judge in filing them still another. The act of taking by the board and the act of filing by the return judge were separable and distinct acts. The taking of the affidavits may well have been done by the election officers, and yet the filing of them by the return judge may have been neglected. That the acts are separable and that the first may have been performed but the second neglected holds good whether the board and the return judge are considered as one official or as different officials. The affidavits may have been lost, mislaid, or deposited in the wrong place by the return judge. Indeed, this would be the legal inference on its being shown that he had not filed them. To infer this would be to put upon him no additional presumption of having failed to perform his duty than already attaches to him by the certificate of the prothonotary that the affidavits were not filed by him.

The contestee is not required to prove that this improper disposition of the affidavits was actually made by the return judge, for the reason that the contestant has the burden of proving that the affidavits were not taken, and his having merely shown that they were not filed in the prothonotary’s office does not establish the fact that they were not taken, does not discharge the burden of proof resting upon him, but only rebuts the presumption that the judge complied with the laws by filing all the affidavits. In support of this position there is ample authority. The very point was discussed in the minority report in the Forty-ninth Congress in the contested-election case of *Curtin v. Yocum*, hereinbefore referred to. In this case there were three reports made; one by the majority, one by the minority, and one by certain members of the Elections Committee. The House adopted the report of the minority and retained Mr. Yocum in his seat.

The minority therefore insisted that the title of sitting Member to the seat should be confirmed.

The report was fully and ably debated in the House on February 25 and 26, 1892, and on the latter day the resolutions proposing the views of the minority were disagreed to, yeas 57, nays 152. Then the resolutions of the majority were agreed to without division, and Mr. Craig appeared and took the oath.

1042. The Michigan election case of Belknap v. Richardson, in the Fifty-second Congress.

Instance wherein, after a delayed decision as to the prima facie right, the House itself fixed the time for instituting proceedings to contest.

Inmates of a Soldiers' Home do not gain a residence in a precinct from the mere fact that they are quartered in the Home.

Discussion as to the binding effect on the House of the decision of a State court as to a State law.

Examples of what were held to be distinguishing marks on an Australian ballot.

On September 9, 1893,¹ Mr. T. H. Paynter, of Kentucky, from the Committee on Elections, submitted a report recommending the adoption of the following preamble and resolution:

Whereas in the Fifth district of the State of Michigan two certificates of election were issued, one to Hon. George F. Richardson, after which, upon proceedings in the supreme court of the said State, a new canvass was ordered in certain portions of said district, upon which a new certificate was issued to Hon. Charles E. Belknap; and

Whereas each of said parties claimed to hold the proper certificate entitling him to a seat in the House; and

Whereas either party by commencing a contest would have been deemed to have waived his claim under his certificate; and

Whereas the prima facie legality and sufficiency of such certificates could not be lawfully or finally determined except by the action of this House; and

Whereas this House have decided that the said Hon. George F. Richardson's certificate entitles him prima facie to the said Seat;² and

Whereas by reason of the peculiarity of the said facts a contest could not be commenced in the usual form and in the usual time; and

Whereas said Hon. Charles E. Belknap desires to contest the right to said seat: Therefore be it *Resolved*, That said Hon. Charles E. Belknap is authorized and empowered to file his notice of contest and institute proceedings to contest said election. That in making said contest the general statutes and the rules of contest of this House shall apply, the time fixed by the statutes being hereby extended and the right of contest being declared to have commenced at the date of the adoption of this report.

On the same day the resolution was agreed to by the House.

On February 27, 1895,³ Mr. Daniel N. Lockwood, of New York, from the Committee on Elections, presented the report on the merits of the above contest. The original returns from the precincts of each county gave a plurality of 18 votes for the contestant, Mr. Belknap, at the election of 1892.

¹ First session Fifty-third Congress, Journal, p. 39.

² This was decided August 8, 1893 (Journal, pp. 8-10). See also section 56 of Volume I of this work.

³ Third session Fifty-third Congress. House Report No. 1946; Rowell's Digest, p. 494; Journal, p. 162.

The examination of this contest is divided into two branches:

1. The report shows that—

In the county of Kent the number of votes cast for Mr. Richardson was 12,779, and the number cast for Mr. Belknap was 12,392, showing a plurality of 387 in that county for Mr. Richardson by the original returns as canvassed by the local boards. But there was included in the original canvass, as shown by the record, 199 votes cast in the first precinct of the township of Grand Rapids by inmates of the Soldiers' Home who were not residents of that precinct and were not qualified electors under the laws and constitution of the State. Of these votes 152 were cast and counted for Mr. Belknap, and 41 were cast and counted for Mr. Richardson.

The supreme court of the State of Michigan has, since the election in 1892, passed upon the legality of the votes of inmates of the Soldiers' Home, and decided that those who were not legal residents of the precinct in which the Home is located at the time they were admitted to the Home can not gain a legal residence while quartered in the Home, and consequently were not legal voters.

The report, after quoting this decision at length, deducts the votes thus decided to be illegal, with result of destroying the plurality of 18 votes for contestant in the district, and giving a plurality of 93 votes to sitting Member.

The minority views, submitted by Mr. Henry F. Thomas, of Michigan, held to this view:

It is clearly the duty of this House to accept the soldiers' vote, if in its judgment they have a right to vote while domiciled at the Soldiers' Home.

The fact that three of the five judges decided against them is no reason why this House should follow their decision.

The Constitution says: "Each House shall be the judge of the elections, returns, and qualifications of its own Members."

I might cite numerous precedents, but I will call attention to only one, that of *Noyes v. Rockwell*, from the Twenty-eighth district of New York, which was decided by the Fifty-second Congress. In this case Noyes asked the supreme court for a mandamus, which was granted, and after the vote was retabulated by the board of canvassers under the order of the court, Noyes had a majority of 16 votes in the district. But notwithstanding this, the House of Representatives of the Fifty-second Congress gave the seat to Rockwell.

There is no dispute as to whom these men in the Soldiers' Home voted for. It is admitted that they voted for Mr. Belknap; therefore, what a wonderful responsibility this House assumes in attempting to set aside the will of 42,000 voters in the Fifth Michigan district, by reason of a contention between five men, who differ as to the language of a statute regarding the place at which a man may exercise the right of suffrage. The Congress of the United States has no higher obligation resting upon it, or a more sacred duty to perform, than to see that the will of the majority is allowed to have its full course and operation in all public affairs, for by this are we assured of the safety of our institutions.

Mr. Thomas furthermore showed that since the decision of the court the constitution of Michigan had been amended so as to allow the inmates of the Soldiers' Home to vote in the precinct in which it is situated.

2. The second question is thus stated by the report of the committee:

The Michigan statute (Public Acts, No. 190) of the session of 1891, page 269, under which this election was held, provides for the introduction of the so-called "Australian" system of voting, and provides that any ballot which shall have any distinguishing mark or mutilation shall be void, and shall not be counted. A distinguishing mark may be defined as "any mark by which a ballot may be identified when it is counted, and by which parties making an agreement before voting can show by the ballot that they have carried out the agreement;" no such vote should have been counted by the inspectors, and the supreme court of the State, in a very recent decision, has so decided (see Attorney-General ex rel., *Scott v. Glaser* at the October term, 1894), reported in 61 N. W. Reporter, page 648.

The committee found 49 ballots in Kent County which had distinguishing marks and which had been improperly counted for contestant. The committee give an enumeration of these distinguishing marks, of which the following are samples:

One vote in the township of Solon was counted for Mr. Belknap with two crosses at the head of the Republican ticket, and two crosses at the upper left-hand corner on the face of the ballot.

One vote was counted for Mr. Belknap in the township of Plainfield marked with a double cross at the head of the Republican ticket and the letter "H" over Mr. Belknap's name in his space.

One vote was counted for Mr. Belknap in the township of Cascade marked regularly for the Republican ticket, with two crosses on the right-hand upper corner of the ballot.

One vote was counted for Mr. Belknap in the first precinct of the Second Ward of the city of Grand Rapids marked with a cross each side, and one below the voting square on the Republican ticket.

One vote was counted for Mr. Belknap in the third precinct of the Third Ward, Grand Rapids, having the words "This I vote for" written in the space containing the vignette on the Republican ticket.

One vote was counted for Mr. Belknap in the first precinct of the Eighth Ward marked regularly for the Republican ticket; the ballot being about three-fourths of an inch narrower than the regular ballot, a strip having been cut from the right-hand margin.

One vote was counted for Mr. Belknap in the second precinct, Fourth Ward, marked regularly for the Democratic ticket with a cross in the space in front of Mr. Belknap's name, Mr. Richardson's name not being erased, but having a line drawn under it.

One vote was counted for Mr. Belknap in the first precinct, Twelfth Ward, Hubbell's name being erased and the words "For Ben Harrison" written in.

One vote was counted for Mr. Belknap in the second precinct of the Twelfth Ward marked regularly for the Republican ticket with a diagonal line running through the voting space on the Democratic ticket, below which was written, "No good."

One vote was counted for Mr. Belknap in the township of Oakfield with three crosses at the head of the Republican ticket.

One vote was counted for Mr. Belknap in the third precinct, Eleventh Ward, marked with voting stamp after the names "Hubbell, Aaron Clark, Swensburg, and Rich," and over the name "Diekma," and partially over and partly on the name "Wilson," with no other marks on the ballot.

One vote was counted for Mr. Belknap in the township of Vergennes not having the initials of the inspector.

One vote was counted for Mr. Belknap in the township of Caledonia marked at the head of the Republican ticket with a circle each side the voting square, having no other marks upon the ballot.

Deducting from contestant these 49 ballots, and crediting sitting Member with 8 ballots to which he was indisputably entitled in one precinct, the majority find a plurality of 150 for sitting Member in the district. Therefore they reported resolutions confirming his title to the seat.

No action was taken by the House on this report, sitting Member thereby retaining the seat.

1043. The Alabama election case of McDuffie v. Turpin, in the Fifty-second Congress.

The House did not permit the returns of election officers to be impeached by testimony of partisan workers who tallied the ballots cast.

Discussion as to the status of the ballots as evidence when the honesty of the election officers is impeached.

The returns being stolen after they were made out by the election officer, their contents was proven orally by one witness.

The evidence failing to establish as legal an election whence no returns were received, the House declined to take it into account.

On January 17, 1893,¹ Mr. Daniel N. Lockwood, of New York, from the Committee on Elections, submitted the report of the majority² of the committee in the Alabama case of McDuffie *v.* Turpin. The state of the returns is described:

By the returns of such election as filed with the secretary of state of Alabama, Louis W. Turpin received 9,595 votes, John V. McDuffie received 4,931, and G. T. McCall received 3,899, the majority for Turpin over McDuffie being 4,664. The certificate of election was issued by the governor of the State to Louis W. Turpin.

The contestant claimed his election on the general ground that the election officers of the district, by what amounted to a fraudulent conspiracy, had failed to count and return the votes cast for him. The minority of the committee, sustaining the contention of the contestant, notice the previous history of the district, the census returns, and the circumstances attending this election, to show that the voters of the district were overwhelmingly colored; that these colored voters were Republicans and supporters of contestant, and that they despised McCall, the third candidate, who was alleged to have become a candidate in pursuance of a corrupt arrangement with the Democratic managers, in order that they might count for him enough of contestant's votes to leave a plurality to sitting Member. The minority further set forth that in pursuance of the conspiracy, the party supporting sitting Member manipulated the election machinery:

The entire machinery of election was in their hands. The board of county supervisors of each county, whose duty it was to appoint the inspectors of elections for the various election precincts therein, and to canvass the votes as returned therefrom, was composed of the sheriff, clerk, and probate judge of the county, and all of these were white Democrats.

In some few instances this board of county supervisors appointed all three of the local inspectors of election from their own party, contrary to the law of the State, which required one inspector to be of opposite politics to the other two. In a few other instances they appointed as the Republican inspectors colored men who were strongly under Democratic influence and who did not enjoy the confidence of the colored Republican voters of the precinct. But in a very great majority of instances they selected for the Republican inspectors ignorant colored Republicans who could neither read nor write and whose presence upon the election boards in nowise interfered with the perpetration of fraud upon the voters, for the reason that they were too dull and illiterate to detect or expose it. This course was pursued right in the face of the well-known fact that in every voting precinct of the district where such appointments were made were some colored Republicans of fair intelligence, who could read and write, and who were qualified to discharge the duties of inspectors.

That these incompetent Republicans were so appointed inspectors of election is not only proven by the uncontradicted testimony of credible witnesses, but is also shown by an inspection of the returns of the election inspectors set out in the record in this case. They show that the Republican inspectors were, with scarcely an exception, unable to write, and that they signed the certificate by making their marks.

The law of Alabama also provided for the appointment by the board of county supervisors of a returning officer in each precinct, whose duty it was to receive the ballot box containing the returns of the election from the inspectors of the precinct and convey it to the sheriff of the county, to be by him submitted to the board of county supervisors for canvass, and it also provided that the inspectors of election in each precinct should appoint two persons to act as clerks at the election.

In not a single instance in the entire district was a Republican appointed either returning officer or clerk of election, the white Democrats invariably being appointed to these places. In some precincts no United States supervisors appear to have been present at the election, while in others these

¹Second session Fifty-second Congress, House Report No. 2261; Rowell's Digest, p. 477; Stofers Digest, p. 51; Journal, p. 121; Record, pp. 2291-2310.

²The minority views were presented by Mr. Henry U. Johnson, of Indiana.

officers were refused admittance, and in still others were, after being admitted, not allowed to see the ballots while they were being counted. Having thus obtained complete control of the entire machinery of election in the district, and having also procured the candidacy of McCall that they might rob the contestant of many of his votes by counting them for the former under the pretense that they had actually been cast for him, and with an ignorant and helpless population to operate upon, the Democratic managers deliberately and systematically went to work to consummate their scheme of electing contestee to Congress from the district against the wishes of the majority as expressed at the ballot box.

To thwart this alleged conspiracy the supporters of contestant arranged in each precinct of the district to have several of their number at the polling places to issue contestant's tickets to the voters and keep a list of those whom they saw vote these tickets. The persons who thus kept the lists were produced and swore to these facts, and produced and identified the lists, which were incorporated in the evidence. In only one precinct did the sitting Member offer evidence that any of the voters thus enrolled did not vote for contestant.

The minority went into the evidence, precinct by precinct, showing the working of the plan to get evidence. They also showed that in some precincts the election officers refused to open the polls, forcing the friends of contestant to organize an election themselves. that in some cases the returning officers failed or refused to make the returns, and that in other cases the returns were not canvassed as returned.

The majority members of the committee in debate denied the pertinency of considerations as to the past history of the district, and denied also that the colored voters belonged entirely or even to an overwhelming extent to contestant's party. In their report they assail the testimony:

About the only well-substantiated facts as appear in the case are the returns made to the boards of supervisors and their returns to the secretary of state. The contestant could not hope or expect to make a successful contest by declarations in notice of contest and secondary evidence for proof.

It is a well-established rule of law that the best evidence shall be produced if possible to produce the same. In this case it was within the power of the contestant to have produced from each of the precincts the ballot boxes with the ballots in each of the election precincts, with the exceptions herein before stated, and the ballots, together with a list of all the voters, could have been placed in evidence, as there is no proof of their loss or destruction, and if a fraudulent count of the ballots by the inspectors and a fraudulent return of the votes for the several candidates had been made the same would have fully and satisfactorily appeared by a recount and an examination of the ballots. The contestant in this case makes the grave charge that the inspectors made fraudulent return of the votes actually voted and put in the ballot boxes. To establish this charge he produced from the election precincts not the ballot boxes containing the ballots as voted and deposited in the box, all of which had to be and were preserved and were accessible to contestant, and which he admits were correct, but called witnesses who had been stationed at the several precincts who testified that on election day they were at the beat or precinct in dispute and distributed McDuffie ballots, and that witness kept or had kept a list of names of those voters to whom they passed out McDuffie ballots and that the persons receiving such ballots voted the same.

It would appear from the statute governing elections in Alabama, and from the evidence, that the witnesses who handed out the McDuffie ballots were at least from 30 to 100 feet from the ballot boxes. The majority of the witnesses were ignorant, and some of them could not read or write. The proposition sought to be established, and which must be established by the contestant in order that he should succeed in this contest, is that persons working in his interest, who kept a list or had a list kept of those to whom they gave ballots, that their return should be taken and counted as the correct return instead of the sworn statement of the inspectors, clerks, and the officers of the election districts. It would be an exceedingly dangerous precedent to permit the actual returns, as made by the inspectors and sworn officers of the election, to be disregarded and impeached by returns made out by irresponsible partisan workers at the polls.

The minority urge, on the other hand:

Contestee has argued in this case that the returns of the election officers are prima facie evidence of the result of the election, and are also the best evidence thereof. While this is doubtless true, it is also undoubtedly true that these returns may be and have been shown to be false in this case. Having been thus impeached by the evidence, they are no longer of any value either in law or fact. The contestee, however, insists that even if the integrity of the returns is thus overthrown, the best evidence of the number of the voters at the election, and of the way in which they voted, is the poll lists of the voters and the ballots which they cast. It is claimed that these poll lists and ballots are expressly required by the Alabama election laws to be preserved as evidence, and that they should either have been produced or proven to have been unattainable before evidence of the kind offered by contestant as to the number of votes cast for him could be received.

It is insisted that at least the voters should have been produced and should have testified in person as to how they voted. In other words, the contestee seeks to shelter himself behind the well-known rule of evidence that the best attainable evidence of a fact must always be produced, and that until this is shown to be unattainable secondary evidence of the fact is not admissible. In reply to this proposition we have to say that under the plenary powers conferred upon the House by the Federal Constitution to determine the election of its own Members it possesses the undoubted power to determine this contest in favor of contestant on any evidence which in its opinion establishes fraud in this election. Not only does the House possess this power, but in view of all the circumstances of this case every consideration of justice and right require that it should be exercised in contestant's favor, unfettered by this rule which the contestee invokes. But the contestant does not have to rely upon this position. The rule of evidence invoked by contestee has been complied with.

The testimony which he has introduced in this case, and which is set forth herein, not only impeaches the returns of the inspectors of election, but it goes further. It impeaches the inspectors and returning officers themselves. It shows them to have been utterly unscrupulous and dishonest in conducting the election from beginning to end. It taints every step they took with fraud and chicanery. It attaches to the poll lists and ballots which passed through their disreputable hands and were entrusted to their disloyal custody, and impeaches the integrity of these as well as that of the returns. Having been subjected to such influences, it is very apparent that as instruments of evidence these poll lists and ballots are utterly without value or reliability in this case.

This being the case, their primary character as evidence is lost, and contestant's evidence is clearly admissible. It would be a remarkable requirement that contestant should produce the very records made by these election officers in order to show the names and number of the voters, or that he should produce the ballots which he might find in their possession long after the election to show for whom the electors voted, when he has clearly established the fact that these officers conducted the entire election with the grossest dishonesty, and practiced thereat all manner of fraud and cunning in order to prevent a fair election.

The majority ruled as follows on other questions:

(a) In three precincts the returns were properly made out, and, with the ballots, were sealed and delivered to the returning officer, but did not reach the board of supervisors, whose duty it was to canvass the returns. One of the returning officers alleged that the package given to him was stolen. In each precinct one witness, who was uncontradicted, testified as to the vote received by contestant, and this vote was allowed. In another precinct, under similar circumstances, the testimony of the witness was supplemented by a copy of the certificate of the election inspectors, and the vote was allowed.

(b) In Leaderville precinct the duly appointed inspectors failed to attend, and polls were opened by the organization of a new board of inspectors. Votes were cast and received, but no returns reached the board of supervisors when they met to make the canvass. Therefore the majority refused contestant's claim to votes, for the reason that the evidence failed to establish that a legal election was held.

The majority concluded, in accordance with the above reasoning, that the official returns should be modified by adding to sitting Member's vote 13 votes, to contestant's 684 votes, and to McCall's 1 vote. Thus the plurality would still remain with sitting Member, and resolutions confirming his title were reported.

The minority found from their examination that contestant had a plurality of at least 604 votes.

The report was debated in the House on February 28, and on that day the motion made on behalf of the minority to substitute resolutions seating contestant was decided in the negative, yeas 64, nays 190.

The resolutions of the majority were then agreed to without division, and sitting Member retained the seat.

1044. The Pennsylvania election case of Greevy v. Scull in the Fifty-second Congress.

Where ballots are numbered in connection with the voter's name, the ballots themselves are the best evidence, and the testimony of the voter should not be taken.

The ballots are among the papers of which the officer taking testimony in an election case may demand the production.

The State law requiring the voters to vote in the precinct in which they reside, the House insists on absolute and technical adherence thereto.

Voters who have performed fully their own duty as to registration are not to be disfranchised because of defects in the lists caused by establishment of new voting places.

Votes received before the election board was legally organized were rejected.

Although a sticker for one candidate left the name of the other exposed, the House considered the voter's intent evident and counted the sticker.

On January 19, 1893,¹ Mr. Charles T. O'Ferrall, of Virginia, from the Committee on Elections, submitted the report in the Pennsylvania case of Greevy v. Scull. The sitting Member had been returned by a majority of 524, which contestant sought to overcome, on grounds described in the report:

In the notice of contest it was charged that a large number of illegal votes were cast for the contestee—illegal because the voters were not registered, or had not made the proof on the day of election, or had not paid a tax as required by the constitution and statute of Pennsylvania, or were non-residents of the State, county, or election district, or had voted in boroughs, when they resided in townships, or had voted in wards of cities or townships, when they had not lived in the me the time prescribed by law. All of these allegations were denied in the answer of the contestee, and countercharges were made that many illegal votes were cast for the contestant, alleging the same grounds of illegality as those just recited.

The case involved the investigation of the illegality of over 1,300 votes, and the committee in this connection laid down the following rule:

It is proper here to state that the contestant relied upon the testimony of the voters themselves to show for whom they cast their ballots. Upon an examination of the statutes of Pennsylvania it was

¹Second session Fifty-second Congress, House Report No. 2333; Rowell's Digest, p. 478; Stofer's Digest, p. 141; Record. p. 805.

found that the ballot of every voter is required to be numbered by the election officers, the number to correspond with the number opposite the voter's name on the poll list, and that all the ballots cast at an election are required to be preserved "to answer the call of any person or tribunal authorized to try the merits of such election."

It is a well-established principle that the ballot of a voter which has been safely preserved by some authorized custodian is the best evidence as to how or for whom he voted and must be produced, and that the testimony of the voter himself is secondary and inadmissible.

In this case, however, the language of the statute "to answer the call of any person or tribunal authorized to try the merits of such election" seems to have led the contestant to believe that he could not call for the ballots, and acting apparently upon this belief he introduced the voters themselves.

In the opinion of the committee the contestant would have found ample authority for the production of the ballots in sections 122 and 123 of the Revised Statutes of the United States. In section 123 full power is given the officer engaged in taking depositions in a contested election case in the House of Representatives "to require the production of papers," and if "any person refuse or neglect to produce and deliver up any paper or papers in his possession pertaining to the election," he is made liable to heavy penalties.

The ballots were papers pertaining to the election; they were numbered so that each one of them could be identified as the ballot cast by the particular voter whose vote was in controversy; they were the best evidence; they were mute witnesses, yet told their own story and were unimpeachable; they could not be bribed nor corrupted. In most instances, according to the testimony, they had been safely preserved and no corrupt fingers had handled them.

But while the committee adhere to the opinion that the evidence of the voters was inadmissible, and to the uniform current of decisions that where the ballots cast at an election are required to be so numbered as to enable them to be identified, and they have been safely preserved by some legal custodian, they must be produced as the best evidence, and the testimony of the voters is secondary and inadmissible, yet it has been considered proper to report the names of such voters who cast illegal votes, and who, as shown by their own testimony, voted for the contestee.

It is also proper, in this connection, to state that in the counties of Blair and Bedford the contestee resorted to the same character of proof as that to which reference has just been made, but in the counties of Cambria and Somerset he introduced the ballots, after first showing that they had been securely kept, except in certain instances which were disregarded by the committee and are not included in the illegal lists herein reported, but allowed to stand in the contestant's column.

Several other questions arose in the determination of this case as follows:

1. The constitution of Pennsylvania provided that a voter "shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election." The evidence showed certain violations of this provision:

(a) In the township of Somerset the electors voted for many years at a precinct which, when the borough of Somerset was created, was taken into the borough, and became the borough precinct. No precinct was established for that part of the township left outside the borough, and at the election in question the township voters cast their ballots in the old precinct, as usual.

(b) At Elk Lick Township there was a precinct within the township, but on the day of election the owner of the house in which the elections had been held for some years refused to allow the polls to be opened in it, and the officers of the election crossed a narrow alley into the borough of Salisbury and there opened the polls and received the ballots of the township voters.

(c) In six townships in Bedford County the electors voted in neighboring boroughs, as had been done for many years, and because no voting places had been established in the townships.

In regard to these cases the committee conclude:

While the committee regard it as a hardship upon the electors in these different townships to reject their votes, yet the constitution and laws of Pennsylvania must be obeyed. The provision of the constitution of that State requiring, without qualification, the electors to vote in the districts in which they had resided for at least two months immediately preceding the election must be enforced. A mistaken idea of the law upon the part of the electors, however honest, or a neglect or refusal upon the part of the lower courts to establish voting places within the townships, can not render void the plain provisions of the constitution. The power to fix the qualifications of voters is vested in the State, subject only to the limitation contained in the fifteenth amendment to the Constitution of the United States. Each State fixes for itself these qualifications, and the United States must adopt and has uniformly adopted the State law upon the subject, and the House of Representatives should not in any case fail to act in conformity with it.

2. As to the voting of electors alleged to be unregistered, question arose from the following conditions: Prior to October 1, 1890, the township of Somerset was divided into two election districts, the northern end being designated as No. 1 and the southern as No. 2. On October 1, 1890, Lincoln Township was formed, and included all of district No. 2 and a small portion of district No. 1, and the old No. 2 voting place was made the precinct of the new township. The committee thus describe the resulting difficulties:

There was no new registration made or ordered for the new township, but the old registration of district No. 2, which embraced all the voters in the new township except about 20 who resided in that part of district No. 1 which was annexed to district No. 2 in the formation of Lincoln Township, was used at the polls, and the voters of the former district No. 2 and the annexed part as aforesaid voted.

In the opinion of the committee there can be no question as to the legality of all of these votes except, perhaps, those cast by voters who resided in the territory taken from district No. 1, about 20, as already stated. They had not in any manner changed their location; they still resided in the territory in which they were registered and cast their ballots at the identical place at which they had formerly voted.

All that had been done was to annex a wall strip of territory to the territory in which they lived, and change the name of district No. 2 to Lincoln Township. If there had been no change, there is no pretense they would not have been legal voters. The registration list had been made a very short time prior to the election as required by law, and the registering officer could with propriety have taken it and changed the caption of it from district No. 2 to Lincoln Township. Nothing was done, in our opinion, to change the legal status of these voters, nor to deprive them of the right to vote in said township in the territory in which they had resided at least the two months required by the constitution of their State. They were guilty of no wrong; no fault could be laid at their door; no negligence on their part could be charged; they had done all that they could do to qualify themselves to vote, and to hold that they could be deprived of their right of suffrage by an order of the court over which they had no control, on the eve of an election, and when they had no time for redress, is a doctrine to which the committee can not subscribe.

The intention of the legislatures in all of the States in providing for registration lists is to guard against fraudulent voting, to prevent colonizing, and men without fixed habitations from depositing their ballots wherever they may chance to be on an election day, and to require residence sufficiently long in a community that the voter may become known and regarded as a bona fide resident and not a mere floater or bird of passage. The registration list as used in the township of Lincoln was as effective in these respects and filled the purposes of the law as completely as if it had been used in district No. 2 before the township was formed.

As to the 20 voters in the annexed territory, it will be found that their names were on the registry list of district No. 1, and this list was at the polls in Lincoln Township on the day of election, and the committee think this was a substantial compliance with the law under all the surrounding circumstances; but, in any event, there is no evidence for whom they voted, and if their votes were illegal and affected the result they would, under the authorities, have to be deducted proportionately from both candidates, according to the entire vote returned for each.

The committee quote McCrary and Paine in support of this view, and say:

In the cases of these voters, they had registered in the districts wherein they lived at the time the registry lists for the November, 1900, election were made as required by law; they remained in the very territory and at the very spots wherein and whereon they lived when these registry lists were prepared; they were guilty of no wrong and neglected no duty, impliedly or otherwise; they could not register again after the changes were made, as the time for registration had passed; they could not control the action of the court and were not responsible for it, and "it would seem a very unjust thing to deny them the right to vote."

In every instance the record shows that the registry lists of the original precincts or districts were at the polls, in the hands of the election officers, and the mere failure upon their part to perform the clerical work of transferring should not deprive the voters of the right to cast their ballots." We should look at the substance and not the formality."

The township of Fairhope and a portion of Altoona were in the same condition as Lincoln, and were considered with it by the committee.

3. As to votes received before the organization of the board, the committee concluded:

The committee also find that 29 votes were received and deposited in the First Ward of Tyrone, Blair County, before the election board was organized or complete as required by law. Twenty-six of these votes were cast for the contestee and should be deducted from the contestee's column, if the testimony of the voters themselves is received as proper evidence.

4. As to the force of the voter's intent they found:

In the first precinct of the First Ward of Altoona a ballot was counted for the contestee which had on it a paster bearing the name of the contestant, but leaving the name of the contestee exposed; it was a Republican ticket. The committee think that the placing of the sticker on the ballot indicated the intention of the voter to vote for the contestant, and that one vote should be deducted in the contestee and one added to the contestant.

The committee found that after the deductions had been made in accordance with the above reasoning, and adhering to the principle that the testimony of the elector as to how he voted should not be received when the ballots themselves were accessible, the sitting Member had a majority of 687 votes. Therefore the committee (no minority filing views in dissent) recommended resolutions confirming sitting Member's title to his seat.

This report was not acted on by the House, and so sitting Member remained in the seat.

1045. The South Carolina election case of Miller v. Elliott in the Fifty-second Congress.

Discussion as to the degree of variations permissible from size and style of printing of ballots prescribed by a mandatory law.

Use of the word "for" before the designation of the office condemned as a distinguishing mark on a ballot.

The size and impression of the type, permitting a ballot to be read on the back, was held to be a distinguishing mark.

Instance wherein a variation of one-sixteenth of an inch from the legal size contributed to condemnation of a ballot.

The color of a ballot is considered in determining as to distinguishing marks.

On February 25, 1893,¹ Mr. Thomas H. Paynter, of Kentucky, from the Committee on Elections, presented the report of the majority² on the South Carolina case of *Miller v. Elliott*. The issues as to this case arose under the following provisions of the South Carolina law:

SEC. 115. The voting shall be by ballot, which ballot shall be of plain white paper of two and a half inches wide by five inches long, clear and even cut, without ornament, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons voted for, and the office to which such person or persons are intended to be chosen, which name or names and office or offices shall be written or printed, or partly written and partly printed, thereon, in black ink; and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited in a box to be constructed, kept, and disposed of as hereafter provided; and no ballot of any other description found in any election box shall be counted.

The contest arose over acts of South Carolina election officers, which are described fully in the minority views:

The boards of precinct managers, or local election officers, of which there were a large number in the district, were, in a great majority of instances, made up entirely of Democrats, and in the remaining instances the Republicans had only a minority representation. When the vote had been polled at the election, the precinct managers at Port Royal, in Beaufort County, and Muster House, in Berkeley County, rejected in the aggregate 324 ballots that had been cast for Miller, being all the ballots he had received at these precincts, and returned to the boards of county canvassers in all 46 votes for Elliott and 4 votes for Brayton, being the total votes polled for these candidates.

In no other precinct in the district were there any ballots rejected by the boards of precinct managers, but the entire vote as cast was certified by these local boards to the boards of county canvassers. The vote so certified showed Miller to have received 7,026 votes, Elliott 3,793 votes, and Brayton 1,413 votes in the district, and that Miller had therefore been elected to Congress over Elliott by a plurality of 3,233 votes. Every board of county canvassers in the district was Democratic, and Elliott appeared before each one of them either in person or by counsel, and moved that the entire vote cast for Mr. Miller in the county be thrown out and rejected on four grounds, to wit:

First, that his ballots were one-sixteenth of an inch shorter than required by the statute of the State; second, that the word "for" appeared on his ballots just preceding the word "Congress;" third, that the ballots were not printed on plain white paper as the statute directed, and, fourth, that the name of Thomas E. Miller was so printed upon the ballots as to be seen through their backs when folded.

The boards of county canvassers in the counties of Beaufort, Berkeley, Colleton, and Orangeburg sustained this motion of Elliott, rejected all of the ballots cast for Miller in these counties, and certified to the board of State canvassers simply the vote cast for Elliott and Brayton. The county canvassers in the counties of Georgetown, Williamsburg, Charleston, Richland, and Sumter, however, overruled Elliott's motion, refused to throw out the Miller ballots, and certified to the State board the vote as certified to them by the local election officers. The effect of the action of the boards of county canvassers in the fast-named counties in rejecting the Miller ballots was such that Elliott appeared to have been elected to Congress over him in the district by a plurality of 478 votes. From the decision of each of these county boards an appeal was taken to the board of State canvassers, Miller appealing from the action of the first-named boards and Elliott from the decision of those last named.

The board of State canvassers was composed of the attorney-general, the secretary of state, the treasurer of state, the comptroller of state, the adjutant and inspector-general of state, and the chairman of the committee on privileges and elections of the house of representatives of the State legislature, all of whom were Democrats. On the questions involved in the appeals these members of the State board divided evenly, the attorney-general being one of the members who voted in favor of counting the rejected Miller ballots. Thereupon, the board of State canvassers being unable to come to any conclusion in the matter on the application of Elliott and his friends, the supreme court of South

¹Second session Fifty-second Congress, House Report No. 2569; Rowell's Digest, p. 480; Stofer's Digest, p. 165; Journal, p. 116.

²The minority views were presented by Mr. Henry, U. Johnson, of Indiana.

Carolina issued a writ of mandamus against the members of the board commanding them to make out a statement of the vote as returned to them by the boards of county canvassers, and to certify it and the election of Elliott, and deliver the same to the secretary of state.

At the outset the majority of the committee assert that—

The evidence shows in the case that the contestant designed in the method of having his ballots printed to destroy the secrecy of the ballot; that his purpose was to procure the kind of material on which they were printed, and have the printing so executed that it could be told by himself and friends how an elector was voting, thus attempting to disregard utterly the wise purpose of the law, which was to enable an elector to vote as he desired, without intimidation and in secrecy. Contestant in 1890 gave his printer one of the ballots, the like of which was used by him in the election of 1888, and ordered his ballots printed like that one; that instead of having them printed on “plain white paper,” he had them printed on “dirty white paper;” that he had the printing on the tickets spread out, and his name dropped a little lower down than on the ticket of 1888, for no purpose except the name Thomas E. Miller would not be so likely to be in the crease when the ticket was folded, thus enabling the name to be easier seen. In the language of his printer, he wanted “his name in bold black type which he selected himself.”

The minority attempt to discredit the testimony attributing such a motive to contestant, and express the opinion that such a charge is unwarranted.

The majority upheld the action of the election officers on the ground that the law was mandatory:

It will be observed that the law prescribes—

The size of the ballot.

That it shall be of “plain white paper.”

That it shall be clear and even cut.

It shall be without ornamentation, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the persons voted for and the office to which such person or persons are intended to be chosen.

The ballot can be either written or printed or partly written or partly printed in black ink.

The ballot shall be so folded as to conceal the name or names thereon and so folded shall be deposited in a box.

It provides further: “No ballot of any other description found in any election box shall be counted.”

That the statute is mandatory there can be no question.

The object of the law was to so far as possible prevent bribery and intimidation of the voters; that for whom the elector voted should alone be his secret, thus preventing anyone from knowing or questioning him as to the ticket which he voted.

The purpose was to make the elector a freeman in the exercise of the election franchise.

The legislature intended that there should be uniformity in size, so that the ballots could not be distinguished by a difference in size. That “plain white paper” should be used, so that neither the voter, the candidate, their friends, nor the officers conducting the election could tell from the texture or tint of the paper for whom the elector voted.

So exact was the ballot to be that it was required to be “clear and even cut.”

It was intended that no ornamentation, mark, etc., should be on the ballot as another safeguard against the knowledge of anyone as to how the elector voted.

As an additional precaution to secure secrecy the law requires the ballots shall be “printed or written in black ink.”

After taking all these precautions, so as to secure secrecy in voting, the law requires that “the ballot shall be so folded as to conceal the name or names thereon.”

The law-making power knew that a statute of this kind was of no value without a penalty; that if the candidates for office, their friends, the electors, or the managers of elections could disregard the law and defeat its beneficent purposes its enactment was folly; therefore, notice was given to the electors that if you do not comply with the provisions of this law, by voting that kind of ballot which is prescribed by law, then the penalty shall be incurred, to wit: “No ballot of any other description found in any box shall be counted.”

In support of their position the majority cite *Nichols v. Board of Canvassers* (129 N. Y.), *Reynolds v. Snow* (67 Cal., 497), *Talcott v. Philbrick* (59 Ann., 477), *Oglesby v. Legman* (58 Miss., 511), and *Steel v. Calhoun* (61 Miss., 563), and say:

If the legislature had merely prescribed the form of the ballot, without declaring those in any other form illegal or commanding their rejection, then it might be a question whether the statute was directory or mandatory. But here the law makes a ballot not in the prescribed form illegal, and declares it shall not be counted; there is no place for the question as to whether the statute is mandatory or directory. The ballot not in the prescribed form is illegal and must be rejected, because the law in terms declares that it shall not be counted.

No court in South Carolina, so far as the committee is aware, has passed upon this law.

The minority opposed the contention of the majority, and argued that the authorities cited had no exact bearing on the case in issue:

(a) As to the shortness of the ballots, the minority show that some, not all, of the rejected ballots varied from the required size by one-sixteenth of an inch in length, and that this was occasioned by accident in printing, and not from wrongful intent. The minority say:

Nor can it be claimed that this shortness in some of the ballots operated as a distinguishing mark, or that any living soul was deceived or otherwise injured thereby.

But it is claimed that the statute is mandatory in its terms and that, this being the case, there is no room for construction, and that any deviation from its requirements as to the length of the ballot, however occasioned or however trifling, renders the ballot void and necessitates its rejection. The minority submit that such a view as this is absurd. It abandons reason and throws common sense to the winds. The object of this statute is to give the elector the right to vote and to aid and protect him in the enjoyment of this right. The rule contended for by the contestee would invariably defeat this very object. There can not, in the very nature of things, ever be absolute perfection in conforming to the requirements of election statutes. Slight deviations here or there will necessarily occur.

The legislature which enacted this statute evidently did not intend to entrap the elector or to hold him responsible for defects so trivial that he could not reasonably observe them. It did not proceed upon the theory either that workmen were infallible or that printing machinery was perfect, nor intend to require that each voter should carry a rule with him to the polls in order to ascertain by actual measurement whether his ticket varied the tith of a hair in length or breadth from the legal requirement. There is ample scope in this case for the application to these ballots of the legal maxim, *de minimis non curat lex*. The minority also insist that the statute is question is in no wise exempt from the rule of construction laid down by the supreme court of one of the leading States of the Union that "all statutes tending to limit the citizen in the exercise of this right (the right of suffrage) should be liberally construed in his favor."

The minority further refer to the case of *Campbell v. Morey*, and to acts of South Carolina election officers in a late election.

(b) As to the use of the word "For" the minority say:

It is not pretended that there was any unlawful purpose in having the ballots printed in this way, nor that the word "For" constituted in any manner a distinguishing mark, for all of Mr. Miller's ballots were printed alike in this particular; nor is it claimed that anyone was deceived or injured by this word appearing on the ballots, or that the result of the election was in anywise affected by it; but it is contended here, as in the case of the shortness of the ballots, that the South Carolina statute is mandatory and requires that for this alleged defect the ballots shall be rejected. We have no desire to repeat in this connection what we have already said with respect to the construction of the statute. It is worthy of note that in only two precincts in the entire Congressional district were any of Miller's ballots rejected by the local officers of election.

The minority further discuss authorities bearing on this question.

(c) The minority reply to the third objection:

The minority assert that no ballot can be rejected, even under the terms of this mandatory statute, which is printed upon what is known and recognized as plain white paper, even though, owing to a difference in shade, it can be distinguished at the election from the ballots of other candidates printed on paper of the same general description.

These rejected ballots of Mr. Miller are unquestionably within the words "plain white paper" as employed in this statute, whether these words are construed in their usual and ordinary acceptance or as understood by expert printers and paper dealers. Four such experts, one of whom resided in Charleston, S. C., examined these very ballots and swore that they were of plain white paper, and that the paper on which they were printed was usually and commonly known by that designation among those of their profession. These witnesses were not contradicted. A number of persons, not experts, also testify in this case that these ballots are of plain white paper. As heretofore stated, every one of these ballots claimed to have been illegal are in evidence in this case and are now in the custody of the committee, and are easily accessible to the House. That they fully answer the requirements of the statute as to color is apparent at a glance.

(d) The minority do not admit the fact as alleged in the fourth objection, and also deny that the conclusions of the majority were in fact true:

It was evidently contemplated by those who framed this South Carolina statute that it might sometimes happen in the printing of tickets, because of the thinness of the paper, the amount of ink used, the force of the impression in printing, or some other cause, that the name of a candidate would show through the back of the ticket. It is also apparent that it was not the intention of the legislature to declare such a ballot illegal solely for this reason; nor does the statute, in point of fact, declare such a ballot void.

It was foreseen that a ballot so printed might still be folded and voted by the elector in such a manner as to conceal the name entirely from view. The statute was not designed to render such a ballot so voted illegal, but to protect it, and its language was so framed as to accomplish this purpose, for the statute provides "and such ballot shall be so folded as to conceal the name or names thereon, and so folded shall be deposited." Even if Miller's ballots were so printed, then, as to disclose his name through the back, still, if so folded and voted as to conceal the name from observation, the minority believe that such ballots would be legal.

The majority of the committee reported resolutions declaring contestant not elected, and confirming sitting Member's title to the seat. The minority insisted that contestant should be seated. The House did not act on the report, sitting Member of course retaining his seat.

1046. The Alabama election case of Whatley v. Cobb in the Fifty-third Congress.

The common-law rules of evidence which govern in the courts of law obtain in the trial of election cases in the House.

It is a rule of law that public officers are supposed to do their duty, and this presumption becomes conclusive if not rebutted.

On January 19, 1894,¹ Mr. Alfred A. Taylor, of Tennessee, from the Committee on Elections, submitted the report in the Alabama case of *Whatley v. Cobb*. The contestant made numerous charges of irregularities and fraud, but so far as the evidence went the only claim seemed to be that certain returns were not transmitted from the inspectors of election to the boards of county canvassers. Admitting the legality and regularity of the evidence on this point, a majority of 515 votes would

¹Second session Fifty-third Congress, House Report No. 267; Rowell's Digest, p. 483; Journal, p. 268.

still be left to sitting Member. But the committee do not admit the validity of this testimony, and say:

It is well established that the common-law rules of evidence which govern in the courts of law obtain in the trial of cases of contested elections in this House. Tested by these rules the whole of the evidence produced by the contestant, except only the official returns made by the secretary of state of Alabama to this House, is inadmissible. It is either secondary when the primary was obtainable, or mere hearsay. It is also incomplete for the attainment of the results sought by the contestant.

Without going into detailed argument on these points one instance will suffice. After proving, as he claims, that regular elections were held at certain precincts and the results properly and legally ascertained, and the official returns duly given to the returning officers, whose sworn duty it was to transmit them to the county returning officer, whose duty, in turn, was to deliver them to the county boards to be counted, the contestant made no effort to show that the returning officers, either for the precincts or the counties, failed to discharge their sworn duty. To this statement there is perhaps one exception.

The inference is plain. It is a rule of law that public officers are presumed to do their duty, and this presumption becomes conclusive if not rebutted. In this case it is conclusive.

It is needless to protract this report. There is nothing in the case fairly considered to disturb the officially ascertained majority in favor of the contestee.

In his brief the contestant supposes many things, and proceeds to argue on these suppositions, but in this course the committee must decline to follow him.

We see nothing in the record to justify the charges in the notice of contest or the strictures made by the contestant in his brief. The latter could well have been pretermitted. We are bound to presume that if legal evidence existed to sustain the charges made, it would have been produced, and as it has not been produced we presume it was not to be had, and that, therefore, the contestant suffered a fair defeat.

Therefore the committee unanimously recommended resolutions confirming the title of sitting Member to the seat.

On March 23 these resolutions were agreed to by the House without debate or division.

1047. The Missouri election case of O'Neill v. Joy in the Fifty-third Congress.

It being assumed that a State law required the rejection of ballots not properly indorsed or numbered by election officers, the House corrected the poll in accordance therewith.

Discussion as to whether a voter should be disfranchised for failure of election officers to obey a law requiring indorsement and numbering of the ballot.

On January 19, 1894,¹ Mr. Josiah Patterson, of Tennessee, from the Committee on Elections, submitted the report of a majority of the committee in the Missouri case of O'Neill v. Joy. The contestant claimed the seat on the ground that he received a majority of the legal votes.

The majority consider only one aspect of the case, which they consider decisive. Preliminarily they give this description of the essential features of the Australian ballot law of Missouri:

When a citizen presents himself as a voter and asks for a ballot, the judges can see at a glance whether he appears on the registration list, and if so the distributing judges take one ballot, and after writing their respective signatures or initials on the back of the ballot, they deliver it to the voter. The voter then retires to a booth where, unmolested and unobserved, he prepares his ballot to suit himself.

¹Second session Fifty-third Congress, House Report No. 268; Rowell's Digest, p. 497; Journal, pp. 304, 305; Record, pp. 3420-3424.

If by accident or carelessness he so mutilates his ballot as to render it useless he can return it to the distributing judges and receive another, indorsed in like manner. In this way the distributing judges are required to keep track of every ballot.

When the voter has prepared his ballot and folded the same, he is prepared to vote, and it is offered by him to two other judges who also belong to opposing political parties, called the receiving judges. The ballot is by them examined to see if it is indorsed by the signatures or the initials of the distributing judges. It is proper to observe in this connection that the requirement of the law is that both judges shall write their signatures or initials on the ballot, otherwise one of the judges might collude with fraudulent voters. The requirement is that judges opposed to each other politically shall concur in issuing the ballot.

If the ballot is legally indorsed by the distributing judges, it is received by the receiving judges, who are required to call out in an audible voice the name of the voter. Then the receiving judges indorse on the back of the ballot the voting number, or the number of the ballot in the order in which it is offered, this being the only writing which the law permits them to indorse on the ballot; and at the same time the voting number is entered on the registration list opposite the name of the voter with the word "voted." Then the receiving judges, or one of them, call out the voting number in a voice sufficiently loud to be heard by the bystanders and the ballot is placed in the box.

The majority thus state and apply the law in regard to deviations from the prescribed method of voting:

In section 4785, Revised Statutes, 1889, as amended by section 11 of the act of April 4, 1891, it is expressly provided that—

"Every ballot shall be numbered in the order in which it shall be received. No judge of election shall deposit any ballot upon which the names or initials of the judges as hereinbefore provided for does not appear."

In section 1005, Revised Statutes, 1889, it is provided that—

"No ballot not numbered as herein provided shall be counted."

In section 4671, Revised Statutes, 1889, chapter 60, it is further enacted—

"Any ballot not conforming to the provisions of this chapter shall be considered fraudulent and void."

Section 4780, Revised Statutes, 1889, chapter 60, as amended by section 8 of the act of April 4, 1891, reads as follows:

"On any day of election of public officers in any election district, each qualified elector shall be entitled to receive from the judges of election one ballot. It shall be the duty of such judges of election to deliver such ballot to the elector. Before delivering any ballot to the elector the two judges of election having charge of the ballots shall write their names or initials upon the back of the ballot with ink or indelible pencil, and no other writing shall be on the back of the ballot, except the number of the ballot."

Now, these provisions of the law of Missouri are plainly and emphatically mandatory. This is too clear for discussion, and we refrain from citing authorities or quoting decisions in support of a proposition so free from doubt. It may be said that to enforce these statutes according to their plain intent and purpose will work injustice to the voter, and that he ought not to be held responsible for the failure of the distributing judges to write their signatures or initials on his ballot, or the failure of the receiving judges to number it.

But it must be borne in mind that no man has the natural or inherent right to vote. The voter is an agency of the State, clothed by the State with the elective franchise, and the same power which prescribes who shall have the franchise can also prescribe the manner of its exercise and throw such safeguards around the ballot as will protect it from fraud and dishonesty. Again, the voter is presumed to know something of the law which secures to him the elective franchise and prescribes the conditions on which it is to be exercised. When he receives his ballot, he can plainly see whether it bears the names or initials of the distributing judges. The receiving judges are required to announce the number of his ballot in a voice sufficiently audible as to be heard by the bystanders.

As the voter is the nearest bystander it may well be presumed he will hear the announcement of his number, and as the numbering is required to be consecutive there is neither temptation or opportunity to write other than the proper number and announce it to the bystanders. The opportunity of the voter to

inform himself and to guard against the loss of his ballot by complying with the law is ample. Especially is this true in view of the fact that at least one of the judges is his political associate and friend and is there to protect him. But aside from all this we have nothing to do with the severity or the hardships of the law. It is plainly mandatory, and precedent and sound public policy alike demand that it should be enforced and obeyed.

(See *Ledbetter v. Hall*, 62 Mo., 422; *State ex rel. v. Cook*, 41 Mo., 693; *West v. Ross*, 53 Mo., 350; *Gumm v. Hubbard*, 97 Mo., 311; *McCrary on Elections*, sec. 126.)

The majority found 607 ballots counted for sitting Member invalid because some were not numbered, or had no initials of the distributing judges, or had the initials of only one judge. They also found that 330 ballots counted for contestant should be rejected for the same reasons. As sitting Member had been returned by a majority of only 67, the effect of this was to show the election of contestant by a majority of 210.

There were other questions in this case which the majority briefly notice, but say:

However, it is not deemed necessary to go into an analysis of the evidence as to these matters, as it is conceded by all parties that if the ballots not numbered or initialed as required by law are to be thrown out the contestant was duly elected

The minority contended that the provisions of law in section 1471, Revised Statutes, quoted above, providing that ballots not conforming to the law should be considered fraudulent and void, related to elections as they were before the passage of the new law of 1891, and say:

And where one system of law is enacted as a substitute for a preceding law the rule of construction is that the preceding law is repealed, although there may be no express declaration of that intention contained in the later act.

The minority further say:

Neither the act forming article 3, of chapter 60, of the revised statutes of the State of Missouri, nor the amendatory act of 1891, in any manner sanctions the construction that the ballot of the elector shall be rejected for the omission to place the voting number upon it. Nor does it forbid the ballot without this number, as it probably would have done in terms if that had been intended, to be placed in the ballot box. And it was to this ballot alone that the language of the statutes of 1889 and 1891 were expressly directed, and the preceding law had no possible reference to this ballot, for it was not then a ballot which could be used under the laws of the State of Missouri. This new system for the first time provided that the ballot should be indorsed with the names or initials of the two judges before its delivery to the voter. No such provision was contained in any form in the preceding law, and therefore the preceding law could not act upon this direction in any form whatever. It is by the law providing for the Australian ballot alone that the direction for the indorsement of the initials of the judges has been given, and they have been forbidden to deposit a ballot in the box not containing the or initials of the two judges.

The prohibition, it will be seen from the language of the section, is directed to the judges themselves, and not to the voter. When he passed back his ballot to the judges as the ballot he intended to vote, all had been done by him which the statute required from him to have his vote deposited and counted. The law does not attempt to deprive him of this right, as it probably could not under the language of the constitution of the State, which defines the qualifications of the voter, and then declares that the person possessing these qualifications shall be entitled to vote. By no construction of this language can it be said that it was intended by the legislature that the disability should be imposed upon the voter, or that his vote when prepared by him to his own satisfaction, and returned to the judges, should be rejected because of any default on the part of the judges in complying with the language of the statute. Neither do these statutes declare that an unnumbered ballot shall not be deposited in the box.

Cases have frequently arisen where the validity or legality of the ballot has been brought in controversy, but no case has been discovered sanctioning the conclusion that the voter shall be deprived of his vote by the omission of the election officers to discharge a duty imposed upon them by law. It is only when a statute has declared the ballot to be void, or forbade it to be counted, that the courts have felt obliged to sanction its exclusion. As the preceding law did not apply to these ballots, but applied solely and wholly to the ballot furnished by the voter himself, it could not consistently be invoked to deprive the voter of his vote, on account of the omission on the part of the judges to initial or number the ballot. It has been assumed by the majority that section 4671 of that law justified the exclusion of the ballots indorsed with but one initial. But it will be seen by a reference to that section, which has already been made, that it is restricted expressly to the ballots voted under the provisions of that law, and it contains no such flexibility of language as will permit it to be applied to the ballots voted under article 3 of chapter 60, and the law of 1891, amending and extending that article.

The minority further call attention to the fact that the evidence proves the ballots to have been honestly voted and received, and condemn the harsh construction of law which would thus unseat sitting Member.

This case was the occasion of prolonged dilatory proceedings, but on April 3, 1894, the House finally came to a vote on the resolution of the majority declaring sitting Member not elected, and it was agreed to, yeas 156, nays 24. The resolution seating contestant was next agreed to, yeas 155, nays 28.

1048. The North Carolina election case of Williams v. Settle in the Fifty-third Congress.

The House should be governed by the construction given to a State law by the supreme court of the State.

The burden is on the party objecting to the vote to show that the elector objected to for illegal registration was illegally registered and for whom he voted.

The registration and poll books are the primary evidence of registration and fact of voting, and when in existence should be produced.

As to proving the act of voting by the elector or by another as well as by the poll book.

The color of the voter should be sustained by other conclusive evidence in order to establish a presumption as to how he voted.

The fact that registration officers register the voter raises the presumption that the latter gave proper answers to questions necessary to the act.

On January 31, 1894,¹ Mr. Thomas H. Paynter, of Kentucky, from the Committee on Elections,² submitted a report in the case of Williams *v.* Settle, from North Carolina. The state of the vote is described:

The certified plurality of contestee, by the board of State canvassers, was 329. The precinct returns gave him a plurality of 623. The board of county canvassers, in the county of Granville, rejected the returns from Dement precinct which gave the contestee a plurality of 36; from Wilton precinct, which gave contestee a plurality of 107; from Buchannon, which gave contestee a plurality of 70; from Royster, which gave contestee a plurality of 8. In the county of Guilford the board of county canvassers rejected the returns from one precinct which gave contestee a plurality of 73. Adding these pluralities to that given contestee by the State board of canvassers it will be seen that contestee's plurality in the district is 623.

¹ Second session Fifty-third Congress, House Report No. 337; Rowell's Digest, p. 484; Journal, third session Fifty-third Congress, p. 169; Record, p. 2945.

² The minority views were submitted by Mr. F. A. Woodard, of North Carolina.

Contestant attacked this plurality principally because of alleged illegal registration of many electors who voted for sitting Member, registration being a requirement of the State constitution. He also urged that the returns of certain precincts be rejected for the following reasons:

First. Certain judges or inspectors of election were not sworn.

Second. Registration books were not kept open thirty days.

Third. Some of the officers absented themselves from the polling place for a brief time during the election.

Fourth. Because parties other than the officers handled the ballots.

Fifth. The officers of election began to count some of the ballots before the polls closed.

Sixth. An inspector or judge of the election was candidate.

(a) As to the votes attacked because of alleged illegal registration. The law of North Carolina provided:

SEC. 2676. No registration shall be valid unless it specifies, as near as may be, the age, occupation, place of birth, and place of residence of the elector, as well as the township or county from whence the elector has removed, in the event of removal, and the full name by which the voter is known.

The majority in their report say:

Contestant seeks to overcome this plurality by showing that certain electors were not properly registered and not entitled to exercise the elective franchise. Certain electors were registered, giving name of State or country only as place of birth. Several hundred Republicans and several hundred Democrats were thus registered and voted. It is contended under the interpretation given to the North Carolina statute by the supreme court of that State, in *Harris v. Scarborough* (110 N. C.), by a divided court, that all persons who were thus registered were not entitled to vote. The effect of this opinion is to sustain the claim.

The committee believes that it was the duty of the registrar, when the elector presented himself for registration and was asked where he was born, and his answer was too indefinite by saying he was born in a State, to have asked him the further question as to the locality in the State where he was born. It was made the duty of the registrar under the statute to record his place of birth. To obtain the necessary information to make this record he should have propounded reasonable inquiries to elicit such responses as would have enabled him to discharge his duties properly. It may have been that the elector could not have been more definite as to the place of his birth. However, the highest court in the State has construed the statute, and the committee feels it should follow where that conclusion leads.

The minority dwell at greater length on this point:

That a State has a right to make registration a prerequisite to voting, and that an elector who does not comply with the requirements of the registry laws is not entitled to vote, is now too well settled to admit of discussion.

And it is equally well settled that in adjudicating any matter affecting the election of Members of this body it is the duty of this House to follow the law of the State from which a contest may come, in order to arrive at a proper determination of the controversy. Judge McCrary, in his learned treatise on the law of elections, second edition, page 277, says:

"The House of Representatives of the United States in construing a State law will follow the construction given it by the authorities of the State whose duty it is to construe and execute it. When a construction has been adopted and acted upon by the State authorities, the Federal Government should abide by and follow it."

The minority quote the cases of *Wright v. Fuller*, *Holmes v. Wilson*, *Miller v. Elliott*, and *Grevy v. Scull* in further support of this contention, and make the claim that the majority of the committee had in several instances during its examination of the case disregarded this principle. The principle announced by the

majority as to the duty of registrars was from the opinion of a dissenting judge, and the majority are criticised for giving it a quasi indorsement:

The supreme court also held that if the registrar read the headings calculated to elicit the requisite answers, he certainly did all that the law required of him, and that the failure to enter upon the registration books such facts connected with his history as the statute requires must be considered due to the carelessness or inexcusable ignorance of the elector. But at the same time the court held that if the failure to register properly was due to the neglect or willful act of the registrar, then the voter should not be disfranchised. It is upon this point that the report of the majority of the committee fails to follow the supreme court. * * *

The act of the legislature on the subject of registration, which has governed us in considering this contest, is mandatory. Its intent and meaning have been clearly defined by the highest court in the State.

The majority of the committee, passing to another phase of the question, say:

The burden is on the contestant to show the illegal registration of the elector, that the elector voted, and that he voted for contestee before he can ask to have the vote excluded from the count. The facts should be shown by competent testimony. Unless the board of county commissioners made an order for new registration the statute legalized the previous registration, and the burden being upon the contestant to show that electors were illegally registered and failing to do so he has not placed himself in a position to have any returns excluded. If this is a correct view of the statute then there is a failure of proof to sustain the claim that there were illegal registrations. In the case of *Boyer v. Teague* (106 N. C., 579) it was expressly decided, head note 18:

“When an elector is allowed to deposit his ballot, the burden is on one who questions its validity to show, by a preponderance of testimony, the truth of such facts or circumstances as are relied on to establish the disqualification.”

Neither the poll nor registration books have been presented in this case as evidence; neither has a transcript of either been presented as evidence from any county in the Congressional district except in Granville, where transcript of certain registration books has been presented, but not of the poll books. These are the primary evidence of the elector's registration and as to the fact of his voting. The record shows that the poll and registration books were in existence when the testimony was taken. If this conclusion be correct, it settles the case for contestee, because there would be no competent evidence as to the registration of any elector except in Granville County. It is not, however, necessary to take this view of the case, nor the one that there was a failure of proof that there were illegal registrations in order to reach the conclusion that the contestee is entitled to hold his seat.

In another portion of the report the majority also argue this question:

Section 2678 provides that the poll books shall be kept in which shall be entered the name of every person who shall vote; and that at the close of the election the judges of election shall certify same over their proper signatures, and shall deposit them with the register of deeds. It would seem by this that the register of deeds is the custodian of the poll books; and it was further provided in this section that “said poll books shall in any trial for illegal or fraudulent voting be received as evidence.”

Section 2686 provides that the registration books shall be deposited with the register of deeds in their respective counties. The register of deeds is the legal custodian of both the registration and poll books.

Neither in the counties of Rockingham, Stokes, Durham, or Caswell is the transcript made of the registration or poll books and presented as evidence in this case; nor is there anything purporting to be a transcript of the poll books presented in this case for any precinct or county.

In the county of Rockingham there is a certificate of the register of deeds stating that certain names are those of certain colored and white electors appearing on the registration books. The certificate simply certifies to the facts which the books purport to show. The registration books are the primary evidence as to who was registered. The poll books are the primary evidence as to the fact that the elector voted. (*Paine on Elections*, secs. 756, 759; *McCrary on Elections*, see. 472.) It is certainly not competent to prove the contents of the poll books or registration books except they are lost or destroyed. Such a certificate of the register of deeds could not be received as evidence under any

circumstances. If this conclusion is correct, then there is no competent testimony in this record as to how any elector was registered or as to whether or not he voted either in the counties of Rockingham, Stokes, Durham, or Caswell.

The minority take issue with this proposition:

On page 3 of the majority report objection is made that the entire registration and poll books were not produced. This was not necessary, nor was such an issue made while taking evidence.

Section 2678 of the code of North Carolina, a portion of which is in these words, "They shall keep poll books, in which shall be entered the name of every person who shall vote, and at the close of the election the judges of election shall certify the same over their proper signatures and deposit them with the register of deeds for safekeeping. And said poll books shall, in any trial for illegal or fraudulent voting, be received as evidence," is quoted in the majority report, and much stress is laid on the fact that copies of the poll book of each precinct at which illegal votes were cast were not made and presented as evidence in this case.

While it is provided that "said poll books shall, in any trial for illegal or fraudulent voting, be received as evidence,"² nowhere is it stated that they shall be the only evidence. Voting is a fact that can be proved, not only by the poll book, but by the evidence of the elector himself, or any other person who may have witnessed the act. And it will be noted just here that the statute refers to the "poll," not the registration book, that "shall in any trial for illegal or fraudulent voting be received as evidence.

The votes alleged to be void were cast in various precincts in Rockingham, Caswell, Stokes, Durham, and Granville counties. The majority, waiving their technical objection as to proof of this illegal registration, entered into an examination, precinct by precinct. In this examination the majority and minority disagree as to questions of fact. Neither deny that many voters, both white and black, appear to be registered illegally, but the majority do not admit that the proof justifies striking the black voters from sitting Member's vote, on the ground that the blacks all voted for sitting Member; and the minority do not admit that because an illegal voter was white he should therefore be stricken from contestant's vote. The voters themselves were not called on to give testimony as to how they voted, but contestant introduced the testimony of election officers, deputy sheriffs, party leaders, etc., to prove from seeing the ballots thrown or from general knowledge that the negroes voted the Republican ticket. The majority denied the conclusiveness of this testimony. The majority also, in the case of Berea precinct, raised this objection:

It is claimed that 33 votes should be taken from contestee at this precinct. J. G. Shotwell was registrar at this precinct and kept registration books. The law provides that the party who seeks to register shall give his place of birth. The registrar was not introduced to say what answers were made by these electors to the inquiry as to the place of birth. There is no evidence that he asked in what county, township, or State they were born, or, if so, what answers were made by the electors. They may have stated the county and State and the registrar failed to make record of it. They may have stated they were unable to state where they were born. If they were unable to do this, they certainly stated as nearly as may be the place of their birth.

In other words, suppose the elector was ignorant as to the place of his birth, he would so state; then he, being unable to be more definite, would certainly not be deprived of the right to exercise the elective franchise. The fact that the registrar placed the name upon the registration books should create the presumption that he gave the proper answers to all questions that were put to him by the registrar. The legal presumption would be in the absence of proof, where the registration book failed to show that his place of birth was stated, that the elector was unable to state his place of birth. This presumption should be indulged, because the other presumption should be that the registrar did his duty. We do not think that these votes should be rejected because of the reasons claimed.

From all these considerations the majority deny contestant's claim that the illegally registered voters should be rejected.

1049. The election case of Williams v. Settle, continued.

The sole objection that election officers are not sworn does not justify rejection of the poll.

Failure to keep the registration books open the required time does not justify rejection of the return if harm is not shown to have resulted.

No fraud being alleged, absence of election officers from the poll for dinner or other reason does not justify rejection of the poll.

Handling of the ballots by parties other than the officers does not necessarily cause rejection of the poll.

Although the law requires ballots to be counted only after close of the voting, a partial count earlier does not necessarily vitiate the poll.

When the law forbids a candidate to be an election officer, is a poll for Congressman void because a candidate for a local office is such officer?

Where a minor may not hold an office, may such minor as a notary take testimony in an election case?

(b) As to the objections to counting the returns of certain precincts:

(1) Because certain judges or inspectors of election were not sworn.

The law of North Carolina provided:

The said judges of election shall attend at the places for which they are severally appointed on the day of election, and they, together with the registrars for such precinct or township, who shall attend with the registration books, after being sworn by some justice of the peace, or other person authorized to administer oaths, to conduct the election fairly and impartially according to the constitution and laws of the State, shall open the polls and superintend the same until the close of the election.

The report, after citing Payne and McCrary, refers to the case of De Berry v. Nicholson (102 N. C.), which in turn cites *People v. Cook* (8 N. Y., 67), and concludes that the court of North Carolina has recognized the principle which should prevail when it held that—

The neglect of the inspectors or clerks to take an oath would not have vitiated the election. It might have subjected the officers to indictment if the neglect was willful.

In Buchanan precinct it was claimed that the registrar was not sworn, in Royster several were not sworn, and in Delmont one of the judges, who was a justice of the peace, swore his associates, but was not himself sworn. In none of these precincts was fraud alleged, but in Buchanan and Royster other irregularities were alleged. But the committee did not consider that the omission of the oath was sufficient to justify the county canvassers in rejecting the Delmont return, where that was the only objection, or the returns of Buchanan and Royster, where other objections were urged, as appears below.

(2) Because registration books were not kept open thirty days under this provision of the State law:

SEC. 2675. Registrars shall be furnished with a registration book, and it shall be their duty to revise the existing registration books of their precinct or township in such manner that said books shall show an accurate list of electors previously registered in such precinct or township, and still residing therein, without requiring such electors to be registered anew; and such registrars shall also, between the hours of sunrise and sunset on each day (Sundays excepted), for thirty days preceding the day for closing the registration books as hereinafter provided, keep open said books for the registration of any electors residing in such precinct or township, and entitled to registration, whose names have never before been registered in such precinct or township, or do not appear in the revised list.

This objection had been one of the contributing reasons which caused the county canvassers to reject the return of Wilton precinct. But the committee do not admit the fact, and then state that even were it so, as stated in the objection, it would not invalidate the election.

The registration books were kept open for the thirty days preceding the election, as required by law. Besides, there is no proof in this record showing that a single elector failed to register who was entitled to exercise that right under the constitution and laws of North Carolina. Indeed, there is no pretense by a single witness, so far as we have been able to find from this record, who claims that he could not register because there was no registrar or registration books.

But even had there been a failure to keep the books open for the time required by law, certainly, unless some elector was prevented from registering and was thus prevented from the exercise of the elective franchise at that election, would there be room for just complaint. The purpose of the statute was to afford ample opportunity to all electors to register.

They quote *De Berry v. Nicholson* in support of this position.

(3) Because some of the officers absented themselves from the polling place for a brief time during the election. Under the law above quoted the judges are required to "open the polls and superintend the same until the close of the election." At Buchanan precinct one judge absented himself during the counting, and at Alleys the board of officers went 200 yards to dinner, taking the boxes with them and leaving them in an adjoining room under charge of the daughter of one of their number. No fraud was alleged in either of these cases, and the committee finding everything regular and proper as to the votes, held that the objection did not constitute a reason for rejecting the returns, although in each case other mere irregularities were alleged.

(4) Because parties other than the officers handled the ballots. The committee quote *Roberts v. Calvert* (98 N. C., 580) to the effect that "if the ballots were truly counted, it would not of itself destroy the election at the particular voting place," although the practice was irregular and ought not to be encouraged. The committee find that in Buchanan precinct a person not an officer assisted in counting the ballots in some of the boxes, but not the Congressional box, and they did not think the returns should be rejected for this reason. At Wilton persons other than judges officiated for brief periods, but a majority of sworn judges were always present, and no wrong was found.

(5) The officers of election began to count some of the ballots before the polls closed at Royster and Covington precincts. The report cites *Frederick v. Wilson* and *Hurd v. Romeis*, and concludes:

This manner of counting the vote is no reason for rejecting it, notwithstanding the statute of North Carolina provides that the registrar and judges of election shall open the books and count the ballot after the close of the election. While we think this practice of thus opening the boxes and counting the ballots should be condemned, yet its having been done and the result having been correctly certified, we think the returns should not be rejected on that account. If the statute in express terms declared that the vote should not be counted except after the close of the polls, and if they were so counted that the returns from that precinct should be rejected, then the statute would be mandatory, and would be compelled to follow its provisions and reject the returns; but as the statute is simply directory we feel that no injury should result to the public in consequence of this error upon the part of the election officers.

(6) An inspector or judge of election was a candidate in Buchanan and Royster precincts, and over this a sharp division of opinion occurs between the majority and minority. Of Buchanan the report says:

It appears that some votes were cast for R. A. Chandler, one of the judges of election, for the office of constable. He was not a candidate for Congress. His candidacy for constable did not imply or even create a suspicion that it was to his interest to do anything wrong in the conduct of the election for Congress. His acting as poll holder could not in any way affect the rights of the parties to this contest. The evidence in this record establishes the fact that the election was honestly and fairly conducted and the correct result certified.

Of Royster:

At this precinct ballots were cast for James A. Bullock for the office of county surveyor. He was one of the judges of election, but told the electors on election day that he was not a candidate and would not accept the office if elected. The proof in the case shows that the fact that he was one of the judges of the election did not have any effect whatever on the result of the Congressional election. The proof is overwhelming that the election was properly conducted and the result honestly certified.

The report further intimates that had he been a candidate for Congress and also acted as judge, and had there been no proof that the election was fairly and honestly conducted, the rejection of the vote would have been justified.

The minority quote the law:

“And no person who is a candidate for any office shall be a registrar, or judge, or inspector of an election.”

Here is a law plain and mandatory. The constitution and statutes of the State had thrown every safeguard that could be suggested around the ballot box; they had prescribed the qualifications of voters and made registration a prerequisite to the exercise of the elective franchise; they had compelled the elector to use due diligence in complying with the requirements, and then, to protect him from any possible interference on the part of interested persons who might be tempted to deprive him of his rights, they enacted the above statute. The laws of North Carolina disqualify any man who has a suit pending and at issue from sitting on a jury, either petit or grand, and renders any bill of indictment found by a grand jury, with even one such juror on it, liable to be quashed on motion, no matter though it may be shown that said juror did not vote on said bill when found.

How much stronger is this case where a man is sitting as judge, not only on his own case, but in that of all his political partisans and friends. It will not do to say that “no harm was done; the judge of election was not a candidate for Congress.” That makes no difference; it is begging the question. The law recognizes the frailty of human nature and provides that it shall not be subjected to such strong temptation.

* * * * *

This law of the State prohibiting candidates from acting as judges of election, if it were only directory, being so clearly in the interest of pure elections, should be respected and enforced, but we can conceive of no law more distinct in its terms or one which is from necessity more mandatory than this, and in our opinion the action of the Granville County canvassing board was right and should be sustained.

A question which the majority disregarded, because they considered that the case was decided without the aid of the testimony which it affected, arose as to the competency of the notary before whom testimony was taken in Rockingham County. It appeared that he was an infant, less than 21 years of age, and the minority discuss at length his incompetency.

The constitution of North Carolina, Article VI, section 1, declares the qualifications for an elector in the State as follows:

"Every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector."

While section 4 of the same article declares that "every voter, except as hereinafter provided, shall be eligible to office."

Section 3304 of the code of North Carolina is in these words:

"The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries, who shall hold their office for two years from and after the date of their appointment, and, on exhibiting their commission to the clerk of the supreme court of the county in which they are to act, shall be duly qualified by taking before said clerk an oath of office and the oaths furnished for officers."

It will not be questioned that the constitution prohibits a minor from holding office in the State.

It cannot be questioned that a notary is an officer. The fact that he is required to take the oath of office is alone sufficient to establish that fact. In *Worthy v. Barrett* (63 N. C., 199) it is declared that the oath to support the constitution is a test on this question. And in *Piland v. Taylor* (113 N. C., 18 S. E. Report, 70), "the office of deputy clerk is an officer provided for by law who is required to take the oath of office." In *Mecham*, section 47, notaries public are declared to be public officers.

In most of the States minors are prohibited from holding office.

In North Carolina the plain prohibition of the constitution has been always recognized by the supreme court. In the case of *Railroad v. Fischer* (of recent date, 109 N. C.), the court declared that the qualification as to all officers is imperative that they should be 21 years of age.

In case of Golden petition (57 N. H., p. 146) the court says:

"Offices, where judgment, discretion, and experience are essentially necessary to the proper discharge of the duties they impose, can not be executed by an infant."

To the same effect we might cite any number of cases from different States. The only exception is a case from Indiana, where a minor was recognized, and in that case Judge Gresham, who delivered the opinion, says:

"Unlike most of the States, Indiana has not declared in her constitution or statutes that only those who have attained the age of 21 years are eligible to any public office."

There is no analogy between that case and the one we are considering.

The minority show that the contestee protested against the notary the first day testimony was taken, and continued to protest. The notary had never acted before this case, and it could not be claimed that he was an officer de facto.

The majority report found sitting Member entitled to the seat.

The report in this case was never debated in the House, it being postponed in the second session to the third. On February 28, 1895, an attempt was made to call it up, but the House refused to consider it.

Therefore Mr. Settle retained the seat.

1050. The California election case of English v. Hilborn in the Fifty-third Congress.

Before considering an election case the Elections Committee corrected the official plurality by including a precinct return omitted from the State canvass.

The returns being rejected and contestant having proven his vote aliunde, the returned Member, who had not proven his vote, was not allowed the residue of the poll.

Under the Australian ballot, where an officer marks the ballot for an

illiterate voter, is the ballot higher evidence than the testimony of the voter?

Ballots must be shown affirmatively to have been kept inviolate in order that a recount may be of effect.

The conduct of election officers being impeached by a return shown to be false ballots in their custody are thereby discredited.

Where election officers are discredited by a falsified return, their testimony as to their own votes is valueless as proof aliunde.

On March 22, 1894,¹ Mr. Jason B. Brown, of Indiana, from the Committee on Elections,² submitted a report in the California case of *English v. Hilborn*. The official election returns made to the secretary of state showed a plurality of 25 votes for sitting Member.

But connected with this official return a question arose:

The testimony shows that at Clarksburg precinct, Yolo County, the contestant received 40 votes and the contestee received 48 votes; that the member of the election board whose duty it was to take the returns to the county clerk and retain the duplicate tally list and list of voters in his possession, as by the laws of California he was required to do, by accident retained both tally lists and did not return the original tally list to the county clerk of Yolo County until after the board of supervisors had adjourned.

The board of supervisors of Yolo County met at the county seat on Monday, November 14, 1892, to canvass the precinct returns. At that meeting it was found that the tally list from Clarksburg had not been received, and word was sent to that precinct. The board, not having finished canvassing the returns on November 14, adjourned to the next day, the 15th. On that day the board finished the canvassing of the returns, with the exception of Clarksburg, which made no return of the tally sheet. Thereupon the board adjourned until 1 o'clock p.m. of that day to wait for the Clarksburg tally list. At 1 o'clock, November 15, the board convened, and the Clarksburg tally list not having been returned, the board declared the result of the canvass of the other precincts, and the vote of Clarksburg precinct was not included in the official count of Yolo County certified to the secretary of state. On that day, after the adjournment of the board, the tally sheet of the Clarksburg precinct was returned and filed with the county clerk of Yolo County.

The statute of California on the subject of failing to return tally sheets in time is as follows:

"If, at the time of meeting, the returns from each precinct in the county in which polls were opened have been received, the board must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until all of the returns are received, or until six postponements have been had." (California Election Laws, sec. 1280.)

There being no question but that the Clarksburg precinct gave the contestee 8 majority, and that majority was not included in the returns made to the secretary of state, and that the foregoing provision of the statute was not complied with, the committee believes that the 8 majority given to the contestee by the Clarksburg precinct ought to be allowed to and be counted for him. This being so, the contestee's majority is increased from 25 to 33, which majority of 33 the contestant must overcome before he can maintain his contest and secure the office he seeks.

The contestant attacked this majority of 33 votes, alleging fraud in Altamont precinct, from which had been officially returned 37 votes for sitting Member and 15 votes for contestant. Suspicion was directed to this return from the fact that it was out of harmony with the previous political inclinations of the precinct, which had a population of farmers, not likely to be unsteady in their preferences. An

¹Second session Fifty-third Congress, House Report No. 614; Rowell's Digest, p. 486; Journal, pp. 308-310; Record, pp. 3424-3438, 3454-3456.

²The minority views were presented by Mr. Dan Waugh, of Indiana.

inquiry was made. Thirty-five electors of the precinct made affidavit that they had voted for contestant. The report says:

Thereupon this contest was commenced and the testimony was taken. Forty-seven of the electors who voted at Altamont testified. Thirty-seven of them testified that they had voted for the contestant, 6 for J. L. Lyons, People's candidate, 2 for L. B. Scranton, Prohibition candidate, and 2 for no candidate at all. This left but 23 of the 70 voters of the precinct unaccounted for, and whether they voted for contestant is unknown.

This would leave contestant a plurality of 3 votes in the district if the 23 unaccounted for votes should be allowed to sitting Member. But the committee, relying on the cases of *Langston v. Venable* and *Featherstone v. Cate*, declare that votes should only be allowed as proven when returns are rejected. Therefore, counting for Altamont precinct only the proven votes, contestant would have a plurality of 26 votes in the district.

But sitting Member did not propose to allow the case to rest here and demanded a recount of the ballots, which showed 29 votes for contestant and 22 votes for sitting Member. The sitting Member admitted that the returns were unreliable, but contended that the ballots were the primary and controlling evidence, and on the strength of what they showed claimed a plurality of 4 votes in the district.

On the question as to whether or not the ballots were the primary and controlling evidence in this case, the majority and minority have the following observations. The minority say:

When the ballots have been safely preserved, as required by law, they become the best and primary evidence as to how the elector voted, and the testimony of the voter is secondary and inadmissible. The ballots are not only a part of the election returns, but are of a higher grade of evidence than the tally papers or a summary made from them. To permit voters to come up after an election, as in this case, and swear they voted differently from what the ballots show, would open up a field of unending perjuries and frauds. If such should be the rule, every election might be tried over a second time by the oath of the voter instead of the ballots deposited in the ballot box. A mistake in the count or in tallying the vote or an impeachment of the returns or tally papers, even for fraud, do not of themselves discredit the ballots. To them the law points as the source to correct all such errors and mistakes. They commit no perjury and can not be bribed. These general principles, to which we have called attention, are fundamental, and are fully recognized and followed by the law and the decisions of the supreme court of California.

The majority of the committee suggest that the rule enunciated above ought to be relaxed under the new system of voting:

The rule, whatever it is, on the subject of the ballots being the primary and best evidence in contested election cases, grew up and was established long before the adoption of the Australian or reform ballot law by any State of the Union. Formerly the ballots were furnished by the respective parties and distributed to the voters outside of the polling places. The illiterate voter received his ballot away from the polls, and took it to some person or persons in whom he had confidence, persons of his own selection, and had it made out according to his own direction. This was his own voluntary act. Even after his ballot had been prepared for him at his own solicitation, if he had any doubt in his mind as to it being according to his wish, he could expose it to some one else to more fully satisfy himself that it was as he desired. He took his ballot to the polling place and saw that it was deposited in the box. All this was his own voluntary action. Nothing compulsory about it. Upon such a state of facts and under such circumstances, it could be well said that he had voluntarily reduced his intention and his action to writing, and that his written expression of what he did and intended the ballot was the best evidence. It was under this system of voting that the rule of the ballot being the best evidence grew up.

A different system of voting exists now almost everywhere and especially in California. The political parties no longer furnish their own ballots. An official ballot is furnished. It is retained inside

the polling place; none are allowed outside. The voter must pass inside of the polling place and obtain his ballot from an official of the election board. If he is illiterate, or from any cause he is unable to make out his ballot, some member of the election board makes it out for him. He may, or he may not, have confidence in the official who prepares his ballot. The preparation of his ballot is not his free and voluntary act. It is compulsory. He must submit to having some one not of his own selection—some person who may be a stranger to him—prepare his ballot for him or he can not vote. This is especially so in California.

On this subject the law of California, at the time this election was held, was—

“Any elector who declares, under oath, to the presiding election officer that he can not read, and that by reason thereof or by reason of his physical disability he is unable to mark his ballot, shall, upon request, receive the assistance of anyone of the officers of election that he may choose in the marking thereof.”

The election board from whom he selects the person to mark his ballot is not of his choosing. The law has selected it and he must choose from it or not vote.

Before he can receive this assistance he must take an oath that he can not read, or by reason of physical disability he is unable to mark his ballot. The officer who marks his ballot for him may be unknown to him. He is thrust upon him by the law. The illiterate voter in California is not a free agent in having his ballot prepared, for he has no opportunity whatever, and can have none, to ascertain whether his ballot was correctly prepared or not. He must depend entirely upon the election officer who marks it for him. Such was the condition of the illiterate voters who voted at Altamont precinct which was presided over by an election board that the proof shows and the contestee confesses made a false return.

Admitting, however, that the ballots are primary evidence, the committee say:

But it is equally well settled that before resort can be had to the ballots, as means of proof, absolute proof must be made that the ballots offered are the identical ballots cast at the election; that they had been safely kept as required by law; that they are in the same condition they were when cast; that they had not been tampered with, and that no opportunity had been had to tamper with them. (Payne on Elections, sees. 776–787; *Atkisson v. Pendleton*, Contested Election Cases of the Fifty-first Congress, p. 47.)

The burden of making this preliminary proof rests on the party who seeks to use the ballots as evidence. In this case it rests on the contestee. It is fundamental that a party desiring the introduction of certain proof, the admissibility of which depends upon some preexisting fact, must prove the existence of such fact before he can introduce his desired proof.

The issue between the majority and minority is joined on the issue as to whether or not the identity of the ballots is proven. The minority showed that the election officers at Altamont were respectable citizens, four belonging to the party of contestant, two to the party of sitting Member, and two to other parties—Independent and Prohibition. The counting of the votes, making of the returns, and signing and sealing of the ballots were done by officers other than the two belonging to sitting Member's party, and the sealed package of ballots was delivered to the county clerk by a judge who belonged to contestant's party. The minority views then relate that:

When the envelope from Altamont precinct was produced in court, it was shown that it had been securely guarded and preserved, the seals undisturbed, and in the same condition as when first sealed up. When the envelope was opened, 70 ballots were found strung upon a string. The inspectors and judges of the election at Altamont precinct—Gunn, Shaffer, Thomas, and Campbell—testified they were the same ballots cast by the electors of that precinct. Gunn and Shaffer identified their signatures or initials on the back of each ballot. The ballots were then counted in the presence of each party and their attorneys, and there were found to be 29 votes for English and 22 votes for Hilbom, which would still leave Hilbom a majority of 4. The minority are clearly of the opinion that the evidence conclusively shows that the

ballots recounted were the identical ballots cast by the voters at Altamont precinct on the day of the election. The contention that the ballots were tampered with or changed has no support other than a sheer suspicion.

The majority doubt both the integrity of the election officers and the custody of the ballots. They show that there was an election for a portion of an unexpired term to the Fifty-second Congress on the same day the same persons being candidates, and that the returns of the short term showed the same discrepancies as those for the term under consideration. And it is reasoned that if election officers would falsify the return they might also tamper with the ballots. Furthermore, the law provided for no safe custody of the ballots by the county clerk:

All the county clerk is required to do is to file the sealed cover and keep it unopened and unaltered. Where he is to keep it, or how safely and securely he is to keep it, are matters wholly within his own discretion. The law fails to direct him on this subject. In this case the sealed cover containing the ballots cast at Altamont precinct was delivered to the county clerk, and by him permitted to be carelessly thrown upon the floor, with others like it, of one of the rooms of his office. And there it remained on the floor of a room open to the public during the day and to a number of deputy clerks during the night. This is not the safe and secure keeping of such a package as is required, to allow its contents to become primary, controlling, and conclusive evidence upon the important question as to who has been elected to the House of Representatives.

There was evidence that the ballots in the open room were guarded, but the majority do not credit it entirely.

Therefore the majority rely on the testimony of the electors, assuming that the officers had falsified the return. In the debate it was pointed out by Mr. Thomas B. Reed, of Maine, that the same four officers of contestant's party, who were charged with falsifying the return were admitted to testify that they voted for contestant, and that their votes so proven were counted. In reply it was admitted that their votes should be deducted from the number proven by oath of the electors.

The majority quoted Payne and McCrary, and the cases of McDuffie *v.* Turpin, McGinnis *v.* Anderson, and Clayton *v.* Breckinridge to show that if election officers falsify a return no credit can be placed in the contents of the ballot boxes left in their hands after the election.

Therefore the majority recommended resolutions declaring sitting Member not elected, and contestant entitled to the seat.

The report was debated on April 3, and on April 4 the resolution declaring sitting Member not elected was agreed to, yeas 170, nays 13, the members of the minority party evidently not voting, to break a quorum if possible. The resolution declaring contestant elected was then agreed to, yeas 165, nays 17.

Mr. English thereupon appeared and took the oath.

1051. The Tennessee election case of Thrasher *v.* Enloe in the Fifty-third Congress.

Clerical errors whereby names of candidates are spelled wrong in the returns do not invalidate correct ballots.

The law requiring ballots to be rejected unless of certain dimensions, the House sustained election officers in rejecting ballots for slight variations.

The words "For President, Benjamin Harrison," over the names of electors were held to be a distinguishing mark.

Where election officers received votes without the required evidence that a poll tax had been paid, the House rejected the votes, although the tax had, in fact, been paid.

Although a State law prescribed a qualification obnoxious to the State constitution, the House held the law constitutional in deference to the decision of the State court.

The law requiring voters to be registered in order to vote, a poll whereat there was no registration was rejected.

On May 7, 1894,¹ Mr. Josiah Patterson, of Tennessee, from the Committee on Elections, submitted the report of the committee² in the Tennessee case of Thrasher *v.* Enloe. The contestant made no allegation of fraud, but based his case on alleged irregularities under the law and constitution of Tennessee. These alleged irregularities were of several classes:

1. The election returns from one district in Decatur County showed 36 ballots as cast for "Benjamin B. Enloe" instead of "Benjamin A. Enloe," the sitting Member, and the contestant claimed that they should be rejected. The proof, however, showed that on the ballots themselves the name was correctly printed and that they were actually cast for sitting Member. As this was a mere clerical error in making the returns, the committee held that sitting Member should not be deprived of the votes. The sitting Member alleged that similarly 199 ballots returned for "P. H. Thresher," instead of "P. H. Thrasher," had been erroneously cast for contestant. The proof also showed that this was another clerical error in the returns, and the committee say:

These clerical errors could not affect the validity of the ballots.

2. Certain ballots cast for contestant were excluded, because they were not of the dimensions prescribed by law, and it was urged that they were improperly excluded. The committee, after noticing the necessity of an undistinguishable ballot of uniform dimensions, quotes the law of Tennessee:

The ballots to be voted shall be of plain, white paper, 7 inches long and 3 inches wide, upon which the office to be filled, with name or names to be voted for, shall be plainly written or printed.

That it shall not be lawful to print or place any picture, sign, color, mark, index, or insignia thereon, and any ballot of less or greater dimensions than as provided in the first section of this act, or any ballot upon which said picture, sign, color, mark, index, or insignia may be placed, if found in the ballot box, shall not be counted by the judges holding said election, but shall be treated as invalid.

That any officer holding said election who shall knowingly receive, or the judges thereof who shall count, any ballot other than as provided in the first section of this act, shall be also guilty of a misdemeanor, and on conviction thereof shall be punished as provided in the third section of this act.

And says:

This statute is, without question, mandatory. No language could be employed that would be more emphatic. There is no room for construction. We must follow the plain mandate of the law or refuse outright to obey it. It is insisted by counsel for contestant that while the statute may be mandatory, yet the difference between the dimensions of the ballots in question and the ballots prescribed by law is so slight that it ought not to be recognized in determining their validity. One-eighth

¹Second session Fifty-third Congress, House Report No. 842; Rowell's Digest, p. 487; Journal, p. 474.

²The minority views were signed by six members of the committee.

or one-sixteenth of an inch difference in width or length, he insists, is too slight to be noticeable. The fact is the difference was material and was readily noticed by the judges.

The statute does not prescribe how nearly the ballot shall approach the dimensions of the prescribed ballot, but expressly says that "any ballot of less or greater dimensions shall not be counted." The extent of the variance is not material; it is the fact of substantial variance the law deals with. It may be conceded that the law did not contemplate a literal compliance with its mandate, but any difference which could be easily observed on comparison with the prescribed ballot would clearly fall within its meaning.

The committee say that the difference of an eighth of an inch was sufficient to enable fraud to be perpetrated, and comment on the fact that the election judges, irrespective of party, united in the rejection of the ballots.

The minority took issue with the reasoning of the majority:

The object of this provision doubtless was to preserve the secrecy of the ballot and to prevent a ballot being cast of which the size would be a distinguishing mark. But if it is to be held that the ballot must be of precisely the dimensions prescribed by the statute, then it would be a practical impossibility to secure a legal ballot with the ordinary appliances used in printing. Fine mathematical instruments would always show some infinitesimal deviation from the exact dimensions prescribed by law. We can not believe that the statute was ever intended to have such a construction. A deviation of from one-sixteenth to one-eighth of an inch would not be noticeable and would not serve to mark the ballot. The report of the majority disregards these ballots. We believe that they were substantially in compliance with the statute, that they were cast by legal voters, and that they clearly express the intention of the voter to vote for the contestant. They should therefore be counted for him.

3. The majority also justified the rejection of certain ballots cast at a precinct for contestant, when the words, "For President, Benjamin Harrison;" "For Vice-President, Whitelaw Reid," appeared on the face of the ballot. The judges of election, irrespective of party, united in rejecting these votes on the ground "that said words amounted to a sign, mark, or insignia, whereby they could be distinguished," and therefore that the votes were not allowable under the law quoted above."The ballot," say the committee, "would have been perfect without the words in question. They could only serve to distinguish these ballots from the others, and they plainly fall within the reason of the rule under which the ballots were excluded, which did not come up to the prescribed dimensions." The further point was made that such words might be used to deceive the voter by being placed over the names of electors of the opposite party.

The minority say of these ballots:

They should have been counted for the contestant. They bore his name and were cast by legally qualified voters. They bore the names of the candidates for the two highest officers for which, in effect, said voter was voting. We do not believe that the statute can fairly bear so technical a construction as would make the words named a "picture, sign, color, mark, index, or insignia." These ballots should be counted for the contestant.

4. The laws and constitution of Tennessee made certain provisions as to polltax payments.

Section 1 of Article IV of the constitution of Tennessee provides:

"There shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election, where he appears to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the legislature shall prescribe, and at such times as may be prescribed by law, without which his vote can not be received."

Section 1 of chapter 23 of the acts of the extra session of the legislature of 1891 provides:

“That the satisfactory evidence to be furnished by the voter to the judges of the election, whether general or special, whether national, State, county, or municipal, that he has paid the poll tax contemplated by the constitution, assessed against him, if any, for the year next preceding said election, shall consist of the original poll-tax receipt, or a duly certified duplicate and copy of the same, or the duly authenticated certificate set out in section 8 when said tax has been paid to a constable and not to said trustee, properly certified by the trustee, or shall make affidavit in writing and signed by the voter that he has paid his poll tax and that his receipt is lost or misplaced, which affidavit shall be filed with the said judges and by them attached and made an exhibit to the returns of said election.”

The law also enacts:

That any person voting, or any judge of any election permitting knowingly any person to vote in the same, without first having complied with the provisions of section 1 of this act, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than \$50 and imprisoned in the county jail or workhouse ninety days.

The majority of the committee therefore conclude:

The recital of the provisions of the constitution and the laws enacted in pursuance of the name obviates the necessity of elaboration. The constitution is mandatory, and the statute is especially so. There is no room for doubt. Unless the evidence required by the constitution and specially prescribed by the statute is furnished to the judges the elector, liable to a poll tax, has no right to vote. It is illegal to receive his ballot and illegal to count it if it is received. The contestee has shown conclusively that the 141 electors, subject to the payment of the poll tax, who voted for him at the Conyersville precinct, in point of fact paid the tax.

The trustee certifies to a list of all persons liable to the tax in the precinct, and shows who of them paid the tax to him. The delinquents were placed on another list, which was turned over to the constable of the district. The constable himself was one of the judges of election. He had his book with him. Those who were delinquent at the trustee's office had paid him, and his book showed the fact. The judges assumed that all who were not delinquent had paid the trustee, while the constable, who was one of their number, knew the delinquents had paid him. But this was not the evidence required by law. No poll-tax receipts were exhibited to the judges, no certificates to copies, or affidavits of loss. The statute was not complied with at all, but, on the contrary, was ignored. The whole policy of the law was subverted. While it is conceded that the judges in this instance were honest, and to enforce the law will work a hardship on the contestee and deprive electors who, in point of fact, paid their poll taxes, of their ballots, yet it is better to do this than to subvert the safeguards which the State has thrown around the ballot box to prevent fraud and the evasion of the law.

To permit the judges thus to set aside the mandates of the statute with impunity opens the gate to fraudulent devices and makes elections uncertain, unfair, and dishonest. Every elector subject to a poll tax must as a condition precedent furnish the evidence prescribed, and if he fails to do it his ballot ought never to reach the ballot box, and if it does it ought never to be counted. When this is well understood, the electors will readily comply with the law, the poll taxes will be collected, and the purity and security of the elective franchise will be promoted. The contestee received 141 illegal votes at the Conyersville precinct, and the contestant 9. It follows therefore that the difference of 132 votes must be deducted from the vote of contestee.

The minority do not agree to this reasoning:

The requirements of the constitution and of the statute, taken together, would appear to be of a mandatory character, and would certainly come far within the rule followed by the House in the case of *O'Neill v. Joy*. There the contestee's majority was taken away by statutory provisions that were claimed to be mandatory. But the undersigned protested against such a strict rule of construction in that case and we protest against it now. The difficulty is that in the pending case the constitution and statutes taken together are more mandatory in character.

The essential part of the provision of the constitution is that the voters shall have paid a poll tax, of which payment the judges of election shall be satisfied. At the precinct referred to no question was raised that the voters presenting the ballots had not paid their tax. They were not asked by the

officers or by anyone at the polls to produce the evidence that they had paid it. They might have had this evidence in their pockets. They were permitted to cast their ballots unchallenged. The judges could, of their own motion, have declined to receive them—in fact, it was their duty to do so—or they would have been compelled to decline to receive them if anyone had objected.

In either case an opportunity would have been afforded the voter to produce the receipt or certified copy, or to make the affidavit provided by law. * * * The contestant claims that the legal voters should not be disfranchised and the whole poll thrown out because some of the votes were claimed to be illegal. On the whole we incline to the opinion that these ballots should be counted. * * * The fault was, primarily, with the election officers in receiving the ballots without requiring the evidence.

5. A law of Tennessee known as the “Dortsch law” prescribed an Australian ballot for cities of a certain population, one of the provisions being that the elector should have no assistance in making out his ticket, except in case of physical infirmity. Contestant insisted that the election held in the city of Jackson under this law was illegal, because the city was not in the class prescribed by law; and because the law was unconstitutional in that it prescribed an educational qualification, which the constitution forbade. The first objection was readily answered by the census, and the second by the decision of the supreme court of Tennessee, which upheld the law in the case of *Cook v. The State*. The majority consider the construction by the State court of last resort as sufficient.

The minority say:

The constitution of Tennessee, in effect, prohibits the enactment of any statute requiring that a man shall be able to read and write in order to vote. It is clear that the Dortsch law imposes such a requirement, and it would appear to be clearly repugnant to the principles of the constitution. But the supreme court of Tennessee has decided this law to be constitutional, and we feel constrained to follow that decision in the present case, in accordance with the general rule. We are clear in our opinion, however, that this law disfranchises men who possess all the constitutional requirements of voters.

6. The law of Tennessee provided that in counties of a certain population:

Each and every voter, in addition to the regulations now required by law to entitle him to vote, shall be registered as a voter, as hereinafter provided, before he shall be allowed to exercise the elective franchise.

Sitting Member insisted that in a district of Hardin County the election was illegal and should be disregarded, because the voters were not registered as required by law. The committee say: “It is evident that a failure to open registration books under this law will defeat an election,” and this was not denied by contestant or the minority. Therefore the vote in question was rejected.

The majority of the committee conclude that in view of the principles stated above sitting Member should be credited with a majority of 110 votes. Therefore they reported resolutions confirming his title to the seat.

The minority concede that he was elected by a plurality of 25 votes instead of the 118 by which he was returned.

On July 10, 1894, without debate or division, the resolutions of the majority were agreed to by the House;

1052. The Kansas election case of Moore v. Funston in the Fifty-third Congress.

Where contestant offered evidence not specified in notice of contest and the answer was not served within the legal time, the Rouse still considered all the evidence.

Discussion as to the evidence required to prove a conspiracy to commit election frauds.

Discussion as to the validity of the testimony of canvassers who have failed to find persons suspected of illegal registration.

Discussion as to the evidence required to show that persons alleged to be disqualified actually voted.

On June 26, 1894,¹ Mr. William A. Jones, of Virginia, from the Committee on Elections, submitted the report² of the majority in the Kansas case of *Moore v. Funston*. At the outset of this case two preliminary questions arose:

(a) Sitting Member objected that the notice of contest did not specify certain matters, upon which much testimony was afterwards offered, and therefore demanded that the said testimony be excluded from the case. The majority report does not deny this, but meets it in the conclusion reached as to the other preliminary question. The minority views criticise the notice as indefinite, but do not make an issue on it.

(b) Contestant claimed:

That the copy of the answer and countercharge of contestee was not served within the time required by law, and that, therefore, none of the testimony offered by contestee, and printed also in the record, should be considered.

The law requires that the notice of contest shall be served within thirty days after the determination of the result of the election by the officer or board of canvassers, authorized by law to determine the same, and shall state specifically the grounds upon which contestant relies in the contest. It is also required by the law that a copy of the answer of contestee shall be served upon contestant within thirty days after service of the notice of contest. (Rev. Stat., secs. 105, 106.)

It is not denied that the notice of contest was served within the time specified. The record shows (Rec., p. 6) that a true copy of the notice of contest was left at the residence of contestee in Allen County, Kans., with his wife, on December 26, 1892. It further shows (Rec., pp. 7, 985) that a copy of the notice of contest was delivered to contestee in person in the city of Washington, D.C., December 28, 1892. And a copy of contestee's answer and countercharge was left at the residence of contestant in Lawrence, Douglas County, Kans., with his wife, on January 27, 1893; and on January 28, 1893, a copy was delivered to contestant in person. (Rec., pp. 1053-54.)

It will be seen, therefore, that the copy of notice of contest was left at the residence of contestee on December 26, 1892, and a copy of the answer and countercharge at the residence of contestant on January 27, 1893; and that a copy of the notice of contest was delivered to contestee on December 28, 1892, and a copy of the answer and countercharge was delivered to contestant on January 28, 1893. If service by copy, left at the residence of the person to be served, is to be regarded as the service contemplated by the statute, then the notice of contest was served on December 26, 1892, and the answer and countercharge thirty-two days later, on the 27th day of the following January. Or, if personal service be required it is found that such service of the notice of contest was made on December 28, 1892, and such service of the answer and countercharge thirty-one days later, on the 28th day of January, 1893. So, in either case, the answer was out of time.

If, then, we should closely apply to the notice of contest the rule of pleading upon which contestee insists, and should apply to the answer the requirement of the law, we should find contestee without an answer, and would have but to ascertain whether, upon the grounds of contest undoubtedly specified in the notice, contestant has made good his contention that he, and not contestee, was really elected a Representative in Congress from the Second district of Kansas. If we should take this view of the matter our labors would be greatly lessened, a considerable portion of the huge record in the case would be

¹Second session Fifty-third Congress, House Report No. 1164; Rowell's Digest, p. 491; Journal, pp. 527, 530; Record, pp. 8088-8102, 8134.

²The minority views were presented by Mr. S. W. McCall, of Massachusetts. Mr. T. H. Paynter, of Kentucky, presented his individual dissent from the conclusions of the majority.

eliminated, and the finding would necessarily be in favor of contestant. We believe, however, that the real question to be determined is not so much whether this or that bit of evidence offered by contestant certainly relates to something clearly specified in his notice of contest as a ground upon which he relies, nor yet whether contestee's answer and countercharge were made in due time, but rather which of the two claimants, according to the record, was really elected and is really entitled to a seat in the House of Representatives.

As to the merits of the case the official returns gave sitting Member a plurality of 81 votes. Contestant attacked this, alleging fraud and irregularities. An examination of these allegations naturally divides itself into three branches:

1. Contestant charged that in that portion of Kansas City lying within Wyandotte County, Kans., a conspiracy was entered into on the part of members of sitting Member's party to put on the registration lists names of persons not entitled to vote, or entirely fictitious, and to stuff the ballot boxes by the use of repeaters. It was further alleged that there were about 1,991 of such fraudulent registrations, and that about 400 votes were cast for the Republican candidate. The majority of the committee, however, did not claim that there was absolute proof of over 68 votes cast for sitting Member illegally as the result of this conspiracy, but considered that 128 such votes might be established by fairly satisfactory proof.¹ The majority admit the difficulty of proving conspiracy:

All text writers and other law authorities treating of the subject recognize the difficulty of proving conspiracy by direct evidence; and, as in the case of fraud, in general, recognize also the propriety, as well as the necessity, of proving distinct facts, many of them insignificant in themselves, from all of which, however, when sufficient, a firm belief in the existence of the conspiracy or fraud may safely be deduced and the conclusion may be as safely acted upon. In many cases circumstantial evidence is the only evidence which can be obtained, and it is also not infrequently of the most satisfactory and convincing character.

In this case the officials of contestant's party, as well as officers of a club belonging to a faction of sitting Member's party, took measures to thwart a suspected conspiracy on the part of the regular organization of sitting Member's party to make fraudulent registration. Canvassers were sent out before the election, and brought in lists of names supposed to be wrongfully registered. The report says of this testimony:

A number of witnesses testify to the result of their efforts, both just before and just after the election, to find registered persons by calling and inquiring at and about the places from which they were registered. Several of those who thus testify were well acquainted in the precincts in which they severally canvassed, and as to many of the persons registered they testify that they know no such persons, never heard of their being or living in the neighborhoods from which they were registered, and upon diligent inquiry could find no one who knew of them. The testimony of these witnesses fills many pages of the record, and a perusal must convince anyone that the investigation set on foot to ascertain who had been registered improperly was honest and carried forward in a most painstaking manner. While much testimony as to what these canvassers learned or did not learn by inquiring at and about the places from which voters were registered may be regarded as hearsay, considered with reference to the actual fact of whether the persons inquired about really lived at the numbers from which they were registered, it is very easy to see how it affected persons managing the campaign for the Democratic party and the Anti-Buchan Club, and how they were led to the placing of challengers at the polls to check and prevent the voting of the registrations believed to be fraudulent.

¹Statement of Mr. Jones in debate. Record, p. 8090.

The report further justifies the use of such testimony by quoting from McCrary:

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

The minority criticised this evidence, characterizing the rule as extreme, and pointing out that it did not cover the present case, since the residents themselves were not called to testify as to people registered from their neighborhood, but the testimony of a person who went to inquire of them was taken.¹

An issue also arose as to the proof of votes cast under this illegal registration. The law of Kansas required that when a voter was challenged his ballot should be numbered to correspond with the voter's name on the poll book, and the word "sworn" should be written at the end of his name, so that ballot could be identified as cast by him.

Persons were stationed at the polls to challenge those attempting to vote on names supposed to be registered fraudulently. The majority report the evidence as showing that when the law of procedure as to challenges was respected, so the ticket could be identified, it was found almost invariably that he had voted for sitting Member.

One challenger testified that the election judge (it appeared that election machinery was largely in the hands of sitting Member's party) who was a member of contestant's party disregarded from 40 to 45 challenges at one precinct. The majority report further finds:

The return of the officer upon the subpoenas issued at the instance of contestant for witnesses shows that he could not find these persons whose names are alleged to have been put on the registration lists fraudulently, and in whose names illegal ballots are charged to have been cast for contestee.

It is in evidence (Rec., p. 681) that the chairman of the Republican committee of Wyandotte County offered one of the challengers for the opposition \$50 if he would leave the polls at which he was stationed to challenge illegal voters and prevent the voting of persons not entitled to vote.

In addition to the foregoing, the record contains enough evidence, concerning the competency of which no reasonable doubt can exist, to show that a considerable number of votes were actually cast in Kansas City, Wyandotte County, Kans., in the names of persons not entitled to register or to vote. Some of these persons were registered from vacant lots; some from churches; some were under voting age; some were in the penitentiary; some had gone away before election day; some, it would seem, never lived there.

¹Speech of Mr. McCall, Record, p. 8093.

The minority doubt the credibility and competency of the witnesses by which the majority reached its conclusions on this branch of the case, and also raise a question as to the method by which contestant sought to prove illegal votes:

The law of Kansas requires that one of the judges of elections shall, as each registered person votes, enter on a copy of the voting list opposite the name of such person the word "voted." Such certified copy is to be returned to the city clerk after the election and to be by him preserved. The contestant has failed to produce this legal evidence or record.

1053. The case of Moore v. Funston, continued.

Although usurpers had acted with the election officers and the ballots were stolen, the committee declined to reject the return on the ground that it would increase the harm to the injured party.

County returns informally signed and the accuracy of which was impeached by evidence were rejected by the House.

Although evidence showed that some votes were affected by intimidating acts of a policeman the House declined to reject the precinct returns.

Discussion as to the votes of certain students at college.

2. In the third precinct of Kansas City, where there was evidence of illegal registration, and where challenges were in several instances disregarded by the election officers, the report finds this state of affairs:

The law of Kansas provides for three judges at each polling place, but at this precinct there were four persons who acted in the capacity of judges of election. One of them, Mark Cromwell, who seems to have passed sometimes under another name, which the witnesses testifying about it do not recollect, was not appointed to serve as such judge, but appeared on election day and put himself on the board. It also appears from the evidence that he was a sleight-of-hand performer and juggler. During part of the time of the counting Cromwell took tickets from the box and called off from the tickets.

The evidence also shows that before the count was completed one of the clerks at this precinct became so much intoxicated that he was unable to continue at work, and an outsider—the witness Bigger, before mentioned—took his place and acted as clerk, though it does not appear that he was sworn or had any more right to so act than any other unauthorized person. During the count, too, it happened several times that the two clerks were as many as four or five votes apart in their tallies, and would get together by one arbitrarily taking the count of the other, without going to the ballots to see which was correct, or whether either was correct.

Craddock also testifies as to the number of ballots cast at this precinct with the name of contestee erased and the name of contestant written in, putting the number of such changes at from 35 to 40.

Brooks, another of the judges of election at this third precinct, testifies to the erasure of the name of contestee and the insertion of the name of contestant upon tickets voted at that precinct, putting the number at from 40 to 50.

Faust, also one of the election judges at the same precinct, called by contestee, guesses the number of such scratches at not to exceed 10. This same election judge, Faust, disregarded the challenges of voters by Rooney, and put the tickets of persons challenged into the box without marking them, thereby disregarding the law and rendering it impossible to determine by an inspection of the ballots themselves how the several challenged persons voted. Faust, it will be remembered, would dismiss a challenge by saying: "I know him; he's all right."

The return from this election is thus described:

Mr. Craddock, one of the judges of election at this precinct, testifies that he duly returned these ballots, and the pool books and tally sheets to the county clerk's office, and was paid by check from the county clerk; and he is not contradicted or impeached. The county clerk testified that if the poll books without the ballots had been returned to him he would probably have noticed it.

When testimony was being taken, these ballots were demanded of the county clerk, but he failed to find them. Later, as the clerk testified, they were found by a citizen of Kansas City at his front gate, loosely tied together and directed to the county clerk. These ballots showed but eight scratched tickets, and corresponded substantially with the original returns, which give sitting Member 310 votes and contestant 335, each one's vote being very nearly the vote of his party in the precinct.

The majority report says that the entire returns from this precinct should be rejected if the ends of justice would be promoted by so doing; but the returns gave contestant a plurality of 25 votes, and it is evident that by the actual vote this was much larger. The report does not, however, assign any definite increase to contestant in this precinct, but intimates that about 100 is the usual majority of his party in the district. Taking the whole county of Wyandotte together, which means the phases of the case included in the first and second branches, the majority arrive at this conclusion:

That the apparent plurality in Wyandotte County of 179 votes in favor of contestee is not his real plurality, after excluding illegal votes and counting correctly votes erroneously counted for one candidate when actually cast for the other; but that the true and legal plurality of contestee in said county over contestant is very small, if, in fact, anything.

The minority do not admit the majority's position, and take the view that the alleged theft of the ballots was in the interest of contestant.

3. In Allen County the majority report advises the rejection of the official returns because of violation of the following requirement of the law of Kansas:

SEC. 2687. On the Friday next following the election the county clerk and the commissioners of the county, or a majority of said commissioners, at ten o'clock a.m. of said day, shall meet at the office of said county clerk, and shall proceed to open the several returns which shall have been made to that office; and said commissioners shall determine the persons who have received the greatest number of votes in the county for the several county, district, and State offices and members of the senate and house of representatives, Representatives in Congress, and electors of President and Vice-President of the United States, * * * and such determination shall be reduced to writing, signed by said commissioners and attested by the clerk, and shall be annexed to the abstract of the votes given for such officers, respectively, hereinafter provided for in section forty-one of this act.

The only signature to the return was the following:

In testimony, I have hereunto set my hand and caused this abstract to be attested by the county clerk of said county, the 11th day of November, 1892.

D. D. SPICER,
Chairman, Board of County Commissioners of Allen County,
and ex-officio Board of County Commissioners.
BY E. M. ECKLEY,
Clerk, Board of Canvassers.

One of the commissioners testified that so far as he was aware, and he was present at the entire session, the canvassing board did not reduce the result to writing or sign it, and that he would not have signed it, because it was not completed that night after making the canvass, because they did not compare the certificates of the county clerk with the different tally sheets of the various townships, and also:

Because of the mutilated condition of the tally sheet of Iola Township; that the board did not make any footing, purporting to be the number of votes cast for the various candidates; that witness did not give his consent to the county clerk to sign any instrument purporting to be an abstract of the votes cast in Allen County on November 8, 1892.

Also E. M. Eckley, county clerk, testified:

That he was county clerk of Allen County, Kans.; that on November 11, 1892, the board of canvassers met to canvass the vote cast at the general election of November 8, 1892; that they reduced the result to writing, but did not sign the same; that witness signed the name of the chairman of the canvassing board to the abstract of the vote; that he made out the abstract from the names and figures given him by the board; that the board did not give him authority to sign their names; that the board did not personally inspect the work nor compare it with the returns as shown by the poll books; that the members of the board could not see the names and figures witness made from where they sat; that witness did not know whether the members of the board were present when he signed the chairman's name to the abstract or not.

Witness D. D. Spicer testified (Record, p. 955) that he was chairman of the board of county commissioners and that he had authorized the county clerk to sign his name to whatever papers were necessary in making his return to the State board; that he can not state what papers they were; that he does not know when he first learned that the county clerk had signed his name to the instrument as chairman of the board of county canvassers.

The committee, after citing text writers and precedents, say:

The committee are of the opinion that in view of the explicit and mandatory provisions of the Kansas statute, already quoted, which requires that the commissioners of the county, or a majority of them shall determine the persons who have received the greatest number of votes in the county, and that such determination shall be reduced to writing, signed by said commissioners and attested by the clerk, and in deference to the well-settled rule laid down in a long line of decisions, some of which have been cited herein, the canvass of the vote of Allen County and the certification of the returns were not in accordance with the plain requirement of law, but in flagrant violation thereof, and that said returns should therefore be rejected.

The minority take issue with this determination:

The contestant asks that the vote of the whole county be rejected because each member of the board did not sign this return. There is no question but that the returns to which the clerk signed the name of the chairman were the correct returns as received from the various precincts. If no return had been made of the county as a whole, it would be competent for the committee to inquire as to what the original precinct returns were, and thus make up the vote of the county.

It is no ground for the disfranchisement of the voters of a whole county that the returning officers, on a day subsequent to the election, are guilty of an informality in attesting the returns, when the result is not in any way affected by such informality. It has even been held that a person elected to the House of Representatives should be admitted to his seat, although no return thereof was made to the secretary of state. A Representative is not to be deprived of his seat because the returning officers have neglected their duties. (McCrary on Elections, 2d ed., par. 554; Justices' Opinion, 68 Maine, 587.)

The minority also called attention during debate to the law of Kansas which provided that in an election the person having "the highest number of votes for any office" shall "receive the certificate of election, notwithstanding the provisions of law which may not have been fully complied with in noticing and conducting the election, so that the real will of the people may not be defeated by any informality of any officer," but it was answered that it had never been made to appear in a manner "satisfactory" (quoting from the statute) what the vote of Allen County was.

The returns of Allen County gave sitting Member 93 plurality, and as his plurality in the district was 81 the rejection of this return would of itself be decisive.

In addition to the three main branches of this case, minor questions arose. Contestant claimed that a colored policeman intimidated voters in the fifth precinct of Kansas City, and several witnesses swore that he threatened with arrest members of his race who were distributing tickets in the interest of contestant, and that he

forcibly took and tore up such tickets. One witness testified that he was satisfied that the presence of this policeman and his acts prevented not less than a hundred of his race from voting for contestant. The majority say that in other contests precinct returns have been thrown out on such evidence, but they do not feel warranted in following such precedents.

The minority also raise this question as to Douglas County:

Five grounds for rejecting certain votes counted for the contestee in this county are given, the principal one being that illegal votes were cast by the students at a seminary of learning at Baldwin, Kans. There is no testimony that many of the students in question voted for Mr. Funston, unless, indeed, the fact that they were connected with a high institution of learning raises a presumption that they voted the Republican ticket. But it appears in all of the cases the student was of age, in some of the cases he was a member of the faculty; that he was not dependent upon his parents, but supported himself, and that he had no fixed determination as to the future place of his abode, unless he was intending to remain at Baldwin. All the cases come safely within the rule laid down by Mr. O'Ferrall in the case of Worthington, *v.* Wright, as follows:

"Where young men had entirely severed their connection with the home of their parents and were relying on their own efforts, exertions, and means, and had no fixed determination as to their future place of abode, they were legal voters at the point where these colleges were located. To hold differently would be to deprive many worthy young men of the right to vote and disfranchise them during the years they might be engaged in their laudable efforts to secure an education."

It does not appear, however, that the majority took issue on this question.

The report was debated at length on August 1, and the House rejected the propositions of the minority, declaring that contestant was not elected and that sitting Member was elected, the first by 90 yeas and 127 nays, and the second by 31 yeas and 126 nays, 13 being noted as present to make a quorum.

On August 2 the resolutions of the majority, unseating sitting Member and seating contestant, were agreed to, yeas 147, nays 86.

1054. The Georgia election case of Watson *v.* Black in the Fifty-third Congress.

Where the State law does not make it the duty of an officer to make a report of the votes cast, a report from that officer is not accepted as evidence of the vote.

No law preventing the use of more than one ballot box at a precinct, the use of three did not justify rejection of the poll in the absence of proof of harm therefrom.

Handling of the ballots by an unauthorized person does not invalidate the poll in the absence of evidence showing harm therefrom

Temporary absence of election officers from the poll does not invalidate the vote, no harm resulting therefrom.

Threats of an overseer to discharge employees must be supplemented by testimony of employees thus intimidated, if the House is to correct or reject the return.

On July 23, 1894,¹ Mr. Thomas G. Lawson, of Georgia, from the Committee on Elections, submitted the report of the committee in the case of *Watson v. Black*,

¹Second session Fifty-third Congress, House Report No. 1147; Rowell's Digest, p. 489; Journal, p. 461; Record, p. 7027.

from Georgia. The committee, at the conclusion of their report, present a preliminary question of importance:

The committee has preferred to report on every point of contention in the case and upon the evidence relating to each one, though it need not have done so, for the record does not show what vote was received by either candidate in the city of Augusta, to which chief objection is made, nor does it show the number of votes received by either candidate in the district. To have allowed every contention of the contestant, the result would have been the same that we have reached.

The attorneys for contestant in the argument of the case asked the committee to accept the report of the comptroller general of the State to show the number of votes cast, and for whom cast, in this Congressional district. The law of the State, however, does not require the comptroller-general to embrace such information in his reports, nor does it make his reports competent and legal evidence in a judicial investigation without further authentication.

The consideration of the case involves a number of subjects, of which the following may be said to present fairly definite determinations of law by the committee:

1. The contestant alleged that at each of the several precincts of the city of Augusta three ballot boxes were used for the reception of ballots, whereas the law of the State permitted the use of one box only at each precinct. The committee find that it had long been the custom in the city, under the conviction that it was lawful, to use one or more ballot boxes at each precinct. The number of precincts in the city was limited by law, and additional facilities for casting votes could be obtained by using more than one ballot box. The law of Georgia provided:

No election shall be defeated for noncompliance with the requirements of the laws, if held at the proper time and place by persons qualified to hold them, if it is not shown that by that noncompliance the result is different from what it would have been had there been proper compliance.

Therefore the committee conclude:

The use of three ballot boxes at an election precinct is certainly not expressly prohibited by the laws of Georgia, nor do we think that their use is inferentially or impliedly prohibited. But on the assumption that their use is impliedly prohibited a noncompliance with the prohibition would not, under section 1334 of the code of the State, above quoted, render the election void, unless it was shown by evidence that their use did, in fact, produce a different result. That is not shown nor attempted to be shown in this case.

2. The report thus discusses an objection:

At one precinct only some unauthorized persons, who seem to have been clerks assisting in holding the election, were permitted to receive the ballots from the voter and transmit them to the superintendents. One was seen to open, unfold, and refold ballots, but his purpose in doing so is not apparent. We can not approve of such practice, but in this instance it was done in the presence of the superintendents and supervisors and we can not discover that any harm accrued.

3. Another objection is thus treated:

Three instances of this character occurred. One superintendent went into the street and received the ballot of a sick person brought there in a buggy and immediately returned to his post, and two others once or twice during the day, and for a brief period, retired to the rear of the room in which the election was held, and were seen to drink from a bottle what was thought to be beer or whisky. One said that he was advised by his physician to take whisky. The two then acting were not presiding at the same polls, were absent but a few minutes each, and were not intoxicated or affected by the stimulant. No ballots meanwhile were received at the boxes presided over by them, and the affair appears, on the whole, to be too trivial to deserve rebuke.

4. It was charged by contestant that employees in a cotton mill were intimidated by an overseer, who threatened to discharge them if they voted for contestant. There was evidence to show that such a threat was made. Of twelve members of contestant's party employed under this overseer it appeared that two or three probably voted for contestant, and there was no evidence to show how the others voted. Nor did it positively appear that anyone was discharged in consequence of the threat. The committee think "that if any of the employees of industrial institutions of the city were discharged on account of their political opinions or actions, or intimidated by threats to discharge them, the fact could have been clearly proven by the employees themselves. But none of these, if there were any, were summoned to testify." Therefore the committee do not entertain the objection.

1055. The case of Watson v. Black, continued.

Bribery being proven, the House deducted the tainted votes but did not reject the poll.

General evidence that repeaters voted is not effective unless supplemented by specific evidence as to who they were, and where and for whom they voted.

In the absence of evidence of the contrary, the election officers are presumed to have acted correctly in denying the claims of certain persons who attempted to vote.

A return not signed by the election officers as required by law is properly rejected.

A State law providing that an election shall not be defeated for mere irregularities, the House overruled the rejection of returns informal but evidently true.

5. There was testimony showing some bribery of voters, from which the committee concluded:

With the exception of two ballots, one of which was not cast, it is not perfectly clear for whom the votes of the persons thus bribed were cast, but we assume from certain parts of the evidence that they were cast for contestee. Allowing, therefore, all that is proven, and disregarding the cumulative character of the evidence, it appears that 20 votes should be deducted from the majority of the contestee. The instances of bribery occurring at two precincts only, being participated in by different persons, and being so few in numbers compared with the very large vote polled, we are persuaded that they were not committed in pursuance of any prearranged and organized plan, but were rather the excesses of overzealous partisans.

6. There was evidence that people supposed to be repeaters voted at various wards in the city, but no one gave any definite testimony as to their number, names, or for whom they voted. The committee say:

Why have not the alleged illegal voters been prosecuted? Why have not the ballots and the poll books been examined and both purged of the illegal votes? There was no difficulty in doing that. The law of the State expressly provides for such a contingency. In providing that the name of the voter shall be numbered on the poll book and that the same number shall be written on his ballot before it is placed in the box, and in requiring that poll books and ballots shall be preserved a sufficient time to be used as evidence in any contest, the law of Georgia makes ample provision for the detection of frauds in elections and for rejecting every illegal ballot.

But it was not attempted in this case to purge either the poll books or the ballot boxes. The best method of determining whether there were repeaters was neglected. There was no effort made to show

by the tax receiver's books whether or not anyone who voted was not a taxpayer or resident of the county. Your committee is therefore utterly unable to determine how many repeaters and illegal voters there were, beyond the number whose names are given by the witnesses, or how many of these votes should be deducted from the majority of the contestee. Between the minimum and maximum number testified to there is a very wide margin, and we don't know whether to accept either or some intermediate number.

7. Another objection is thus disposed of:

Some 70 or more persons offering to vote for contestant at Jewells were not permitted to do so by the superintendents of the election. It does not appear why their votes were refused, except that their names did not appear on a list in the possession of the superintendents. Tax defaulters are not qualified voters in Georgia; but whether the list mentioned was a list of those who had paid their taxes and qualified themselves to vote, we do not know. The superintendents of the election were sworn officers, and in the absence of evidence to the contrary we presumed that they discharged their duty in a lawful manner.

8. The law of Georgia provided that—

when the votes are all counted out there must be a certificate, signed by all the superintendents, stating the number of votes each person voted for received; and each list of voters and tally sheet must have placed thereon the signature of the superintendents.

The committee say:

In the ninety-eighth election district of the county the tally sheets, list of voters, and election returns were not signed by the superintendents as required by law, nor did it appear in what capacity the superintendents acted. We think that the return from this precinct was properly rejected.

In certain other precincts certain of the papers were signed, while others were not, but there was enough to show that the election was legally held and to show the number of votes cast and for whom cast. Therefore the committee overrule the action of the local canvassers in rejecting these returns and credit the contestant with his majorities, on the ground that under the Georgia statute relating to informalities, quoted above, the returns must be held sufficient.

There were other objections raised by contestant which the committee dismissed as not sustained by definite evidence, and in conclusion the committee recommended resolutions confirming the title of sitting Member to the seat.

On June 29, 1894, without debate and by a rising vote, the resolutions were agreed to, ayes 106, noes 10.

1056. The Illinois election case of Steward v. Childs, in the Fifty-third Congress.

In construing State election laws not construed by the State courts the Elections Committee should recommend such construction as to give full effect to the clear intent of the legislature.

The State law providing that ballots shall not be counted unless marked in a certain way, ballots otherwise marked should be rejected by the House.

The State law requiring rejection of the vote in the case of voters assisted in marking ballots without making an affidavit of disability, the House overruled the election officers who counted such ballots.

The State law requiring rejection of ballots not marked with initials of election officers, the House overruled the election officers who had counted such ballots.

On February, 1895,¹ Mr. Jason B. Brown, of Indiana, from the Committee on Elections, submitted a report in the Illinois case of *Steward v. Childs*. The official returns had given sitting Member a plurality of 17 votes, which the contestant had attacked because of alleged irregularities in the application of the then newly enacted Australian ballot law of Indiana. The committee say in a preliminary way:

The first general election held under this law was the election of November 8, 1892, out of which this controversy grows, and so far as we know its provisions have not yet been construed by the courts of Illinois. In the light of the power reserved to the Members of the House of Representatives, by the Constitution of the United States, to be the judges of the election, returns, and qualifications of its own Members, and in the light of the power to prescribe the time, place, and manner of holding elections of Members to the House of Representatives reserved by the same instrument to the State legislatures, it is deemed the duty of the committee to recommend to the House such construction of these laws as will give force and effect to the clear intention of the legislature which enacted them.

In general the law provided that there should be a grouping of candidates by parties on the ballot, with spaces so that the voter might at one mark vote the whole party ticket, or might by several marks vote for candidates individually. The specific provision of the law was that the voter—

shall prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto.

The law further provided that “any voter who may declare upon oath that he can not read the English language, or that by reason of any physical disability he is unable to mark his ballot, shall upon request be assisted in marking his ballot by two of the election officers,” etc.; and also that—

* * * No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted. * * *

The committee, in view of these provisions of law, and in view of the decisions of various State courts which are cited, concluded:

The committee find it to be the law that ballots on which the voter undertook to express his choice by marks other than the cross placed in the circle or square, as provided by the statute, are not legal and should not be counted; that ballots voted by electors who were assisted in marking their ballots without having first made the affidavit of disability, as provided by said statute, are not legal and should not be counted; that the initials of that one of the judges of election who delivered the ballots to the voters are a part of the “official indorsement” required by the statute, and ballots not bearing such initials are not legal and should not be counted.

Applying the law as thus stated they found a net loss to contestant of 259 votes, and a net loss to sitting Member of 26 votes. Thus the plurality of sitting Member was increased, and the committee reported resolutions confirming his title to the seat.

There was no action by the House on this report, and sitting Member of course retained the seat.

¹Third session Fifty-third Congress, House Report No. 1741; Rowell's Digest, p. 493; Journal, p. 99.

1057. The Virginia election case of Goode v. Epes, in the Fifty-third Congress.

Discussion as to what is the best evidence when objection is made to the action of county canvassers in rejecting precinct returns.

Although service of notice of taking testimony be irregular, if the party yet is informed and appears and cross-examines, the House may consider the evidence.

Ex parte affidavits are not considered in an election case.

Where canvassing officers reject returns transmitted unsealed when the law requires them to be sealed, what evidence should the House require to overrule the canvassers?

On February 28, 1895,¹ Mr. Thomas G. Lawson, of Georgia, from the Committee on Elections, presented the report of the majority of the committee on the Virginia election case of Goode v. Epes. The report thus states the vote and the returns:

The board of canvassers of the State of Virginia awarded the certificate of election to the contestee upon evidence before them that he had received a majority of 868 votes. But it appears from the record that the commissioners of election in the counties of Brunswick, Amelia, Prince Edward, Mecklenburg, Greeneville, Lunenburg, and Sussex, respectively, rejected the returns from 21 precincts and refused to canvass and count their votes, at which the contestant received a majority of 1,509 votes, or 641 votes in excess of the majority by which the contestee was declared elected.

Contestant objected to the rejection of these returns, and the case turns on this feature alone.

At the outset certain preliminary questions are discussed:

(a) The majority say in regard to the evidence:

The law presumes that the board of commissioners of election in the respective counties acted in accordance with the law and the facts of each case when they rejected the returns, and in order to overthrow that presumption the best evidence relating to the invalidity of their conduct ought to be adduced. If the party who impeaches its validity does not furnish the best evidence within his reach in favor of his contention he is open to the suspicion that he is cognizant that such evidence would not avail him. Inasmuch as the action of the commissioners is impeached they are the best witnesses to the facts; they above all other persons must have known the grounds on which these returns were thrown out; they were the only persons who had any agency in their rejection, and the only persons upon whom the law imposed the duty of canvassing and counting them. All other evidence is probably hearsay.

The evidence in the record relates to the conduct of the commissioners of election in seven counties, in which there were 24 of these officers, yet they were examined in only two counties, and no reason is assigned why one or more of them was not examined in each county. The evidence is therefore primarily defective in quality, and after a close analysis a great deal of it fails to throw any light upon the vital issues in the case. We have, however, rejected none of it. We have labored to the extent of our power to extract the truth from it.

An example of this evidence is afforded in Amelia County where the county clerk testified, and in Mecklenburg County, where the deputy clerk testified as to the action of the commissioners. In the latter county the clerk was sent from the room before the commissioners came to their decision, and when he returned they announced to him their conclusions but not their reasons. The commissioners themselves were not called to explain their acts.

¹Third session Fifty-third Congress, House Report No. 1952; Rowell's Digest, p. 496; Journal, p. 169.

The minority say:

There is such a presumption in favor of public officers that they do perform their legal duties as that is required by the laws enjoining those duties.

But it is only a presumption at the most, which must yield to proof of the facts affecting the correctness of the presumption. When the facts are fairly supported by legal evidence and they appear to be in conflict with the presumption, then the presumption will, as it should, be completely overthrown. And such will appear to be the condition of this contest, which should be disposed of upon the effect of the evidence, disclosing the real state of the facts upon which the county commissioners have proceeded in rejecting the votes of a large number of precincts or districts, within the Fourth Congressional district of the State of Virginia, to which the present contest relates.

The district contained 98 precincts, besides wards of the city of Petersburg, and in the canvass made by the boards of county commissioners of eight different counties in the Fourth Congressional district of the State, they are claimed to have unlawfully rejected the entire vote of 32 districts or precincts. That circumstance of itself, so far as it has been supported, is sufficient to reasonably suggest the suspicion that these boards were, in their conduct, actuated by a motive not in consonance with an honest or legal discharge of their duties. The evidence as to the conduct of the election in the rejected precincts was largely obtained from reputable local officials, politically acting with the Democratic party, friendly to and supporting the contestee, and opposed to the contestant, who was supported by what are called third-party voters and Republicans. From the evidence of these witnesses the facts have been established to the approval of the counsel for the contestee, that the elections in the rejected precincts were orderly and carefully conducted, and the votes of none but lawful voters were received, and that in the returns made of the votes by the election officers to the county commissioners they endeavored to conform to the requirements of the laws of the State of Virginia to the best of their understanding.

The votes in all the rejected precincts, except one which gave a very small plurality for the sitting Member, were so favorable to the contestant as to wholly overcome the plurality of 868 counted in the district for the contestee, if they had been accepted and canvassed by the boards of county commissioners. And these circumstances very materially advance the presumption that there could be no proper or legal foundation for rejecting the votes of so large a part of this Congressional district as was rejected by the boards of county commissioners. Whether this presumption is in itself accurate or not, must in the end be disclosed by ascertaining from the evidence the reasons leading to the exclusion of these votes, and an examination of the evidence for that object will be made.

(b) The minority in their views suggest an objection of the sitting Member to certain testimony.

In Prince Edward County objection was taken on behalf of the contestee to the taking of evidence on the part of the contestant, for the reason that the notice was served by leaving it at the residence of the contestee on the 10th of February, 1893. This service could only be regularly made in case of inability to serve it on the contestee himself, or on his agent or attorney. The contestee was absent from the district and in attendance on the House of Representatives, but he had an attorney acting in the proceedings, and regularly the service should have been made on him. (Rev. Stat., sec. 108.)

But while the service was irregular, the counsel appears to have had timely information of it, for he appeared before the notary and stated his objection to the service, and then fully cross-examined the witnesses who were sworn on behalf of the contestant. The object of the notice was, therefore, fully accomplished, and the depositions so taken can not be excluded from consideration.

The majority do not mention this objection and evidently did not heed it, since they consider the evidence from this county.

(c) Testimony relating to the stealing of ballots in two precincts of Greeneville County and to the rejection of returns of two precincts of Prince George County, was in the nature of ex parte affidavits, which the majority evidently disregarded. The minority specifically state that this is not the evidence prescribed by the act of Congress, and do not insist on giving it effect.

The examination of the case so far as the merits go divides itself naturally into several branches:

1. The law of Virginia had the following provision:

After canvassing the votes in the manner aforesaid, the judges, before they adjourn, shall put under cover the poll books, seal the same, and direct them to the clerk of the court of the county or corporation (as the case may be) in which the election is held; and the poll books, thus sealed and directed (together with the ballots strung as aforesaid, inclosed, and sealed), shall be conveyed by one of the judges—to be determined by lot if they can not otherwise agree—to the clerk to whom they are directed, on the day following the election, there to remain for the use of the persons who may choose to inspect the same.

It appeared from the evidence that both the poll books and ballots from Rock Stone precinct were returned unsealed, and that the commissioners rejected them for this reason. The majority of the committee say:

Witnesses who were examined as to the condition of poll books and ballots that came from this precinct differ in their depositions as to the sealing of them, but one testifies as to their condition at one period of time and the other at another period of time, and this, no doubt, accounts for the discrepancy. Accepting the deposition of Lewis who describes their condition when received by the commissioners of elections, we are reluctant to say that the returns were not properly rejected. They were certainly not in the condition that the statutes of Virginia prescribe.

But as the voters at this precinct had no agency in sealing the books and ballots, and as their insecure condition can not be imputed to them, we think that they ought not to be deprived of the elective franchise without imperative reasons. We think that the poll books and ballots ought to have been examined by the commissioners of election, and, in the event nothing was found to discredit them, they ought to have been canvassed and counted.

The minority say that the returns were rejected “for what can be certainly said to be no more than a harmless deficiency.”

At Wilkinson Shop precinct the poll book was not sealed, and apparently the ballots were not returned with it. The commissioners rejected the return, and the majority of the committee, “in the absence of further or explanatory evidence,” conclude that they were warranted in so doing. The minority do not think the evidence proves that the ballots were not sent, and condemn the commissioners for rejecting the returns:

And the only point in this manner presented is whether the omission to seal justified the refusal to canvass the votes of this precinct. The election laws of the State of Virginia have not declared that to be a result of the omission. Section 132 does require that the books and the ballots shall be put under cover and sealed and directed to the clerk of the court of the county in which the election is held, and that they shall be conveyed by one of the judges selected for that service to the clerk to whom they are directed. It does not expressly, or by implication, forbid the clerk from receiving them or the commissioners from canvassing them if they are not sealed. It can not be seen that any actual uncertainty arose out of the omission to seal these books and votes.

It is not pretended that any change was made in the returns or the votes in their transit from the judges and clerks to the clerk of the court or that they had in any respect been interfered with. But they appear by the transcripts in the record to have been before the commissioners as they left the hands of the election officers. And under this state of the facts and the statute of the State, the commissioners could not rightly decline, as they did, to canvass these votes. The rule upon this subject, settled by well-considered authority, is that if the act omitted or the irregularity appearing is not of such a nature as to cast uncertainty on the result or to interfere with the legal expression of the will of the elector,

and it has not been made essential to the validity of the election or the statute has not declared that the vote in consequence of the act or omission shall be void or shall not be counted, there the fault or failure of the officers charged with the duty shall not be followed by an exclusion of the vote. (*Bowers v. Smith*, 111 Missouri, 45, 61–62; McCrary, on Elections, 3d ed., see. 192.)

And conformably with this principle, the vote of this precinct ought to have been accepted and canvassed by the county commissioners.

The returns from Bridgforth's Mill were rejected by the commissioners because the poll book was not sealed, but there being testimony that it was in safe custody, the majority concluded:

In point of fact, the poll book was not sealed, but it was practically protected against alteration, and was securely kept without alteration until it was delivered to the clerk or the court, who was their lawful custodian. For reasons expressed in our comments upon Rock Store precinct we think that the votes at this precinct ought to have been canvassed and counted.

In Mecklenburg County the commissioners rejected the returns of four precincts, three because the returns, while sealed, were so wrapped that they might have been taken from the wrapper at the ends. The returns of the fourth precinct were properly sealed, but in taking them to the county clerk the judge was out in the rain and the moisture partially unsealed them. The majority conclude as to the four precincts:

The evidence is of such character to raise a suspicion that these returns were improperly rejected, but we can not assume, in the absence of evidence sufficiently clear and strong to bring conviction to a mind reasonably unbiased, that the commissioners of election transcended their duty, especially as it appears (rec., p. 116) that unauthorized persons may have had access to the returns.

The minority, after reviewing the testimony, conclude that there was no evidence to show that the returns had been tampered with, and express the opinion that they were improperly rejected.

1058. The case of Goode v. Epes, continued.

When an election is moved from the prescribed place to another, should the poll be rejected or corrected with reference to the voters who did not attend?

Participation of a United States marshal in the duties of election officers, no harm being shown, did not justify rejection of the return.

Mere failure of election officers to take the oath prescribed by law does not vitiate the return.

Where the State law gives canvassing officers the authority to correct irregularities, they may not reject returns for lack of clearness.

Canvassing officers, having judicial power, may not reject the poll book as a return for the reason that theft of the ballots has prevented its verification.

2. The commissioners rejected the returns from Trotter's store, in Brunswick County, where contestant had a majority, because the election was held 1 mile from the voting place established by law. The majority justify this rejection, quoting McCrary and Brightley. The new place of election was not visible from the lawful one, and although two men were requested to remain and notify electors

of the change of place, there was no evidence that they executed the trust. The majority say:

It is true that the number of votes cast at this precinct was within 20 of the number registered, and the contestant and contestee might both be benefited by crediting them to the latter. To do so would not alter the result we have reached. But, inasmuch as the election was void, we do not think it can be thus validated. It is not known for whom these votes would have been cast, and to establish such a precedent would be mischievous.

The minority do not concur in this. They say it can not be accurately ascertained how the 20 voters who were registered but did not vote would have voted. One witness estimated that 13 would have voted for contestant and 7 for sitting Member. But the minority hold that to avoid injustice to sitting Member the whole 20 should be counted for him:

But to avoid all possible injustice to the contestee, they should all be added to his vote, which will leave a plurality in favor of the contestant of 41 votes. What the law endeavors to do is to give its appropriate effect to the will of the electors, as that may be expressed by their ballots, and not to defeat the expression of their will by giving undue prominence to irregularities productive of neither actual injury nor uncertainty. The officers did the best thing they could under the circumstances, and to still hold the election to be invalid because of the change in the building for holding the election would place the right of the electors on the contingency that the person on whose premises it should be held would permit that to be done. That surely ought not to be allowed, for it would empower one person in many cases to prevent an election from being held at all.

Reviewing the testimony of witnesses, the minority further say:

And they disclose no more than a harmless irregularity, intrenching in no degree upon the right of the voters to have due effect given to their votes and to the registered voters of the precinct. The legal principle is "that irregularities which do not tend to affect the result are not to defeat the will of the majority. The will of the majority is to be respected even when irregularity is expressed." (McCrary on Elections, 3d ed., sec. 193.)

3. The returns of Butter's precinct were rejected by the commissioners because a United States marshal, not sworn as a judge of election, had performed the duties of one of the judges for a part of the day. The majority of the committee found, however, from the testimony of one of the judges of election, that the marshal was merely permitted to hold the registration book during the voting. He did not touch the ballots in any way. Considering the testimony showing the "trifling character" of this interference, the committee conclude that the returns were wrongfully rejected.

4. The returns of Rice's precinct were rejected because the judges and clerks of election were not sworn, so far as was shown. The majority of the committee say:

The failure of the judges and clerks of election at Rice's to take the oath prescribed by law, if such was the case, did not invalidate the election. The vote can not be affected by the failure of an election officer to perform a duty that is purely ministerial and directory.

The minority say the evidence shows that the judges and clerks were sworn, "but the written oaths subscribed by judges and clerks had no signature to the jurats." This the minority consider an inadvertence merely, and say:

As long as it did not appear that these persons were not sworn, the presumption is that they were.

5. At Namozine and Spring Creek precincts the commissioners rejected the returns for the alleged reason that they did not clearly show the state of the vote.

The committee overrule this action, holding that the law of Virginia gave the commissioners authority to correct such irregularities.

6. As to Trotter's Store, in Greenville County, the majority say:

The ballots from Trotter's Store had also been stolen. The commissioners rejected the poll book for the reason that, the ballots being stolen, they could not compare the two and verify their agreement. We think that the commissioners erred. It was evident that the ballots were stolen to prevent a fair ascertainment of the result of the election. The purpose of the spoliators should have been frustrated if possible; the poll book, though not in the condition required by law, should have been examined, and if found unaltered should have been allowed. To determine whether or not it had been altered, the commissioners were authorized by section 134 of the election laws of Virginia to summon and examine witnesses. We allow the contestant his majority at this precinct.

Various other precincts are discussed by the majority and minority, but questions of fact rather than law are involved.

The majority of the committee, correcting the returns in the light of the above decisions, found that contestant received a majority of 653 votes in precincts wrongfully rejected, and that after this was deducted from sitting Member's returned majority, the latter would have still a majority of 215 votes, and thus should retain the seat.

The minority contended that contestant was shown to have a plurality of 442, and that he should be seated.

The report was never considered in the House, having been submitted within a few days of final adjournment.

1059. The Senate election case of Ady v. Martiin, from Kansas, in the Fifty-third Congress.

A question as to what constitutes an "organization" of a State legislature within the meaning of the law providing for the election of United States Senators.

In 1893¹ the Senate considered the case of Joseph W. Ady *v.* John Martin, of Kansas.

The credentials of Mr. Martin as a Senator from the State of Kansas being in due form, he was admitted to a seat in the Senate at the beginning of the special session of the Senate, March 4, 1893. Subsequently a memorial signed by 77 members of the Kansas legislature was presented in the Senate relating to the election of a United States Senator from the State of Kansas to fill the vacancy caused by the death of Hon. Preston B. Plumb. The memorial set out the facts from which it was claimed that the proceedings in the election of Mr. Martin to fill the vacancy aforesaid were irregular and illegal, and also set forth the subsequent election of Joseph W. Ady in a legal and formal manner. The grounds on which it was claimed that the proceedings of the legislature of Kansas in the election of Mr. Martin were illegal, are set forth in the remarks of Mr. William E. Chandler, of New Hampshire, who said in debate:

A Kansas legislature was chosen November 8, 1892—40 senators, 125 representatives, 63 being a majority in the house and 83 a majority of the whole 165.

¹ Election Cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 812.

On Tuesday, January 10, 1893, the members assembled at Topeka. The senate was duly organized as one body without controversy; but two houses were organized, each claiming to be lawful.

The Douglass house had 64 members holding certificates from the secretary of state. Three other members, holding certificates, afterwards appeared, making 67 members.

The Dunsmore house had 58 members holding certificates and 10 persons without certificates. These 10 claimed the places of 10 certified members who were in the Douglass house, asserting that of the latter 4 were ineligible because they were postmasters when elected, and that the rest had not been legally elected.

The senate recognized the Dunsmore house and refused to recognize the Douglass house, and so did the governor of the State.

On February 25, 1893, the Kansas supreme court decided that the Douglass house was the lawful body, and on February 28 the members of the Dunsmore house joined the lawful body and the Dunsmore house ceased to exist, none of the 10 unlawful members of that house either being admitted or claiming seats in the lawful body at any time.

On Tuesday, January 24, 1893, the senate voted for United States Senator, no person receiving a majority. The Douglass and Dunsmore houses each voted for United State Senator, Joseph W. Ady receiving a majority in the first and John Martin receiving a majority in the second body.

On Wednesday, January 25, there was a joint assembly, Lieutenant-Governor Daniels presiding. The senate roll was called; 15 senators did not vote; 24 voted for John Martin and 1 for M. W. Cobun.

The lieutenant-governor then directed B. C. Rich, clerk of the Dunsmore house, to call the roll. Fifty-six members of the Dunsmore house who had held certificates from the secretary of state voted for John Martin, 3 for Cobun, 1 for Mr. Close, 1 for Mr. Snyder, 1 was absent, and 1 did not vote, making the 58.

Ten members of the Dunsmore house who did not have certificates from the secretary of state voted 9 for Martin and 1 for Hanna.

"After the call thus made had been completed 2 members of the Douglass house, Wilson and Rosenthal, asked to vote; were allowed to do so and voted for Martin."

The vote then stood: Martin, 86; Cobun, 4 Hanna; Close, 1; Snyder, 1; Hanna, 1; making 93.

Before the result of the vote was announced Senator Lucien Baker arose, and in behalf of 15 senators and 65 representatives asked the right to vote. The lieutenant-governor refused to allow them to vote, declared the result to be as above stated, and that John Martin was elected, and then he left the chair.

Mr. HALE. Let me ask the Senator a question. I have been following the Senator's remarks. Does he mean to say that in the joint convention, where there were rival bodies, two houses of representatives, both present, that the presiding officer, after the roll call of one house had been completed, in order to get votes enough to make a quorum allowed two members of the other house, which he had not recognized, to vote, and that then, after doing that, when other members of that house requested the privilege of voting, he excluded them?

Mr. CHANDLER. The Senator correctly understands the case. That is exactly what took place, as the language I have read very clearly indicates.

Mr. HALE. Is that an undisputed fact; and if so, what followed upon that.

Mr. CHANDLER. I will show the Senator if he will listen a moment. The fact is undisputed that 24 senators voted for Martin; 1 for Cobun; that the roll was then called, and only members of the Dunsmore house voted. I again read:

"After the roll call thus made had been completed two members of the Douglass house, Wilson and Rosenthal, asked to vote; were allowed to do so, and voted for Martin."

The Senator is correct in the suggestion that it took these two votes to make in joint assembly up to that time 83, being a majority of the whole legislature. I proceed:

"The excluded senators and members continued in session, elected George L. Douglass presiding officer, and proceeded to cast their votes as follows:

"Joseph W. Ady, 77; present and not voting, 3."

And thereupon Mr. Douglass declared that there had been no election of United States Senator, and the assembly adjourned.

The total votes cast, which justify the conclusion that there was no choice, appear below, as follows:

	Votes
John Martin	86
Cobun	4
Close	1
Snyder	1
Hanna	1
J. W. Ady	77
	<hr/>
	170
Deduct the surplus and illegal votes, being	10
Total legal votes	160
Necessary for a choice	81
	<hr/>
Martin received	86
Deduct his illegal votes, being	9
	<hr/>
Total legal votes cast for Martin	77

Or 4 less than were necessary for an election.

An attempt has been made to show that Martin in the assembly as cut short by the lieutenant-governor was elected without counting the 10 illegal votes, as follows:

	Votes
John Martin	77
Cobun	4
Close	1
Snyder	1
	<hr/>
Giving in all	83

votes cast by legal members, and being exactly a majority of the whole 165 legal members of the legislature.

But to make this calculation it is necessary to count the 2 votes of Wilson and Rosenthal from the Douglass house, while excluding the 65 other members of that house and the 15 senators.

To justify taking in the 2 while excluding the 80 is impossible.

From the foregoing facts it is not difficult to reach two conclusions: First, the time had not arrived when the legislature of Kansas could lawfully elect a United States Senator. The legislature had not been organized within the meaning of the United States law, which is as follows:

“SEC. 14. The legislature of each State * * * shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.”

It is true that there was a lawful senate, and it is true, as appears from the subsequent decision of the supreme court of Kansas, that there was a lawful house. But it is also true that there was, in addition to the lawful house, an unlawful house, and that unlawful house was recognized by the senate and by the governor, while the lawful house received no recognition as such, either from the senate or from the governor.

Manifestly there was no organization of a legislature within the meaning of the national statute, so that the time began to run at the end of which, by the national law, it was the right and the duty of the members of the legislature to elect a United States Senator. In no just sense could the legislature be said to be organized under the conditions above described. It is not contended that in all cases where a lawful senate and a lawful house are organized it must be shown that they communicate with each other and recognize each other. That fact is to be presumed in the absence of counter proof; but as soon as such counter proof appears and the anomalous condition is shown that the lawful house has made no connection with the senate, but that the senate, on the other hand; is in connection with an unlawful house, there can not be said to be in any proper sense an organization of the legislature within the meaning of the United States statute. This point I do not intend to enlarge upon. I am thoroughly convinced of its validity.

But, conceding that there was an organized legislature on Tuesday, January 10, 1893, entitled on the second Tuesday thereafter, namely, on January 24, and on the day after, the 25th, to elect a United States Senator, it seems clear that there was no lawful election. Review the facts. The members of the three houses met in one room. The voting began. A part of the senators voted, the other part omitting to vote. The members of the unlawful house voted, the members of the lawful house omitting to vote when the roll was called by the clerk of the unlawful house, whom they did not recognize as clerk. Then two members of the legal house asked to vote, and their votes were received. Next, the senators who had not voted and the members of the legal house asked to vote, but the lieutenant-governor refused to receive their votes, although he had received the two votes from the members of the legal house, and then he declared Mr. Martin elected.

Can it be by any possibility contended that the lieutenant-governor had any right so to deal with the joint assembly; to receive the votes of the members of the illegal house; to receive at his discretion the votes of two members of the legal house, and then to exclude the remaining 62 members of the legal house and 15 senators? The idea is preposterous. The case is clear. Either there was no lawful joint assembly on that day, because the legislature was not organized, or it was the duty of the lieutenant-governor to receive the votes of all the members of the two houses. To base the right of a Senator to a seat upon this floor, as Senator Martin's right is based, solely upon the assumed authority of the lieutenant-governor, as exercised in this case, to receive votes enough to elect Mr. Martin and make a majority of the legal votes of the whole legislature, and then to arbitrarily stop the balloting and declare Mr. Martin to be elected, is as dangerous and vicious a proceeding as has ever been heard of in the history of fraudulent elections.

While the matter was referred to the Committee on Privileges and Elections, no report was made and no action was taken by the Senate.

1060. The Senate election case of Davidson v. Call, from Florida, in the Fifty-second Congress.

For the election of a United States Senator the joint meeting of the legislature is a distinct and separate body with a quorum of its own.

In 1892¹ the Senate investigated the case of R. H. M. Davidson *v.* Wilkinson W, of Florida.

In April, 1891, the legislature of the State of Florida met and was duly organized at the time and place appointed by law. On the second Tuesday after such organization, being the 21st day of April, 1891, the two chambers of which it was composed held a session and voted, each separately, for the election of a United States Senator. No one was chosen at this election, and it was so declared and entered upon the journals of the respective houses. On the following day, being Wednesday, the 22d of April aforesaid, the legislature met at noon in joint assembly, and one vote was taken for Senator, which resulted in no election. And on every succeeding day, except Sundays, until the 26th day of May, 1891, they met and took one vote in the same manner, with the same result. On the 26th day of May, 1891, the joint assembly met as before, and upon a vote being taken for United States Senator it was found that Wilkinson Call had received a majority of the votes of those present and voting, the same being also a majority of all the members elected to both houses of the legislature. Thereupon Mr. Call was declared duly elected.

The validity of this election was questioned upon the ground that there was not a quorum of the State senate present and voting at the time it occurred. This objection was based upon the proposition that the joint convention or assembly

¹Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 806; first session Fifty-second Congress, Senate Report No. 106.

in such cases is composed of the two houses as such, and that therefore a quorum of each must attend to properly form such convention.

The governor being of the opinion that this position was sound appointed Robert H. M. Davidson to be Senator from the State of Florida until the next meeting of the legislature, and issued credentials in the usual form under date of September 22, 1891, to which the secretary of state affixed the great seal of the State in obedience to a peremptory writ of mandamus issued by the supreme court of Florida, November 17, 1891.¹ The credentials of both claimants were presented to the Senate December 7, 1891. On the following day Mr. Call was sworn and his credentials, as well as those of Mr. Davidson, were referred to the Committee on Privileges and Elections. The committee reported, February 1, 1892, finding the facts set forth in the preceding paragraph, and holding that "This act [of July 25, 1866] provides that 'the members of the two houses shall convene in joint assembly,' etc. The joint assembly is thus composed not of the two houses, but of the members thereof. The joint assembly is not a junction or union of the two houses as such; it is not a merger of the two houses into one of either, but it is a body distinct and separate from either as such, and has by the words of the enactment a quorum of its own prescribed and defined, to wit, 'a majority of all the members elected to both houses,' without any reference to a quorum either of the senate or the house. * * * The term legislature in this clause is not to be construed technically with reference to the separate chambers which may exist within it, but as designating the collective number of all the persons composing it? and that therefore Mr. Call was duly elected.

February 4, 1892, the Senate considered the report of the committee and declared Mr. Call "lawfully entitled to a seat in the Senate."

1061. The Senate election case of Clagett v. Dubois, of Idaho, in the Fifty-second Congress.

As to what constitutes the "organization" of a legislature under the terms of the law relating to the election of United States Senators.

In 1892² the Senate investigated the case of William H. Clagett v. Fred. T. Dubois, of Idaho. The first legislature of the State of Idaho met, pursuant to proclamation by the governor, Monday, December 8, 1890. The house of representatives effected a permanent organization on that day. The senate, the lieutenant-governor being ex officio presiding officer, after prayer, elected a clerk pro tempore, after which the senators were sworn, a committee on rules selected, choice of seats provided for, a set of temporary rules adopted, and, finally, a committee on organization appointed. Tuesday, December 9, the permanent organization was perfected by the choice of a secretary and other officers. Tuesday, December 16, being the second Tuesday after Monday, December 8, each branch of the legislature took one ballot, acting under joint resolution, "to elect, as provided by law, United States Senators." The following day the two houses met in joint convention, and, the result of the previous day's balloting showing no choice of a Senator, proceeded to ballot. No person was elected on this day. On the

¹ 28 Fla., 441.

² Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 764; first session Fifty-second Congress, Senate Report No. 148.

following day, Thursday, December 18, the joint convention elected Messrs. Shoup and McConnell Senators to fill the existing vacancies, and Mr. Dubois for the term beginning March 4, 1891. Mr. Dubois's credentials were issued under date of December 18, 1890. February 6, 1891, the legislature of Idaho voted that there was "at least grave doubt" as to the validity of the election of Fred. T. Dubois and to proceed to a new election. In pursuance of this resolution a new election was held, and Mr. Clagett was declared elected February 11, 1891. The governor issued credentials, certifying that fact, under date of February 14, 1891. On the assembling of the Fifty-second Congress Mr. Dubois presented himself to take the oath as Senator. Objection was made, and the matter went over until the following day, when Mr. Dubois was sworn, and his credentials, together with a memorial of William H. Clagett, claiming the seat, were referred to the Committee on Privileges and Elections. The majority of the committee reported that "both on construction and precedent the legislature of Idaho was organized on Monday, December 8, A. D. 1890, within the meaning of the term 'organization' as used in the constitution of the State of Idaho, in the act of admission, and in the Revised Statutes" (R.S., sec. 14); that "Tuesday, the 16th day of December, was, in the judgment of [the] committee, the second Tuesday after the meeting and organization of the legislature of the State of Idaho," and that therefore Mr. Dubois was duly elected and entitled to retain his seat. Two of the committee dissented, contending that according to precedent the word "organization" meant permanent organization" that the permanent organization was not effected until Tuesday, December 9; that the proceedings which culminated in the election of Mr. Dubois did not take place on the second Tuesday thereafter, but were premature, and that therefore he was not entitled to the seat as Senator from Idaho. February 25, pending the discussion of the report of the committee, Mr. Clagett was given the right to speak in his own behalf for two hours, and on the following day the limit of time was removed. March 3 Mr. Dubois was declared entitled to retain his seat by vote of 55 yeas to 5 nays.