

## Chapter XXXIII.

### GENERAL ELECTION CASES IN 1883.

---

#### 1. Cases in the second session of the Forty-seventh Congress. Sections 972-983.<sup>1</sup>

---

#### **972. The Mississippi election case of Buchannon v. Manning, in the Forty-seventh Congress.**

**Illustration of specifications so vague as to destroy the validity of the notice of contest.**

**Although insufficiency of the contestant's notice might preclude an award of the seat to him, it might not preclude declaration of a vacancy after examination of the testimony.**

On January 29, 1883,<sup>2</sup> Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Mississippi case of Buchanan v. Manning.

In his reply to the notice of contest sitting Member had objected—

that said notice is so insufficient and defective that I need not deny or admit the allegation therefor, for the reasons, to wit, said notice does not specify particularly the grounds upon which you rely and gives no reasons for failing to do so.

Second. The allegations are only conclusions of law and general averment of wrongdoing in some undefined portions of the district, by unnamed election officials of precincts not specified, in unnamed counties, or by persons not named or described, and in places and by means not specified, and in violation of laws and the rights of others not designated.

Third. Your allegations are so vague and uncertain that I am not informed as to the persons or officials whom you accuse of crimes, nor where committed, nor do you aver that such wrongdoings were not instigated by you, or that they were known to or acquiesced in by me, or that the result of the election was changed by reason of the matter set forth.

The first specification in contestant's notice was:

That in a portion of the counties comprising said district such persons were not appointed, neither was such representation given to the different political parties in said counties, in the appointment of county commissioners of election, as was designed and required by law.

---

<sup>1</sup>Other cases in this session are classified in other chapters:

McLean, Missouri. (Vol. I, sec. 553.)

Jones v. Shelley, Alabama. (Vol. I, sec. 714.)

<sup>2</sup>Second session Forty-seventh Congress, House Report No. 1891; 2 Ellsworth, p. 287. It appears that the minority views received a number as a separate report (No. 1890) when presented in the House, Journal, p. 328.

The majority in their report seem to consider this specification as admissible:

The machinery of elections by the Mississippi code is placed in the hands of the governor. He appoints the county commissioners of election, who in turn appoint the precinct election officers. The precinct officers make return of the vote cast in the different precincts to the county board, who in turn make their report to the secretary of state.

By section—of the Mississippi election law the different political parties are to have representation on said board. It ought to be carried out in good faith, and the different political parties ought to be represented on the election board. It is a duty incumbent upon the executive to see that this provision of law is carried out. It has been found in many of the States of the Union that a provision in the election laws similar to this is a safeguard against frauds and ballot-box stuffing.

The second specification was:

That in a portion of the counties comprising said district, election districts were abolished and other election districts established, without complying with and in violation of law.

The majority report says:

This allegation is clearly insufficient, as being too vague and general. It would have been an easy matter to have named the precincts, and pointed out how the acts complained of tended to prevent a fair election.

The third specification—

That in a portion of the counties comprising said district the registration of voters was not conducted as required by law, thereby depriving a large number of persons (of lawful right) of the privilege of registering and voting.

is condemned by the report as “uncertain, vague, and wholly insufficient.” The fourth specification is condemned for similar reasons.

The fifth specification:

That in several of the counties comprising said district a large number of persons lawfully entitled to register were refused registration, and that the registration and transferring of voters was discontinued many days prior to the time contemplated by law, thereby depriving a large number of persons lawfully entitled to register (or to transfer) from the right of registering and transferring and voting; and that in a portion of said counties the registration books were for a time removed from the place designated by law for their keeping, thereby depriving a large number of persons (of lawful right) of the privilege of registering (or transferring) and voting.

The report says of this:

This allegation is too general. The particular places and the acts complained of should have been specifically set out. The same may be said with reference to the sixth allegation in the notice of contest.

The seventh:

That at many of the voting places United States supervisors of election were not permitted to exercise the duties of their office, being prevented therefrom by the unlawful interference of other officers of election, or from other sources, in violation of law, and to such an extent as to prevent their ascertaining the result of the election and from performing other duties required of them by law; that no separate lists of the names of voters were kept by the clerks of election, as was required by law; that the polls were not opened at the time required by law, were not kept open continuously from 9 a. m. till 6 p. m., as required by law, and that upon the closing of the polls the counting of the vote and making up of returns was not done at the voting places nor at the time required by law.

The report concludes as to this specification:

The seventh ground of contest alleges that at many of the voting places United States supervisors of election were not permitted to exercise the duties of their office, and were prevented therefrom by unlawful interference by the other officers of election (we presume State officers). This charge is general, and it does not specify any particular voting place in the district where these acts occurred;

but, perhaps, if any such unlawful interference is shown to have existed at any of the voting places, the committee would be justified in considering the allegation amended so as to make it conform to the proof, unless it were shown that thereby an injustice because of the insufficiency had accrued to the contestee.

The eighth:

That at many of the voting places ballots were received and counted that were not lawful ballots in form and print; that inspectors of election rejected and refused to count ballots that were lawful after the same had been lawfully deposited in the ballot boxes; that inspectors of election (with knowledge of the fact at the time) permitted ballots to be voted that were not lawful ballots; that during the hours prescribed by law for voting, voters were harassed and disturbed in such manner as to prevent their voting in a free, fair, untrammelled, and peaceable manner.

This is also condemned:

The eighth ground of contest challenges the form and print of the tickets, but it is not pointed out specifically in what the illegality consisted. And the ninth, tenth, eleventh, twelfth, and thirteenth grounds of contest are open to the same objections.

The majority therefore hold that with the single exception stated, "under the uniform rulings of this committee and the House," and in accordance with the precedent in the case of *Duffy v. Mason*, "the notice of contest would be held clearly insufficient."

"We prefer, however," says the report, "not to rest our decision of this case upon the sufficiency of the pleadings, for if the testimony taken in the case develops the fact that the sitting Member was not elected, it would be our duty to so report, although the contestant might not be entitled to his seat, having failed to comply with the law with respect to the sufficiency of his notice."

The minority views, presented by Mr. William G. Thompson, of Iowa, also say on this point:

It will be observed that in the beginning the contestee claimed that the notice of contest was insufficient, and has insisted for that cause that the case should be dismissed.

In whatever manner any failure of proper notice might affect the right of contestant in this case (for insufficiency of pleading), if upon examination of the facts in the case it appear that the sitting Member is not entitled to a seat it is the duty of the committee to so report.

### **973. The case of *Buchanam v. Manning*, continued.**

**Discussion as to kind and quality of evidence needed to establish a general conspiracy against a ballot box in a district.**

**Discussion of the validity of census tables as creating presumptions in a case involving a constituency divided politically on the color line.**

**The proof of one corrupted vote going into a ballot box does not invalidate the whole.**

**The House is reluctant, on allegations of general conspiracy of election officers, to reject unimpeached returns because other returns are shown to be fraudulent.**

**Although illiterate election officers seemed to have been appointed purposely, yet the House was reluctant to reject their returns when the safeguard of Federal inspectors had existed.**

As to the merits of the case, it appeared from the official returns that the vote of the district was divided among three candidates, as follows: Manning, 15,255; Buchanan, 9,996; Harris, 3,585.

The minority of the committee, who recommended resolutions declaring neither contestant nor sitting Member entitled to the seat, found from the census that there was probably a majority of 2,600 colored voters in the district, as compared with white voters, and became satisfied from the evidence that colored voters belonged to contestant's party, while the white voters were divided between sitting Member and the third candidate. The minority views say:

It is further clearly proven that quite a number of white voters did not go to the polls. (See evidence, Howze, p. 19; Newsom, p. 22.)

It is further proven that contestant received a number of white votes, and yet, according to the returns, the contestee is credited with 15,215 votes, which is manifestly impossible under the circumstances.

On the other hand, the contestant is credited with only 9,996 votes, while there are 19,800 colored voters in the district, who, according to the proof of contestee's own friends, were all solid for contestant, and came to the polls and voted or offered to vote.

This again is a manifest impossibility. This at once throws suspicion on the fairness of the count, and when the whole of the election machinery was in the hands of contestee's friends the burden of showing the fairness of the count should be upon him when a reasonable doubt of fairness has been established by the proof.

The minority conceive that a conspiracy existed, made possible by the appointment of election officers almost entirely of sitting member's party, although the other parties asked representation, and carried out through corrupt administration of the registration laws, through intimidation, through fraud aided by connivance with election officers, through establishment of new polling places, by the appointment of illiterate men to represent contestant's party on boards of election officers. The minority thus sum up:

First. The appointment of illiterate officers of election is such a manifest disregard of duty and violation of statute law as to render void the whole appointment of election officers. One of the essential duties of county commissioners and precinct inspectors is to sign and certify the returns, and their duty can not be performed by a person who can not read and write. Where three persons are named in a statute as necessary to perform an official duty, all must be appointed and all must act, though a majority may control. (See *Ballard v. Davis*, 2 George's Miss. Reports; also authorities heretofore cited.) Hence the appointment of illiterate inspectors and commissioners of election would vitiate the whole appointment and destroy the election.

Second. But we do not wish to rest our report on so technical a ground, and hence we hold that the appointment of illiterate inspectors and commissioners takes away from the return of the election officers that presumption of truth which otherwise it would have, and a party claiming a seat on the return of such officers must show the utmost good faith in the election.

Third. In the case before us, first, the action of the governor and State board, their refusal to allow the opposition party to name any of the election commissioners; second, the same action of the part of the county commissioners in appointing the precinct inspectors; third, the appointment of corrupt and illiterate officers; fourth, the systematic adjournments of the election without sufficient cause; fifth, the premature closing of the registration books, and refusal to register Republican voters, the erasing of names of Republican voters already registered, and the forgery of poll books; sixth, the failure to openly count the vote at the closing of the polls; seventh, the changing of polling places; eighth, the abandonment of ballot boxes during adjournment, and of their carrying off to private houses during adjournment; the interference with and exclusion of United States supervisors; ninth, the fact that these practices were in counties having large Republican majorities, are conclusive evidence of a conspiracy to defraud.

This being a conspiracy to defraud, there being proof of fraud at a number of precincts, and the illiterate inspectors leaving the door open to unlimited fraud, and there being no proof by contestee of good faith in the election, it must be set aside.

The majority of the committee do not agree to such propositions:

It has been strenuously contended that there is some evidence uncontradicted and which tends to establish a conspiracy among the Democrats of the district, which resulted in the returning of the vote as heretofore given for Manning, and the suppression of the true vote given for the contestant and Mr. Harris, the Greenback candidate. This is founded upon the fact that the colored vote in the district exceeded the white vote, and that it was solidly Republican, and that it was cast, or ought to have been cast, for Mr. Buchanan; that the white vote was divided between the sitting Member and the Greenback candidate, Mr. Harris. To establish this, census tables have been resorted to, and other evidence has been introduced tending to show that there was a general turnout of Republican at the election, while there was much indifference on the part of Democratic voters.

The case of *Spencer v. Morey*, decided in Forty-fourth Congress, Miscellaneous Cases, Volume V, page 438, adverted to by contestant in his brief, can not be regarded by us as an authority in this or any other case. So far as we have been able to study it, it stands alone in the line of contested election cases. We do not believe that proof of one corrupted vote going into a ballot box is like "a drop of poison in a bowl of water, which contaminates the whole of it, and can not be separated from that which remains pure."

The duty of the House is to separate the honest from the dishonest vote; to purge all ballot boxes of illegal votes; to administer a rebuke to the voters of any precinct who permit the voice of the people to be stifled or suppressed; and to enable the House to do this a contestant should produce testimony of specific acts in order to show the wrong which he complains of. It can not be done by general, vague, and uncertain allegations and charges. There is some proof introduced to establish these various points, but it is very general, and consists largely of the opinion of witnesses, and is not of such a character that the committee feel justified in finding that a general conspiracy against the ballot box was practiced. It seems to your committee that if any such practice prevailed the United States supervisors appointed for the purpose of preventing such frauds could and would have given information whereby they could have been specifically proven.

Your committee have not hesitated to recommend to the House the throwing out of all the boxes where frauds, intimidation, or ballot-box stuffing have been proven, but it would be unsafe to assume from the testimony in this case that other frauds had been committed by the election officers not specifically shown or proven in any tangible or definite manner.

As to illiterate election officers, the majority say:

There is no doubt in our minds, from the evidence in this case, that many of the Republican precinct inspectors were appointed as such because they could neither read nor write. This is, in our judgment, a clear abuse of the law, and without the supervisors' law, which enables the opposing party to have men of their own selection to guard the polls as supervisors, we would be strongly inclined to apply a corrective for this manifest abuse of power.

With tickets exactly similar in all respects, or as nearly so as they can be printed, and on the same kind of paper, it would not be a hard task for election officers, if they were so disposed, to cheat an illiterate man, who could neither read nor write, both in the vote and in the count. All good people ought to discountenance and cry down evil practices of this kind. We indulge the hope that it will not be repeated in the future.

#### **974. The case of *Buchanan v. Manning*, continued.**

**Although many electors have suffered by arbitrary refusal of registration officers to do their duty, yet the House requires a contestant to show specifically the resulting harm.**

**Disregard of a law requiring party representation on election boards may contribute to establish conspiracy, but does not do so of itself.**

**Change of the place of an election may cause such confusion as to defeat the popular will.**

**Periodical firing of a cannon at a polling place during an election was held to be intimidation justifying rejection of the poll.**

**Instance wherein a contestant was granted leave to withdraw.**

As to the registration, the majority report holds:

It appears in the evidence that very many electors in the various counties of this district were deprived of the right of voting because they were not registered. The registry law of Mississippi provides the manner in which registration shall be made. An unlawful refusal on the part of the registration officers to register a qualified elector is a good ground for contest; but in order to make it available the proof should clearly show the name of the elector who offered to register; that he was a duly qualified voter, and the reason why the officer refused to register him, and, under the statutes of the United States, if he offered to perform all that was necessary to be done by him to register, and was refused, and afterwards presented himself at the proper voting place and offered to vote and again offered to perform everything required of him under the law, and his vote was still refused, it would be the duty of the House to see to it that he is not deprived of his right to participate in the choice of his officers. Unfortunately, in this case the proof falls far short of that which is required to enable the House to apply the proper remedy. That there were many instances in which the officers of the registration arbitrarily refused to do their duty is apparent. That many electors were deprived of their right to vote in consequence of this action is also apparent; but in going through the testimony in this case the number thus refused registration and refused the right to vote if added to contestant's vote would not elect him. Neither is it shown sufficiently for whom the nonregistered voters would have voted had they been allowed that right.

As to the partisan election boards, the majority say:

We are not willing to go as far in this case as the majority of the committee did in the Forty-sixth Congress in the case of *Donnelly v. Washburn*.<sup>1</sup> It was there held—

“The very fact that in these seven precincts Mr. Donnelly had been deprived by the city council of Minneapolis of all representation among the officers conducting the election is, in itself, a very strong proof of conspiracy and fraud.”

We may remark that there is abundance of testimony in this case showing that nearly one-half of the polls in some of the counties were under the exclusive control of the party friends of the contestee; and it is stoutly maintained by the contestant that the refusal to register qualified Republican voters, and that the appointment of incompetent Republican election precinct officers at other polling places, and various other acts and omissions on the part of the partisan friends of the contestee, taken in connection with the fact that at many of the precincts only Democrats were appointed election officers, afford a strong reason why the rule laid down in the *Washburn-Donnelly* case should apply in this.

The appointment of managers of election, in fairness and common decency, should be made from opposite political parties. A refusal to do so in the face of a statute directing it to be done may in some instances be evidence of fraud, and it might form an important link in the chain of circumstances tending to establish a conspiracy.

We are not satisfied that the evidence in this case establishes such a conspiracy.

As to changes of polling places, both majority and minority say:

There is evidence tending to establish the fact that some of the voting places were changed just prior to the election, and that much confusion was thereby caused among the voters. Many of them were not aware of the change, and in some instances they did not know where the new polling places were established. Just how far this affected the result of the election we are unable to tell from the evidence. We can, however, readily imagine how a resort to changing the polling places just before an election in a county would cause such confusion and unfairness as would defeat the popular expression of the will of the people through the ballot box.

The majority reject a precinct for the following act of intimidation at North Oxford precinct:

B. P. Scruggs testifies that he was United States deputy marshal on the 2d of November, 1880; that he lives in Oxford, State of Mississippi; that he was present at the election held there on that day;

---

<sup>1</sup>It is hardly accurate to speak of anything as decided by this case, where there was no report indorsed by a majority of the committee and no action by the House.

that within 20 steps from the entrance of the court-house, where the voting was being carried on, Mr. Keyes, a prominent Democrat of that place, and a member of the board of aldermen, was in charge of a cannon which was being fired, and that the witness protested against the firing of it; that he was told by Mr. Keyes that he had orders to fire it; that it was none of his business who gave him such orders; that they continued to fire the cannon until late in the afternoon; that the cannon was a regular 6-pound field piece. Witness also testifies that the Republicans were prevented from celebrating the victory gained by them because they were told by two prominent Democrats, Mr. Crawford and Mr. Skipwith, in the presence of Mr. Baker, chairman of the Democratic county central committee, that "they might have the right to do so, but they did not have the might," and to prevent a bloody collision, they abandoned it.

The minority found 11,715 votes which they considered so tainted as to justify setting aside the whole election.

The majority found only 1,994 votes for sitting Member and 1,455 for contestant cast in polls which ought to be rejected. So they recommend the adoption of the following resolution:

*Resolved*, That the contestant have leave to withdraw his papers without prejudice.

On March 2,<sup>1</sup> after brief debate and the reading of the report, the resolution of the majority was agreed to without division.

**975. The Missouri election case of Sessinghaus v. Frost in the Forty-seventh Congress.**

**The House counted the ballots of qualified voters who were prevented from voting by conditions arising from a registration established by a city government.**

**May the State delegate to a municipality the power to regulate the manner of holding an election?**

**Officers of election having wrongfully denied qualified voters the right to vote, the House counts the rejected votes.**

On February 17, 1883,<sup>2</sup> Mr. Samuel H. Miller, of Pennsylvania, from the Committee on Elections, submitted the report of the majority of the committee in the Missouri case of Sessinghaus v. Frost. The sitting Member had received a plurality of 197 votes on the face of the returns.

The objections of contestant involved two leading questions:

(1) A number of persons—155 in all—who were shown to have all been qualified voters under the laws of the State of Missouri, and who tendered votes for contestant, were refused the right to vote because their names had been stricken from the registration lists under the provisions of an ordinance of the city of St. Louis, which provided for a board of registration to be appointed by the mayor, and—

whose duty it shall be to meet with the recorder of voters, at his office, twenty days before each general, State, or municipal election, for the purpose of examining the registration, and making and noting corrections therein as may be rendered necessary by their knowledge of errors committed, or by competent testimony heard before the board; a majority of said board shall be necessary to do business, and the mayor shall be ex officio president thereof. They shall strike from the registration, by a majority vote, names of persons who have removed from the election district for which they registered, or who have died, and shall note the fact opposite the name of any person charged with having registered in a wrong name, or who for any reason is not entitled to registration under the provisions of this ordinance, which person shall be challenged by the judges of election when presenting himself to vote, and rejected

<sup>1</sup>Journal, p. 545; Record, pp. 3590, 3593–3606.

<sup>2</sup>Second session Forty-seventh Congress, House Report No. 1959; 2 Ellsworth, p. 381.

unless he satisfy said judges that he was entitled to register, and said board shall also place on said books the names of such persons as in their judgment have been improperly rejected by the recorder of voters.

After a discussion of the terms of the constitution and laws of Missouri, the majority of the committee found that the ordinance was of no binding effect:

The Constitution of the United States having declared that the legislatures of the several States shall provide for choosing Members of Congress, and the constitution of Missouri having authorized the general assembly, and that alone, to enact a registration law, we hold that the above ordinance has no binding force or effect, and is invalid.

We therefore rely upon the language of McCrary, section 11, that—

“In the absence of any positive law making registration imperative as a qualification for voting, it is a very plain proposition that the wrongful refusal of a registering officer to register a legal voter who has complied with the law and applies for registration ought not to disfranchise such voter. The offer to register in such a case is equivalent to registration. This would be held to be the law upon the well-settled principle that the offer to perform an act which depends for its performance upon the action of another person, who wrongfully refuses to act, is equivalent to its performance.

Mr. A. A. Ranney, of Massachusetts, a member of the committee concurring in the majority report, filed views which discussed the point more fully:

I should ordinarily hesitate long and deliberate with care, lest I might be mistaken, before I could decide against the validity of the city ordinances in question and under which the board of registration seem to have acted and which have been apparently in force and acted upon in the city and State so long. But the question is raised and argued on both sides with great ability. And I am forced to the conclusion that the acts of the board in striking off the names of the parties in question was unauthorized, illegal, and void; that under the Constitution of the United States, article 1, section 4, the State legislature alone had power to prescribe the manner of holding elections, subject to alteration and regulations made by Congress. That this power includes the whole machinery of elections, registration laws, etc., is too well settled to require argument.

I am unable to find any act of the legislature of Missouri which prescribes registration as a qualification or regulation and which was in force at the time in question and applicable to the city of St. Louis. Apparently the legislature recognized this as the state of the law and accordingly, as appears in the argument, passed an act to remedy the defect and provide for it in the year 1881. The charter of the city of St. Louis must be confined in its provisions to matters municipal, and it would be a great stretch of language and principles of law to hold that it extended beyond that and embraced authority to regulate the manner of holding elections in matters of State and Federal officers, so the city authorities could establish registration laws and prescribe the qualifications of voters and limit the right of exercising the elective franchise. It is more than doubtful whether the legislature, which is alone invested with authority of this kind, could thus delegate it any way.

The minority contended that the St. Louis ordinance was framed in conformity with the constitution and laws of Missouri and was valid.<sup>1</sup>

The majority further found:

But conceding (which we do not in this case) that the city ordinance relative to registration was constitutionally and legally enacted, and its provisions applicable to this election, we contend that these 155 votes should still be counted, and for the following reasons:

The oath prescribed for and taken by the judges of election precluded them from hearing or determining the case of any voter whose name is not on their list; therefore as to that class of voters they are not really judges of election. The law in that case has provided another set of judges, whose duty it is to hear competent testimony concerning the case of each and every man whose name is suggested by anyone should be stricken off, and after judicially hearing the case they shall by a majority vote determine whether that man is a voter or not.

---

<sup>1</sup>Minority views filed by Mr. Samuel W. Moulton, of Illinois.

So we say that if the judges of election could not receive the votes of these men they are not the judges of their qualifications to vote in any sense, their place for that purpose being filled by the board of revision. We hence conclude that if the only officers recognized by the city charter who had a right to judge of the qualifications of these 155 men have improperly, wrongfully, and fraudulently denied them the right to vote, that this House should remedy that wrong and count their votes for him whose name was on their ballots.

As to the propriety of counting these votes, the majority say:

The testimony shows that all of the above 155 men were legal and qualified voters, many of them being old residents, and that they did all in their power to entitle them to vote.

We hold that their votes should now be counted by the House. The said voters had done everything the law required of them; they had exhausted their remedy; they had registered and gone to the polls and offered to vote, but their names having been stricken off they were not allowed to vote.

The principle is well established and was adopted by this committee in the case of *Bisbee v. Finley* (present Congress) that where judges of election improperly refuse a qualified voter the right to vote his vote will be counted here. We submit the reason of that rule will apply as well to this case where the voter has done everything in his power and the primary wrongful act was committed by the registration officers.

McCrary on Elections, sections 10, 11, and 383, fully sustains this view in the following language:

"A case may occur where a portion of the legal voters have, without their fault and in spite of due diligence on their part, been denied the privilege of registration. In such a case if the voter was otherwise qualified and is clearly shown to have performed all the acts required of him by the law, and to have been denied registration by the wrongful act of the registering officer, it would seem a very unjust thing to deny him the right to vote. In elections for State officers, however, under a constitution or statute which imperatively requires registration as a qualification for voting, it may be that the voter's only remedy would be found in an action against the registration officer for damages." (See also secs. 11 and 383.)

It will be observed that Judge McCrary, after stating the general doctrine, says that—

"In elections for State officers, however, under a constitution or statute which imperatively requires registration as a qualification for voting, it may be that the voter's only remedy would be found in an action against the registration officer."

This refers exclusively to State officers, while the office for which it is intended to count these votes is not a State office, that the United States Constitution has given this body full control over the question as to who are its Members; and in the State of Missouri neither the constitution nor any statute in force in St. Louis makes registration an imperative prerequisite or qualification.

Also the majority find another reason:

Furthermore, these votes should be counted on another ground, following a well-established principle of law.

The proof in this case shows that the board of revision by whom the above voters were disfranchised acted at the outset and throughout their entire proceedings in absolute violation of not only the spirit but the letter of the law which gave them authority. The ordinance explicitly says that this board shall meet—

"For the purpose of examining the registration and making and noting corrections therein as may be rendered necessary by either their knowledge of errors committed or by competent testimony heard before the board, a majority of said board shall be necessary to do business."

By a resolution adopted at the beginning (heretofore cited) they declared they would neither hear testimony nor act upon the knowledge of the board. Thereafter names of voters were stricken off the list without even being read to the board, and merely upon the recommendation of an individual member, who, in many cases, as the proof shows, adopted without question, knowledge, or examination the reports of his unsworn and unauthorized deputies.

**976. The case of *Sessinghaus, v. Frost*, continued.**

**As to what constitutes on a ballot a caption designed to deceive the voter.**

**The House counted ballots rejected by election officers under an erroneous construction of the law.**

**The intent of the voter being certain, the omission of a candidate's given name does not vitiate the ballot.**

**A small number of voters being driven from the polls by intimidation, the House counted their votes but declined to reject the whole poll.**

(2) The majority determined to count certain votes for contestant for the following reason:

There were 23 ballots cast for contestant, but not counted, having this caption, viz, "Chronicle Selected Ticket," a ticket made up of names of persons on both the Republican and Democratic regular tickets. It was not, in the language of the law (see p. 1681), a ticket designed to deceive the voter. It showed plainly what it was, viz, a ticket selected by the Chronicle, an independent daily newspaper published in St. Louis. (See pp. 945-946.) This ticket had contestant's name on it for Congress from this district, and was, in some of the precincts, thrown out by the judges and not counted.

The supreme court of Missouri, in the case of *Turner v. Drake* (71 Mo., 285), construed this statute as follows:

"This is a proceeding instituted in the county court of Carroll County, contesting the election of defendant as recorder of deeds of said county. The county court quashed the notice of contest on the motion of defendant, from which action plaintiff appealed to the circuit court, where, upon a trial de novo, judgment was rendered for defendant, the notice of contest quashed, and the proceedings dismissed, from which plaintiff has appealed to this court.

"The only ground for contest alleged in the notice is that all the ballots cast for defendant, at the election which was held on the 5th day of November, 1878, were fraudulent and void because the caption of said ballots contained the words, 'Republican, Independent, Greenback.' The following is the form of the ballot as to State and county officers: 'Republican, Independent, Greenback; supreme judge, Alexander F. Denney,' etc.

"The claim that the ballots cast for defendant, of which the foregoing is a type, were fraudulent and void, is based upon section 1, acts of 1875, page 15, which is as follows:

"Each ballot may bear a plain written or printed caption thereon, composed of not more than three words, expressing its political character, but on all such ballots the said caption or headlines shall not in any manner be designed to mislead the voter as to the name or names thereunder. Any ballot not conforming to the provisions of this act shall be considered fraudulent, and the same shall not be counted."

"We cannot, from the mere face of the ballot, declare, as a matter of law, that the words used in the caption were, in any manner, designed to mislead the voter as to the name or names thereunder. The words employed would indicate to the voter that he would find among those to be voted for Republicans, Greenbackers, and Independents, or persons who were candidates without party indorsement. We think the evident purpose of the legislature in the above enactment was to prevent one political party from using, as a caption to its ballots, the name of any other political party from that mentioned in the caption. A ballot with a caption using the words 'The Republican Ticket' which contains only the names of persons who represented the Democratic ticket would fall within the class of ballots interdicted by the law.

"The design of the statute is to prohibit the use of any words in the caption to a ballot which do not truly indicate the political character or party affiliation of the persons to be voted for, and any ballot which represents by the words used in the caption that it is the ticket of one party when in truth and in fact the persons whose names are contained in the body of the ballot represent another and different party is under the statute fraudulent and void."

Under this and similar decisions, it seems to us there can be no doubt that contestant is entitled to have counted for him these 23 votes.

(3) The majority also ruled as follows:

Evidence on pages 952 and 897 of the Record, which is uncontradicted, will be found showing that 10 votes cast for contestant were thrown out and not counted by the judges, merely upon the ground that the contestant's given name was not on the ballots. The proof shows that no other man by the name of Sessinghaus was a candidate at that election in that district for any office.

Hence we follow the unbroken chain of authorities as cited by McCrary and hold that these 10 votes should be counted for contestant.

(4) As to intimidation, the majority report that 20 votes should be counted for contestant for this reason:

As to precinct No. 39, the contestant urged persistently \* \* \* that this precinct should be thrown out, but we are constrained to differ with him. We find that the evidence of intimidation hardly comes up to the standard provided by the precedents cited by McCrary, and hence we conclude that it must stand. We find, however, that 20 men (all colored) who were qualified and legal voters and duly registered, and who had done all that the law required of them, who were entitled to vote at that poll, went there and offered to vote, but were refused for various trivial reasons, many of them being frightened by abuse and driven from the poll.

(5) On questions of fact certain votes are counted for contestant because wrongfully excluded by election officers.

In conclusion, as a result of their decisions, the majority find a plurality of 172 for contestant, and report resolutions for seating him.

The minority concluded that sitting Member was entitled to retain the seat.

The report was debated in the House on March 2,<sup>1</sup> and on that day the resolutions of the majority were agreed to,<sup>2</sup> yeas 126, nays 110.

Accordingly Mr. Sessinghaus appeared and took the oath.

**977. The Florida election case of Bisbee, jr., v. Finley in the Forty-seventh Congress.**

**Contestant's testimony being delayed by dilatory action and intimidation, the House considered a portion taken after the legal limit.**

**Discussion as to certain testimony alleged not to be strictly in rebuttal.**

On February 19, 1883,<sup>3</sup> Mr. Ambrose A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the majority of that committee in the Florida case of Bisbee, jr., v. Finley.

At the outset consideration may properly be given to a preliminary question concerning the taking of evidence. Contestee claimed before the committee that a portion of the contestant's evidence was taken after the expiration of the first forty of the ninety days allowed by statute for the taking of testimony, and that some of that which was taken during the ten days allowed for rebuttal was not strictly in rebuttal, and that all such should be rejected and not considered by the committee. The majority report finds that during the first forty days contestant took testimony as fast as he could, but that much time was consumed on the part of sitting Member by useless and dilatory cross-examination. Also violence and disorder prevented contestant's attorney from going into some parts of the district.

<sup>1</sup> Record, pp. 3616, 3627-3631.

<sup>2</sup> Journal, pp. 551, 552.

<sup>3</sup> Second session Forty-seventh Congress, House Report No. 1066; 2 Ellsworth, p. 172.

Therefore contestant, without prejudice to sitting Member, continued to take testimony after the expiration of the forty days. But sitting Member's counsel would not remain during the talking of this testimony, although contestant offered to give his opponent all the time he wanted for answering the testimony objected to. The majority report further says of sitting Member's attitude:

He knew of the other facts stated and of the illness of counsel which had delayed the taking of the evidence entirely within the first forty days. And the committee think that a fair-minded man would have been most likely to enter into an agreement allowing further time, and he must be presumed to know the previous practice of the Committee on Elections to exercise discretion in such matters.

It is also evident that most and probably all of the evidence to which he now objects did not admit of an answer, as his attempt to answer other evidence of the same kind to which he does not object proved ineffectual. That taken during the last ten days was such from its nature that it could not be contradicted or its force impaired by any counter evidence.

It is Manifest, therefore, that contestee did not suffer and was not prejudiced by any delay or the acts complained of.

No complaint is made or pretense set up that the evidence was not fairly taken and accurately reported. He had full opportunity to cross-examine if he desired to do it, and also to answer it after the same was taken. But he did not choose to do so and preferred to take the risk of its being considered. After the case was referred to the committee and printed he did not appear or make any motion to strike out the evidence objected to, so that it might be supplied if the motion was granted, but took the objection for the first time at the argument.

The committee are clearly of the opinion that the evidence taken after the expiration of the forty days should be received and considered, and they have considered it; that the evidence taken in rebuttal should also be considered. All of the evidence was taken within the ninety days allowed by statute, so that in that respect the statute was literally complied with, and the forty days allowed contestee was more than sufficient for his purposes, as he did not begin until about two weeks after contestant had finished, and then occupied but sixteen days, while he had the offer of all the more time which he desired.

It is manifest that contestee did not believe he could answer the evidence and, in the spirit manifested by his cross-examination, designed apparently to use up the time, so as to get beyond the forty days, and by leaving when the forty days were up, and when he knew contestant was going on to finish his list of witnesses, he was seeking some technical advantage if he could get it. The testimony in rebuttal, also taken within the ten days, appears to have been proper and competent, and should be, and has been, considered. The course of the committee seems fully justified by good precedents.

No statute can tie the House down to any rules of procedure.

Its provisions are directory, constituting only convenient rules of practice, and the House is at liberty, in its discretion, to determine that the ends of justice require a different course. (McCrary, pp. 353, 358, 359.)

In 1 Bartlett (Rep., 223, 224), a Democratic committee held that if either party desired further time to take testimony after the time had expired, it was his duty to give notice to his opponent and proceed and take it and present it to the committee, which would, on good reasons being shown, receive and consider it.

So, too, in regard to rebutting evidence; that rests in the discretion of a court always, even if not strictly in rebuttal. (Reed *v.* Kneear, Brightley's Election Cases, 416; Richardson *v.* Stewart, 4 Birney, 197.)

#### The minority say:

The record shows that all the evidence taken in the counties mentioned below by contestant was taken as rebutting testimony, after the expiration of the time allowed by law for taking original testimony; that neither contestant nor contestee had taken any testimony in any of these counties during the forty days allowed to each, and that consequently there was nothing to rebut; that the contestant disregarded the act of Congress, which says that "the contestant shall take testimony during the first forty days, the returned member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period" (of ninety days).

The following are the counties where contestant took such original testimony in the ten days allowed him for rebutting testimony only, and where contestee had taken no testimony; and where there could not therefore possibly have been anything to rebut, viz: Brevard, Bradford, Columbia, Hamilton, Putnam, Orange, St. Johns, Suwanee, and Volusia counties.

The record shows that no evidence in chief was taken in or concerning the election in any of these counties, and none whatever by the contestee during his forty days, and that all of contestant's testimony therein was taken after contestee's time had elapsed and after the contestant's time for rebuttal had commenced. See *Vallandigham v. Campbell* (1 Bartlett, p. 223); *Brooks v. Davis* (1 Bartlett, 244; *McCrary on Elec.*, secs. 347, 348); *Bromberg v. Haralson* (first session Forty-fourth Congress, vol. 5, Index to Miscellaneous Documents Digest of Election Cases, p. 364).

It is claimed that all this testimony should be rejected.

Against all the evidence taken by the contestant in the above-mentioned counties the unanimous report of the Committee on Elections in case of *Bromberg v. Haralson*, first session Forty-fourth Congress, is cited. It appeared in that case that in Wilcox County the contestant, Bromberg, the Democratic candidate, undertook to violate the election law, just as the contestant in this case has done, and that his testimony so taken was rejected. (See *Bromberg v. Haralson*, supra.)

All the testimony in the above counties is ex parte in behalf of contestant. The notices served by contestant on contestee for taking this testimony in all those counties informed contestee that contestant would proceed to take testimony in rebuttal. The contestee, knowing that no original testimony had been taken in any of these counties, and that there could be nothing to rebut, declined to attend such examinations of witnesses. The contestant, instead of taking rebutting testimony, proceeded to take original testimony.

The minority quote McCrary, with comment:

The statute as it now stands (see sec. 108, Rev. Stat.) affords an opportunity for investigation, so ample and complete that it is believed that it will seldom happen that the House will find it necessary to depart from its provision in order to do the most complete and perfect justice, and it will no doubt be adhered to as furnishing the best possible guide for instituting and carrying forward inquiries of this character.

We have considered almost all the testimony thus irregularly and illegally taken, but we earnestly protest against the admission of such evidence unless great injustice would be done by rejecting it. We prefer to adhere to the law. The above-mentioned counties should stand as returned, however, both from the fact that all the testimony taken by contestant to assail them is unwarranted and because the testimony itself, as shown by the record, is insufficient to warrant the committee in rejecting the official returns and thereby disfranchising hundreds of legal voters.

**978. The case of Bisbee, Jr., v. Finley, continued.**

**A vote offered by an elector and illegally rejected should be counted as if cast.**

**Electors having made affidavit of their qualifications and as to the ballots they intended to cast and the same being corroborated orally, the House counted the rejected votes.**

**As to the evidence which should be produced at the poll to justify rejection of a vote tendered by alleged convict.**

**As to the merits of the case, it appeared that sitting Member had a majority of 1,003 votes on the face of the official returns.**

The examination of the objection raised by contestant involved a discussion of several questions of law:

(1) A question as to the counting of votes tendered but not received by the officers of election. The majority report holds:

The contestant avers and claims that many electors duly offered to vote for him, and their votes were illegally rejected, and insists that all such votes so tendered and refused shall be counted as if cast.

As a question of law we do not understand it to be controverted that a vote offered by an elector and illegally rejected should be counted as if cast. It was so held in the case of *Niblack v. Walls* (Smith's Reports, p. 104, reported by McCrary, who was then chairman of the Committee on Elections); again, in *Bell v. Snyder* (Smith's Reports, 251, 252, and in *Martin v. Yates* (Forty-sixth Congress). McCrary, in his work on contested elections, regards it as a settled principle (sec. 423), and your committee have so regarded it in this controversy.

In the appendix to this report, Exhibit A, will be found the name of every voter whose vote was tendered for contestant and rejected which we have allowed and counted for him, except a few votes in Madison County. This exhibit gives not only the name of the voter, but the page of the record where the testimony will be found establishing his right to vote and that his vote was tendered and rejected.

In the county of Marion, in which a large number of electors were deprived of the right to vote without any fault or neglect on their part, the electors in many instances, after being denied the right to vote, went before a United States commissioner and made an affidavit to the fact of their qualifications as electors and of their offering to vote, to which they attached the identical ballot which they tendered to the election officers. The figures in the column of Exhibit A headed "Affidavit" refer to the pages of the record containing such affidavits. In the case of *Bell v. Snyder* (Smith's Reports, pp. 251, 252) such affidavits were considered sufficient evidence of the voters' intention to vote for the officers whose names were on the ballot attached to the affidavit, and on such evidence their votes were counted.

But contestant has not only put in evidence the affidavit of the voters with their ballots attached, but has in most instances taken the testimony of the voter whose vote was refused, and where the voter is not called as a witness it is shown by the testimony of other witnesses, officers of the election and other persons at the polls, that his vote was tendered and refused.

Your committee find from the evidence that there should be added to contestant's vote 268 votes on the ground that they were tendered for him and illegally rejected, and should now be counted.

The minority views, presented by Mr. Frank E. Beltzhoover, of Pennsylvania, say on this question:

The contestee's counsel denies that these votes should be added to the contestant's majority in this county, and states the law on the subject to be as follows, viz:

"In order that a vote not cast shall be counted as if cast it must appear that a legal voter offered to vote a particular ballot, and that he was prevented from doing so by fraud, violence, or an erroneous ruling of the election officers."

The burden of proof of all these facts is upon the party who seeks to have the votes not cast counted for him. It devolves upon the contestant, therefore, to prove that each one of these voters was a legal voter, and that his vote was illegally rejected.

The ground upon which it is claimed and admitted that these 122 votes not cast were rejected was because they had not registered, or their names were not found on the registration list.

The election law of Florida requires registration at least ten days before the election. The law is as follows:

"No person shall be entitled to vote at any election unless he shall have been duly registered at least ten days previous to the day of said election, nor shall any one be permitted to vote at any other voting place or precinct than that of the election district stated opposite his name on the county registration list." (See act of legislature of Florida, 1877, pam., p. 69, sec. 3.)

Prima facie, all persons whose names are not found on the registration list are not legal voters, and in order to entitle them to vote, their names not being on the list of registration, it is incumbent on them to make every preliminary proof which the statute requires.

But whether these votes were rejected properly or improperly, it is very plain that, having been rejected, under the law they can not be counted unless each voter has adduced in the contest the same proof in every respect which would have entitled him to vote at the polls on the day of election. What, then, would have been required of each one of these voters whose names did not appear on the registry list? The law says that each one "shall, on offering to vote at the voting place or precinct in such election precinct, be required to state under oath: (1) That he is 21 years of age; (2) that he has resided in the State of Florida one year; (3) and in the county six months, (4) that he was duly registered at least ten days before the election; (5) and that he has not changed his place of residence to any district other than the one in which he was living when registered, (6) or if he has changed his place of residence

since such registration that he has notified the clerk of the circuit court of the fact of such change. These are six requirements which are necessary and indispensable to the legal qualification of any person whose name is not on the registration list. The testimony is not very clear what the rejected voters in this instance offered to do at the time they proposed to vote on the day of election. If they were ready and willing to swear to all these six matters, then they should have been allowed to vote. There is no doubt about this. But having been refused by the election board, although wrongfully, can they be counted now unless they have subsequently made the same proof during the contest and have it now before the committee? We think not. The proof which has been offered in all the various cases does not in any case, so far as we have been able to discover, come up to the requirements of the law. These votes, therefore, although it is possible they may have been and are now legal votes, must be rejected. We can not ignore any one of the muniments of the electoral privilege, which should be guarded as well to keep out illegal votes as to insure the right to those who are entitled to vote under the law.

(2) As to the proof required to refuse a vote where there is a disqualification because of conviction for crime, the majority report says:

It is urged by contestee that the votes of some of the persons named had been disfranchised by conviction of crime.

It appears to have been a rule with the election officers, not only in this but in other counties, to refuse to receive the vote of any person whose name was on a list—called by some of the witnesses a convicts' list—which had been prepared by the political associates of contestee and placed in the hands of the officer of election. It further appears that the votes of such persons on the said list were refused, without evidence of indentivity, and without the production of any record of conviction, at the polls.

We have excluded from our count the votes of all persons where the evidence is satisfactory that the person alleged to have been convicted is the same person whose vote was offered and refused, though the record of conviction is not in evidence, and to designate them have placed the letter C opposite their names on said exhibit.

We do not mean to be understood, however, as holding that the record of conviction in such cases should not be produced as the proper evidence of disqualification. The question is an immaterial one in this case.

### **979. The case of Bisbee, jr., v. Finley, continued.**

**Where the law requires a citizen of foreign birth to produce his naturalization papers at the time of voting, a failure so to do destroys the vote even after it has been received.**

**A vote admitted without presentation of required evidence at the polls is not validated by production of the evidence during the investigation.**

(3) The constitution of Florida provided:

At any election at which a citizen or subject of any foreign country shall offer to vote, under the provisions of this constitution, he shall present to the persons lawfully authorized to conduct and supervise such election a duly sealed and certified copy of his declaration of intention, otherwise he shall not be allowed to vote, and any naturalized citizen offering to vote shall produce before said persons, lawfully authorized to conduct and supervise the election, the certificate of naturalization or a duly sealed and certified copy thereof; otherwise he shall not be allowed to vote.

The majority report contends that the production of the evidence when the vote is offered is peremptorily enjoined, and cites the case of *State v. Hilmontel* (21 Wis. R., 574–578) and the Congressional cases of *Myers v. Moffett*, *Weaver v. Given*, and *Covode v. Foster*, etc., and continues:

Here the constitution of the State makes every voter of this class an agent to execute it, and places the burden upon him to furnish the prerequisite evidence of his right to vote. The constitution does not say that he shall be required to produce his naturalization papers only when his vote is challenged. By that instrument he is informed and challenged in advance of the election itself, and he must approach

the polls armed with such evidence as the supreme law commands him to produce as a condition precedent of his right to exercise the franchise of an elector. Our attention has not been directed to any judicial authority in conflict with the authorities cited. On the other hand, we find the principle to have been uniformly applied, and we are therefore of the opinion that it should be applied to this case.

The principle must likewise be maintained that the production of this evidence at the trial will not change the legal status of the voter and thus make these votes in question legal votes. Such a decision would be at variance with a well-established principle of law which forbids the making of an act valid at a subsequent period which at the time of its commission was void because prohibited by law.

Votes illegal when received can not be made legal by evidence offered at the trial which should have been produced before the vote was cast. (*Shepperd v. Gibbons*, 2 Brewster, p. 129; *Myers v. Moffett*, 1 *id.*, p. 230.) The principle is again established in the following:

“If election officers receive a vote without preliminary proof which the law makes an essential prerequisite to its reception, such vote is as much an illegal one as if the voter had none of the qualifications required by law.” (*Brightly’s Law Cases*, 453–492, notes; also, 21st Wisconsin, 566; 23d Wisconsin, 630; 16th Michigan, 342.)

The principle is self-evident. Voting is a single act commanded to be performed within a particular time, on a particular day, and in conformity with law. There can not therefore be a valid performance of the requirements of the law at a period subsequent to the day on which alone the law commanded the act to be performed. The question at issue is not whether such evidence as required by law to establish their right to vote could have been furnished, but whether such evidence was furnished. If they did not produce it, the supreme law prohibited their voting, and an act prohibited by law can not be valid.

The committee being of the opinion that all votes cast by persons of foreign birth who failed to produce their naturalization papers or papers declaring their intention to become citizens, as required by the constitution of Florida, are illegal and void. We proceed to state the number of such votes which from the testimony should be deducted from the count.

The evidence introduced and to be relied upon is, first, the testimony of the voter himself that he did so vote without producing such evidence of his right to vote; secondly, his own admission, under oath, that he voted for contestee; and, thirdly, where the voter refuses to testify for whom he voted when called and sworn by the contestant, the testimony of other witnesses that he adhered to and supported the principles of the Democratic party and was a Democrat. This is a well-settled principle: “When a voter refuses to testify for whom he voted it is competent to resort to circumstantial evidence, such as that he was an active member of a particular political party.” (*McCrary*, sec. 293.)

We find from the evidence that 74 votes should be deducted from contestee’s vote on the ground that they were cast by persons of this class.

The minority oppose this contention, citing the case of *Finley v. Bisbee*, in the Forty-fifth Congress, and *Curtin v. Yocum*, in the Forty-sixth Congress, and a decision by Judge Briggs (*Leg. Int.*, July 19, 1878), holding in the case of *Gillin v. Armstrong*:

That unregistered voters having voted without making the affidavits, the law presumes that they are legal, and it can not be permitted to show that they were not so legal.

**980. The case of Bisbee, jr., v. Finley, continued.**

**An election held without proper registration., under laws requiring registration, was held to be illegal.**

**The honesty of election officers being impeached, the testimony of the voters as to their own votes was admitted to destroy the return and prove the vote aliunde.**

**The ballot box not having been kept inviolate, an unofficial recount is of little value to substantiate impeached returns.**

**As to the weight of testimony required to overturn the presumption that sworn agents of the law have acted rightly.**

(4) The laws of Florida required a registration of the electors, and the constitution of the State commanded:

That no person not duly registered according to law shall be allowed to vote.

Because of disregard of this provision the majority of the committee rejected the returns of the entire county of Brevard:

The law requires one general registration book for each county, and also another registration book for each election district into which the county is divided; and these district books are the original books of registration, in which each voter must write his name, or have it written by the registering officers, and take the oath of allegiance to the State and to the United States, which oath is to be printed or written at the commencement of the book. Opposite the voter's name must appear, in proper order, the number of the election district in which the voter resides, and the day, month, and year of his registration.

The law provides for copying by the clerk of the circuit court the names on the district books into the general registration book. This clerk is the registering officer for the election district in which his office is located, and he appoints a registering officer for each of the election districts of the county.

The registration must be closed ten days before the day of election, and a certified copy of the district book is to be delivered by the sheriff to the election officers, which copy is the legal evidence to the officers of the election of the fact of registration, and of the qualification of the electors whose names are on such copy.

The contestant asks that the entire election be set aside in this county, and that no votes shall be counted for either party, on the ground that the election was held without any registration in conforming to the law.

The evidence relied upon consists of the testimony of one James A. McCrory, the deputy clerk of court, who had charge of the clerk's office, and who performed, as it appears, such duties as were performed in this county preparatory to the election. (Record, pp. 403-405.)

This deputy clerk was a Democrat, and was examined as a witness on behalf of contestant. It is proven by his testimony that no registration books were provided or used in this county, and that the only semblance or pretense of registration of the electors consists of "loose sheets of paper" containing the names of citizens, which were brought into the clerk's office by the registering officers from eight election districts.

The whole number of such districts was twelve, and from the other four this deputy clerk testifies that even such lists of names "on loose sheets of paper" were not made and brought to the clerk's office. McCrory can only name one district from which such irregular lists of names were returned that contained oaths required by the law to be taken and subscribed by the elector and registration officers. (Record, p. 405.)

It has been called to the attention of your committee that it was proven by the clerk of the court, and other witnesses, in the contested election case of *Bisbee v. Hull*, that there were no registration books provided or used in this county at the election of 1878.

It also appears that by a statute of Florida, passed in 1879, a considerable portion of the territory of the adjoining county of Volusia was added to this county, Brevard, consequently it can not be claimed that any of the citizens residing within this portion of the county had the right to vote by reason of any prior registration. And this new part of the county is included in that containing the eight election districts in which these lists of names "on loose sheets of paper" were made and delivered.

The registration books, under the laws of Florida, are public records, and the clerk of the court is the legal custodian of them. This deputy, who had charge of the office, could not well be ignorant in regard to the subject-matter of his testimony, and he evidently testified with some reluctance, which may be accounted for from the fact that he was a political associate of contestee,

According to this testimony it is manifest that the entire foundation for a legal election in this county was wanting. As to the four districts in which not even the irregular lists of names "on loose sheets of paper" were made, there can be no pretense that there was any registration of any kind whatever. From these four districts 63 votes were returned for contestee and 12 for contestant.

As to the other eight election districts, it can hardly be claimed that "loose sheets of paper" are registration books such as the law requires. They could be manufactured, abstracted, and substituted at pleasure, with slight risk of detection.

To sustain this as a legal registration would do violence to the provision of the constitution and laws of Florida, would destroy all the safeguards against the frauds at elections which the registration laws are intended to prevent, and would, we think, furnish greater facilities for fraud than the absence of any registration at all.

Your committee therefore hold that the election in this county must be set aside as illegal and void.

The principle is so well settled that an election held without registration, under laws requiring registration, is illegal, that the citation of authorities is deemed unnecessary.

The returns from this county give the sitting Member 222 votes and the contestant 74 votes, which are excluded from the count.

The minority contend that the evidence does not establish the claim of the majority, and say:

It shows that there was a substantial compliance with the registry law, and that the voters should not, therefore, be disfranchised, because of the neglect of the officers who may have failed to furnish in all cases the proper registration lists. This is the law plainly laid down in Wheelock's case (1 Norris, 297), which was decided in Pennsylvania under a statute like the one in Florida. In Wheelock's case it appears that the general registration list had been made, and was on file in the commissioner's office, but there was no registration list at all at the polls. In that case the supreme court say:

"To disfranchise all the voters of a township, as we are asked to do in this petition, the facts on which we are required to act should show a case free from legal doubt. If we, by our decision, should permit the carelessness or even the fraud of officers whose duty it is to furnish a list of voters at the elections to defeat the election and deprive the people of the county of the officer who was elected by a majority of their votes, we would thus make the people suffer for an act in which they did not participate and which they did not sanction. In so doing, instead of punishing an officer for the violation of the election law we practically punish the voters of the county by defeating their choice of a county officer as declared at the election. A decision of this kind would be fraught with danger by inciting unprincipled or unscrupulous persons on the eve of an important election to recreate or destroy the list of voters or other important papers in a township in which the majority may determine the result in the county. Rules applicable to contested elections, like other legal rules, must be uniform, and the results and consequences of decisions therefore determine their correctness."

(5) Over Arredonda, poll, in Alachua County, a sharp division arose. The returns from this poll gave Finley 172 votes and Bisbee 69.

The majority report shows that in former years the vote of this precinct had shown a vastly different party division, and says:

The return is impeached and destroyed as evidence by the testimony of the electors themselves. Contestant has called and sworn as witnesses 259 voters, each of whom testifies unreservedly that he voted for contestant, and it is established by other evidence that another elector, deceased before the testimony was taken, voted for contestant, making 260 votes cast for him at this poll, instead of 69 given him by the returns.

The testimony of these electors will be found in the record, pages 68 to 218, inclusive. Their names are on the poll list made and returned by the election officers (all of whom were the partisan friends of the sitting Member but one, who was under the influence of liquor on election day), and it can not therefore be disputed that the 260 shown to have voted for contestant were legal electors, nor have your committee any doubt they voted for contestant.

As to the testimony of some of these voters, the criticism is made that they could not remember the names of all the candidates, State and national, for whom they voted.

We do not consider it remarkable that five months after the election an elector could not name all the candidates he voted for out of a dozen or more on his ballot, while he would be likely to remember the name of his candidate for Congress who had been his candidate for Congress for three elections in succession.

Any considerable number of voters proven for one candidate in excess of the number returned for him has always been regarded as evidence of fraud and a legitimate method of impeaching the return.

Here it is established that 191 more votes were actually cast for contestant than were returned for him. We think it is sufficient to exclude the return from the count, without further evidence.

One provision of the statute is that "the ballot box shall not be concealed from the public," and section 21 (of pamphlet compilation furnished the committee at the argument of the case) reads as follows: "As soon as the polls of an election shall be finally closed the inspectors shall proceed to canvass the votes cast at such election, and the canvass shall be public and continued without adjournment until completed."

Your committee find from the evidence that these provisions of the statute were violated, and without any reason being assigned for so doing.

Both the witnesses for contestant and contestee testify that after the polls were closed the officers of the election took the ballot box away from the polling room to a house in which they took supper, two or three hundred yards distant from the building in which the election was held, and the ballot box was carried inside of the supper house.

The report further holds that the ballot box was not kept with the security demanded by the law during this adjournment, and that it was surrounded by suspicious circumstances, impeaching the integrity of the election officers, and says:

Without any further statement of the evidence touching the action of the election officers on this branch of the case, your committee are of opinion that the disregard of the mandatory provisions of the election laws was willful and with a dishonest purpose of securing an opportunity to commit fraud, which such laws were intended to prevent, and that the conduct of these officers was such as to render their acts unworthy of credit and to entirely destroy the prima facie character of their return as evidence of the result of the election at this poll.

For this reason, as well as for the reason that the return is impeached and destroyed by the testimony of the electors, your committee have excluded this return from the count. The testimony with regard to this poll taken in behalf of the sitting Member will be found in the record, pages 378 to 394, inclusive, and the testimony in behalf of contestant other than that of the voters from pages 186 to 196.

The precedents for excluding a return in such a case as this are numerous, and the principles of law which we have followed are well settled. We refer, however, to McCrary on Elections, sections 302, 303; Brightly's Leading Cases, page 493; 1st Brewster's Reports, pages 66, 107; Washburn *v.* Voorhies (2d Bartlett, 54); Reed *v.* Julian (2d Bartlett, 822); Finley *v.* Walls (Smith).

The sitting Member took the testimony of the clerk of the circuit court of this county, to whom the ballot boxes were delivered after the election.

This clerk, nearly six months after the election, produces the box, opens it, examines the ballots in it, and testified that there were in the box 85 Republican ballots, counting no name for Member of Congress; that there were but 68 ballots for contestant, though the return gives him 69; 148 ballots for Republican Presidential electors, whereas the return gives them 150; and that there were but 140 ballots for Republican candidate for governor, though the return gives him 143. (Record, p. 399.)

It is claimed that these ballots in the box are better evidence of the result than the testimony of the voters.

As to the testimony of this clerk, it is sufficient to say that there is no law in Florida providing for the preservation of the ballots for the purpose of being used as evidence; the ballots are not evidence sufficient to overcome the testimony of the voters where the question of fraud and tampering with the ballot box is raised. (McCrary on Elections, sec. 276; *id.*, 439; Washburn *v.* Voorhies, 2d Bartlett, 54.)

McCrary says in "such a case the ballots might sustain the fraud." (McCrary, sec. 439; also Reed *v.* Julian, 2d Balt., 822.)

These ballots can not be entitled to much weight as evidence of the result of the election, where it has been shown that the acts and conduct of the election officers are unworthy of credit and their returns set aside and regarded as unreliable. Having created for themselves, in violation of law and their official oaths, opportunities for tampering with the box, it is legitimate to infer that they would endeavor to put ballots in the box that would support the return.

Finally the majority conclude:

Your committee decide that the contestant is entitled to have 260 votes counted for him at this poll, or 191 in addition to his returned vote; and as contestee has not proven any votes for himself, none can be counted for him.

The minority analyze the evidence and conclude that, while the adjournment was irregular, yet no chance for fraud was shown, and cite evidence to show that there were divisions in contestant's party to explain the increase in the vote for sitting Member. As to the proof of the vote the minority say:

But there is a grave objection to the testimony of voters to show the true state of a poll in such a case as this, and surrounded by such circumstances. The voters were mostly illiterate and could not read their tickets, and the Dennis Republican ticket did not have Mr. Bisbee's name on it. How could they say any more than that they voted the Republican ticket? Besides, not only are political leaders liable to conceal their cutting a party ticket, but ignorant voters, who would incur the odium of their neighbors for admitting a deviation from the party paths, are also likely to deny the fact, and particularly when they have the additional shield for their consciences that they may not and perhaps can not know certainly how they voted.

The views also quote McCrary and other authorities to show that the rejection of a poll is a last resort:

The case of *Biddle and Richard v. Wing*, supra, is also cited as giving the correct doctrine, which holds: "Indeed nothing short of the impossibility of ascertaining for whom the majority of votes were given ought to vacate an election." (See also McCrary, pp. 436, 437, 438.) Under the law, as laid down in these citations, does the evidence justify the rejection of this poll? Have all the provisions of the election law been entirely disregarded by the election officers; and are the returns utterly unworthy of credit? Is it impossible to ascertain with reasonable certainty what the true vote is, and is it necessary to exercise the dangerous power of rejecting the poll, which the law says should only be done in extreme cases? We think not. But in addition to the provisions of the law, which declare what kind and amount of proof of fraud and illegality are required to reject a poll, the contestee very properly refers also to those presumptions which the law always throws around sworn officers, and those equally important presumptions of law, which are always in favor of innocence and right and against fraud and wrong. It is a well-settled and fundamental principle of law that in all cases and at all times all presumptions are against fraud and in favor of fairness. Fraud is never presumed, even from suspicious circumstances. When charged it must be proved. It is unnecessary to cite authorities in support of this. What is done by sworn officers in the pursuit and discharge of their duties is always presumed to be rightly done, and nothing but clear and convincing and unequivocal proof can destroy the credit and validity of their official acts. (See McCrary, sec. 87, etc.; see also Skerrett's case, *Brightley's Leading Cases on Elections*, p. 820 and p. 333, where the court holds this language: "What has been done by the sworn agents of the law is always to be presumed rightly done; and those who seek to impeach the acts of these functionaries must not expect to be entertained if, instead of bringing positive, tangible, and direct charges, they content themselves with general, argumentative, and theoretic imputations.")

**981. The case of Bisbee, jr., v. Finley, continued.**

**Returns of a poll being rejected, the vote proven aliunde by one party is counted and nothing is credited to the other party unless he also prove aliunde.**

**The ballots in the box exceeding the names on the poll list, and the returns being impeached by the testimony of voters, the poll was rejected.**

**Instance wherein the House purged and did not reject a poll whereof the election officers had acted unfairly in drawing out of the box excess ballots.**

**Instance of the rejection of a poll for intimidation participated in by an election officer and general disorder.**

**The House deducted on account of an uncertified precinct return, although only the parol evidence of a single witness showed that it was included in the county canvass.**

**The House, on the testimony of one witness, assumed that county canvassers had improperly included an uncertified return.**

(6) As to Newtonsville poll the majority report says:

The charge is made that fraud was committed at this poll by stuffing the ballot box with Democratic ballots. Two hundred and ninety-six votes were returned, 150 for Bisbee and 146 for Finley. (Record, p. 19.)

By the electors called and sworn as witnesses it is proven that 168 votes were cast for contestant; 18 in excess of the number returned. (Record, pp. 23-65 and pp. 296-313.)

It is also clearly proven that when the polls closed there were 29 more ballots in the box than names of electors on the poll list, which excess was drawn out and destroyed (Record, pp. 31, 182, 185); that Democratic ballots were found in the box folded together, which were counted; that before the ballots were counted a Democratic officer stirred or mixed the ballots up with his hand (Record, p. 183); and, after drawing out and destroying 21 ballots, on a second count 8 more in excess of the poll list was discovered, which were drawn out by the Republican inspector.

It is proven that 5 of the 8 so destroyed were Republican ballots, and that the greater portion of the other 21 were also Republican ballots. We conclude from the evidence that this excess was caused by the voting of two or more ballots by one voter, and that this was done by the supporters of contestee.

The report concludes:

On the part of contestant it is insisted that the return should be rejected, and only the votes otherwise proven counted. And our attention is called to the case of *Washburn v. Voorhees* (2d Bartlett's Reports, p. 54), where returns were rejected on proof of an excess of votes proven for one candidate over his returned votes of about 8 per cent, and at one poll of 4 per cent of the total vote returned.

McCrary says (sec. 371), "It is very clear that if the returns are set aside no votes not otherwise proven can be counted." The supreme court of New York, in *7 Lansing*, 274, and other authorities, have declared and applied this as a settled principle, which we do not propose to overrule.

Another well-settled principle is that no poll shall be entirely set aside if the return can be corrected with reasonable certainty. The only correction of the return which, from the evidence, could possibly be made would be to count 174 votes for contestant and 121 votes for contestee. While we think this would approximate the probable true state of the vote at this poll we can not say from the evidence that such a result is reliably proven. The only other disposition that can be made of this poll is the rejection of the returns and count no votes save the 168 proven for the contestant, and from the views we have taken of the whole case it is not material to the final result which alternative is adopted.

The minority challenge the competency of the evidence and fall back on the presumption that the sworn officers have done their duty. It was also argued in the debate that, as the law provided for drawing out the excess of ballots, the proceedings were regular.

The majority also set aside the Parker's store poll:

There were but 306 votes returned for Representative in Congress, 151 for Bisbee and 155 for Finley. (Record, p. 262.) There are 336 names on the poll list. (Record, p. 374.)

It is satisfactorily proven by the electors sworn as witnesses for contestant that 179 votes were cast for him instead of 151 returned, an excess of 28 votes. (Record, pp. 323-371.) There were ballots in the box at the close of the election in excess of the poll list to the number of 6 or 7 (Record, p. 355), and 5 votes tendered by Republicans and rejected, which are included in Exhibit A of the appendix.

This excess of 28 votes proven for contestant over the number returned for him is not explained in any manner by the testimony. Whether it is the result of fraud in the officers of election or of gross carelessness in the count there is no proof to show, but upon the testimony adduced it must have been one or the other. In counting so small a number of votes it is wholly improbable that the election officers innocently made the mistake of suppressing 28 votes for contestant—nearly one-sixth of the total vote cast for him. Contestee has not taken any testimony with respect to this poll, and we are required to dispose of this question upon the evidence in the record.

There is no evidence by which the return can be corrected. The return is proven to be unreliable as evidence of the true vote, and the latter can not be ascertained by any other evidence.

“We think, therefore, that this return should be set aside and that no votes not otherwise proven should be counted.

It may be claimed that it would be proper to credit contestee with the difference between the returned total vote and the number proven for contestee, but this would be an assumption without evidence and an evasion of the rule that when a return is rejected each candidate must prove his vote by other evidence.

If legal votes were cast for contestee he had an opportunity to prove them, but he neglected to do so.

(7) In Madison County the majority report finds evidence of wholesale fraud, whereby excess of ballots over the poll lists were created, and then in the drawing out the ballots for contestant were deducted. But violence in this county prevented the contestant taking testimony fully. The report says:

To detail at length all the occurrences in this county as disclosed by the evidence would enlarge the report beyond proper limits, and therefore the statement will be condensed as much as possible.

It is in evidence that the Democratic ballots voted in this county were not more than half the size of and of finer quality of paper than the Republican ballots, and could be readily distinguished from the latter by even the sense of touch. This fact is established by the testimony of the witnesses of both contestant and contestee, and by specimens of ballots in evidence, and it is unnecessary to further allude to the evidence on this point. Likewise, upon the question of an excess of ballots, and of two or more having been folded so that one would be partially inclosed in another, and in such manner as when handled or shaken they would separate, there is no disagreement between the witnesses of the contestant and contestee.

The committee find that the sitting Member did not examine any witnesses with regard to any of the polls in this county except polls Nos. 1 and 2 in the town of Madison, and that his witnesses support the testimony adduced by contestant concerning difference in ballots, excess over poll lists, and the folding together of the same; that the contestee did not interrogate any of his witnesses as to the character of ballots drawn out and destroyed, whether they were Democratic or Republican; and as it was a very material thing to be established, the inference to be drawn is, that the contestee's attorney was aware of the fact that in the main they were Republican ballots, and that the testimony on behalf of contestant, taken before contestee examined his witnesses, establishes the fact that they were Republican ballots thus drawn out and destroyed. From this evidence the committee concludes that the following Republican ballots were drawn from the ballot boxes and destroyed, to wit: At the Greenville poll, 52; at the Madison poll No. 1, 52; at Madison poll No. 2, 14 votes, and that 20 more in excess on the second count were counted, which added that number illegally to contestee's vote; at Cherry Lake poll, 14 votes, and at Mosely Hall, No. 4 poll, not less than 10 votes.

The committee are therefore of the opinion that the fraud thus committed at the five polls last mentioned should be corrected by adding 142 votes to the contestant's vote and deducting 162 votes from contestee's vote. By thus correcting and purging the polls in question the contestant's majority at the five polls will be increased 304 votes.

The minority views say:

It is contended in behalf of contestant in regard to the Newnansville poll, in Alachua County, that the following language (quoted from McCrary) gives the true rule of law, viz:

“It is very clear that if the returns are set aside no votes not otherwise proven can be counted.”

This we admit is the true rule of law, and it is a gross inconsistency that would apply it to Alachua

County and would wholly depart from it in Madison County and attempt to set up an entirely new rule for which there is not an authority or precedent in the books.

The only way known to the law of disposing of such a case is either to accept the returns or to reject them in toto and put both parties upon the proof of their respective vote aliunde. But the contestant seeks to establish an entirely new rule, unknown to the law.

The law can not bend to suit the purposes of either party to the contest.

There is no principle of law more clearly established, says McCrary.

“And the safe rule probably is that when an election board are proved to have willfully and deliberately committed a fraud, even though it affect a number of votes too small to change the result, it is sufficient to destroy all confidence in their official acts and to put the party claiming anything under the election conducted by them to the proof of his votes by evidence other than the return.” (See McCrary on Elec., p. 174.)

McCrary, on page 372, says:

“If the fraud be clearly shown to exist to such an extent as to satisfy the mind that the return does not show the truth, and no evidence is furnished by either party to a contest, and no investigation of the committee to enable them to deduce the truth therefrom, then no alternative is left but to reject such a return.

“To use it under such a state of facts is to use as true what is shown to be false.” (See Washburn v. Voorhees, 2 Bartlett, 54.)

This statement of the law is peculiarly applicable to all the precincts attacked in Madison County.

There are but two ways known to the law of disposing of Madison County—either to let the returns stand as officially made or to discredit them altogether. For if they are false they can not be used for any purpose.

(8) Contestant impeached poll No. 3 in Hamilton County because of violence and disorder. The report finds:

Your committee find from the evidence that these charges are substantially sustained, and that the election at this poll was not, in any just sense, a free and fair election.

It is proven by a number of witnesses that the political supporters of contestee in several instances led colored men to the polls in a state of intoxication, which they had designedly, produced, and forced them to vote a Democratic ticket; and that from the efforts of Republicans to prevent such conduct and to secure the right of each elector to vote a free ballot violent quarrels ensued in front of the polling window, and that the immediate vicinity of the polls was a scene of disorder, lawlessness, and threats of personal violence, continuing a considerable portion of the day, and that by such means the result of the election at this poll was effected.

It was also proven that the officer of election who received the ballots sat in the window of the poll with a revolver exposed on his person, and that he rejected votes illegally. The deputy marshal was compelled to abandon efforts to maintain order, and several witnesses testified that in their opinion twenty or thirty votes were changed from contestant to sitting Member by the methods used. The committee conclude the poll should be set aside.

(9) The return from Fort Christmas was not signed by the election officers, and the report holds such return illegal and rejects it.

The minority say:

It is claimed that the whole vote of this poll should be rejected on the ground that the precinct return does not show that it was signed by the inspectors of this poll. There is no fraud alleged as to this omission.

The contestant makes the proof by the parol evidence of a single witness that the returns from this poll were included in the county canvass. This is not the best evidence, yet, if we take it as admissible evidence, the presumption of law is that the county canvassers properly and legally admitted the returns from this poll in the absence of proof to the contrary. The election laws of Florida require that the poll list, the oaths of the inspectors and clerk, and the registration list of the precinct be returned,

as well as the certificate of the vote, by the precinct officers. From some or all of these papers it might well appear to the board of county canvassers that the returns from any given precinct were authentic.

It would be against the well-established law to reject this poll on that ground. Nothing can be more familiar than the rule laid down by McCrary, sections 87 and 91:

“It is well settled that the acts of public officers within the sphere of their duties must be presumed to be correct until the contrary is shown.”

It is presumed that the county canvassing board properly canvassed the vote of this poll, no evidence to the contrary being produced.

(10) Other irregularities were discussed and decision reached on questions of fact largely.

In conclusion, the report summarizes and concludes:

Which deducted from the last stated result gives for Finley 12,309; Bisbee, 12,954, and a majority for Bisbee of 645.

Now, concede to contestee at the two polls of Newnansville and Parker’s Store, Alachua County, the difference between the total returned vote for Representative and the votes proven for contestant, and 255 votes would be deducted from Bisbee’s majority, leaving him 390 majority. And even if the polls in Brevard County No. 3, Hamilton County, and Fort Christmas poll, Orange County, were not rejected, contestant would still have a majority of 147 votes.

In any view to the case founded upon the law and the evidence, the contestant has a majority of the legal votes cast.

Accordingly the majority reported resolutions declaring contestant elected and entitled to the seat. The minority found sitting Member elected.

The report was debated at length on June 1,<sup>1</sup> and on that day the resolutions of the majority were agreed to, yeas 141, nays 9, the minority refraining generally from voting for obstructive purposes.

Mr. Bisbee then appeared and took the oath.

**982. The South Carolina election case of Lee v. Richardson, in the Forty-seventh Congress.**

**Discussion as to the degree of intimidation which will justify the rejection of an entire poll.**

**The House expressed the opinion that the storing of guns adjacent to the polls and the presence of disorderly persons who might naturally use them constituted effective intimidation.**

**Instance wherein the Committee on Elections purged and did not reject a poll whereof the election officers had withdrawn excess ballots unfairly.**

On February 24, 1883,<sup>2</sup> Mr. William H. Calkins, of Indiana, from the Committee on Elections, presented the report of the majority of the committee in the South Carolina case of Lee v. Richardson. On the face of the returns sitting Member had a majority of 8,468 votes, but contestant alleged in substance that this was a dishonest majority, obtained by fraud and intimidation.

The committee examined the charges, precinct by precinct, and a minority of seven members of the committee, headed by Mr. A. H. Pettibone, of Tennessee, found enough changes justified, in their opinion, to create a majority of 284 votes for contestant. In reaching this conclusion the minority rejected the returns of

<sup>1</sup> Record, pp. 4421–4445; Journal, pp. 1388, 1389.

<sup>2</sup> Second session Forty-seventh Congress, House Report No. 1983; 2 Ellsworth, p. 520.

Darlington precinct, where 1,271 votes were returned for Richardson and 117 votes for Lee.

Mr. Calkins, in the report, states that in the main he agrees with the minority views, but differs as to Darlington, which is decisive, for unless it be rejected the contestant can not overcome sitting Member's majority:

The main difference of opinion is with reference to Darlington precinct. At that precinct Richardson received 1,271 votes and Lee received 117. I do not think the evidence is sufficient to reject this return; it is purely a question of evidence, and I can not bring myself to believe that the evidence is sufficient to justify its rejection. There is no evidence in the record tending to prove how the vote would stand on the theory of contestant, if the return was rejected. I think the evidence with reference to this precinct fairly establishes two propositions, viz: First, that the colored voters, on the morning of election, in large numbers, took possession of the market house where the elections were usually held. For some reason, not apparent, the poll was opened at the court-house, instead of the market house, and the white voters at the opening took possession of it. Attempts were made by the colored voters, early in the day, to force their way to the box to vote, which seems to have been prevented by the white voters crowding the stairs leading to the box. This led to crimination and recrimination and considerable confusion and excitement, and a rumor seems to have prevailed among the colored voters that several stands of arms had been brought to the town the night before the election by the white Democrats, and that they were concealed in the courthouse and in Early's store. Whether this was so or not is immaterial in the view which I have taken of the testimony. There was no physical display of the guns on the day of election, and I find as a matter of fact that probably as early as 10 o'clock, and certainly not later than 11 o'clock on the day of election, the colored voters, under the advice of one Smith, who was a leader and man of influence among them, dispersed and did not attempt again to vote on that day at that poll. The danger of bodily harm was not sufficiently imminent to warrant this course, and there was an entire lack of diligence on the part of these voters to maintain their right to vote. As a matter of law these voters had a right to vote at any precinct in the county; there was another voting precinct not many miles from Darlington, and there is no reason given why they might not have voted at that precinct if they were driven away from Darlington. For these and other reasons I am persuaded that Darlington should remain, and therefore submit the following resolutions, in which a majority of the committee concur:

*Resolved*, That Samuel Lee have leave to withdraw his papers, and this case is dismissed without prejudice.

The minority say:

But it is very evident from the testimony that intense excitement prevailed at Darlington on the day of the election. The polls were held at a different place from the usual one.

The witness McCall, a county commissioner of election (Record, p. 111), admits that the place was less convenient. It was up in the second story of the court-house, 15 feet above the ground, with two stairways leading up to the ballot box.

It appears from all the testimony that the Democrats, dressed in red shirts and caps, took possession of the polls from the outset.

J. A. Smith (Record, p. 106) states that from 700 to 800 Republican were prevented from casting their votes by reason of intimidation. He says:

"I made three attempts to reach the ballot box-myself and others; I found it impossible to do so without a collision with the Democrats and red-shirts, who had the steps packed from bottom to top."

Aimwell Western, Jr. (Record, p. 92), states that from 800 to 1,000 Republicans left the polls without voting. He also states that on the night before the election two wagons loaded with guns came on the back street and they were carried down the street next to the court-house. A portion was placed in a store of one Early and "some were put in the court-house where the ballot box was."

On Record, page 94, he gives the names of the men who unloaded those wagons: Moses Bishop, Sam Hinds, Rosser Hart, and Charlie Bishop. He states that Moses Bishop and Sam Hinds carried a portion of those guns upstairs where the ballot box was. It appears from his testimony that guns were

brought on the train about 12 o'clock at night, which train neither blew a whistle nor rung a bell. The guns were tied up in blankets in large bales.

None of the persons who handled the guns were called as witnesses to deny the statement. A great many witnesses were called by Mr. Richardson who did not see any guns and did not see any intimidation.

After quoting from testimony, the minority continue:

The depositions of 240 witnesses appear in the Record, who swear they were present at the Darlington poll and desired to vote for Mr. Lee, but were prevented from so doing by threats or intimidation. Convinced they could not vote without danger of riot and bloodshed, hundreds withdrew from the poll. There is counter testimony in the Record, but it is from the very parties complained of, and from comparatively few other witnesses.

Your committee are compelled to say, from all the evidence, that the case of Darlington poll falls within the principle laid down by McCrary, as follows:

“Sec. 416. The true rule is this: The violence or intimidation should be shown to have been sufficient either to change the result or that by reason of it the true result can not be ascertained with certainty from the returns. To vacate an election on this ground, if the election were not in fact arrested, it must clearly appear that there was such a display of force as ought to have intimidated men of ordinary firmness.”

Here it is proper to remark that up to 1878 Darlington precinct always was largely Republican.

A few years ago the Republicans used to poll 1,200 to 1,300 votes at that poll. See testimony of John G. Gatlin (Record, p. 79), John Lunney (Record, p. 81), Jordan Lang (Record, p. 95).

At the election in 1880 Mr. Richardson is credited by the schedule, which purports to be certified to by the clerk, Garner, but which he testifies he did not certify, as having received 1,271 votes to 117 votes for Mr. Lee; and from the impossibility of ascertaining how the actual vote stood at Darlington poll, by the disregard on the part of the county commissioners to forward the returns and Poll list to the secretary of state, in violation of a plain provision of law, and from the fact that intimidation and violence prevented hundreds from voting, your committee reject Darlington poll from the count.

The only issue joined in the report or in the debate is as to Darlington precinct. As to the ruling in the minority views, relating to other precincts, whereby such reductions were made as to enable Darlington to be decisive, it is to be inferred, perhaps, that a majority of the committee might have approved them had it been necessary. They involve the treatment of fraud and irregularities, of which a few sample cases are:

(1) Santee, Sampit, and other polls, at some of which honest elections were held, and at all of which it was possible to reach a true result, and where contestant had large majorities, were thrown out by the county commissioners because the boxes were “sent without a written certificate authorizing the bearer to deliver it.” The minority views held this reason flimsy and counted the polls.

(2) At Upper Waccamau the minority disposed of a question which is typical of a class in this contest:

This precinct was rejected by the Democratic county commissioners for the same reasons—purely technical. The managers who held the election were all Democrats (Record, p. 810). They were Mr. Richardson’s political friends, and ought to have seen that no fraud was perpetrated, as against him at least. But Bently Weston and R. F. Johnson, the two supervisors, one a Democrat and one a Republican, reported (Record, p. 814) and Johnson swears that there were 432 names on the poll list; that an excess of 50 ballots were found in the box. This excess was drawn out and destroyed by a Democratic manager, but by a singular perversity of fate 48 of the ballots were Republican and only two Democratic. And, as a specimen, let the following testimony of R. F. Johnson show:

Question. How many, if any, Democratic ballots were found together in one at the counting of the ballots at the close of the poll?—Answer. Twelve in one.”

After this manipulation the Democratic managers gave to Mr. Lee 341 votes and to Mr. Richardson 90, which gave Mr. Lee 251 majority, and this was rejected by the Democratic county commissioners and utterly cast away.

Reversing this process of gross and palpable fraud, even the Democratic managers, whose business it was to see justice done, admitted and certified to a majority for Mr. Lee of 251, and remembering that 48 honest votes given to Mr. Lee were drawn out and 48 votes not honestly given to Mr. Richardson were left in the box, thus taking from Lee 48 votes which belonged to him and adding to Mr. Richardson's vote 48 votes which did not belong to him, Mr. Lee's vote is swelled to 341 plus 48, which makes 389, and Mr. Richardson's is 90 less 48, which gives him 42 votes; and this clearly gives Mr. Lee at this poll a majority of 347 votes, instead of 251.

**983. The case of Lee v. Richardson, continued.**

**The Elections Committee reversed the action of local canvassers who had rejected returns transmitted by an election officer of doubtful appointment.**

**The Elections Committee declined to ratify the rejection of a poll because it had been closed too early, no injury being shown.**

**The resolution before the House providing that a contestant have leave to withdraw, the mere adoption of an amendment to seat contestant does not thereby decide the case.**

**After an amendment in the nature of a substitute is agreed to, the question must then be taken on the original proposition as amended.**

(3) As to Rafting Creek precinct the minority made this ruling:

Here, as usual, all the managers appointed by the county commissioners were Democrats. One of them, however, Mr. McLeod, did not serve by reason of a broken arm. (See Record, p. 34.) Prince A. James, a colored man, was chosen by the other two managers, both Democrats, to fill his place. (See Record, p. 15.) A fair election appears to have been held, by all the testimony given in evidence. The result was that for Lee were cast 313 votes, and for Richardson, 51 votes. This gave to Mr. Lee 9, majority of 262 votes. (See Record, pp. 33 and 249.)

The returns and ballot box were placed by the managers in the hands of Prince A. James to be delivered to the county commissioners. But on the pretext that James had not been appointed by them as one of the managers, these sternly righteous commissioners refused to count the vote at all, and threw out the entire poll. (See testimony of D. J. Winn, pp. 7 and 8, and E. P. Ricker, pp. 47 and 48.)

Your committee believe that an immense majority of all honest American would say at once, since no one questioned the integrity of the election at Rafting Creek poll, Mr. Lee's majority ought to be counted for him. Your committee feel that they are compelled so to count the vote; and Mr. Lee's majority of the honest votes, honestly cast, honestly counted, honestly returned, but rejected by the county commissioners, was 262 votes.

(4) As to the rejection of the poll of Midway precinct by the county commissioners, the minority ruled:

The only objection to this poll is that the managers, all politically opposed to Mr. Lee, closed the polls at too early an hour.

J. J. Morris, one of these managers, swears that this was done on the suggestion of Mr. Mouzon (Record, p. 717), while Mr. Mouzon swears (Record, p. 493) that it was done "at the suggestion of some of the managers." Your committee thinks that even if Mouzon gave bad advice the managers were not bound to take it, and since the contestee does not even pretend that anyone was deprived of voting at this poll by reason of its too early closing, your committee can not agree on such a technicality that the poll should be thrown out and Mr. Lee deprived of his majority of 83 votes. It is true that one witness, R. K. Hurst, swears (Record, p. 717) that Henry Williams, a colored man, told him he intended

to vote the Democratic ticket, but after Hurst voted and left he voted the other way. As Williams was not called, and the testimony is purely hearsay, your committee can not agree that this poll should be thrown out.

The minority, as the result of their conclusions, recommended the following:

I. Resolved, That John S. Richardson was not elected as a Representative to the Forty-seventh Congress of the United States from the First Congressional district of South Carolina, and is not entitled to occupy a seat in this House as such.

II. Resolved, That Samuel Lee was duly elected as a Representative from the First Congressional district of South Carolina to the Forty-seventh Congress of the United States, and is entitled to his seat as such.

The report was debated on March 3, 1883,<sup>1</sup> and on that date the question was taken<sup>2</sup> on a motion to substitute the minority resolutions for those of the majority; and there appeared, yeas 124, nays 111. So the motion was agreed to.

The question then recurred on agreeing to the resolution of the majority as amended by the minority substitute, and there appeared, yeas 128, nays 6—not a quorum voting.

Two other roll calls resulted the same way. Then a motion was made to reconsider the vote by which the previous question was ordered on the pending resolution as amended, and another motion to lay the first motion on the table. On the latter motion no quorum voted, although five roll calls were had.

And this was the state of the question when the House adjourned sine die.<sup>3</sup>

---

<sup>1</sup>Record, pp. 3745–3752.

<sup>2</sup>Journal, pp. 621, 625, 632, 640, 642, 646.

<sup>3</sup>Mr. Lee in later years had before Congress a claim for salary on the ground that really, although not technically, the House decided in his favor.